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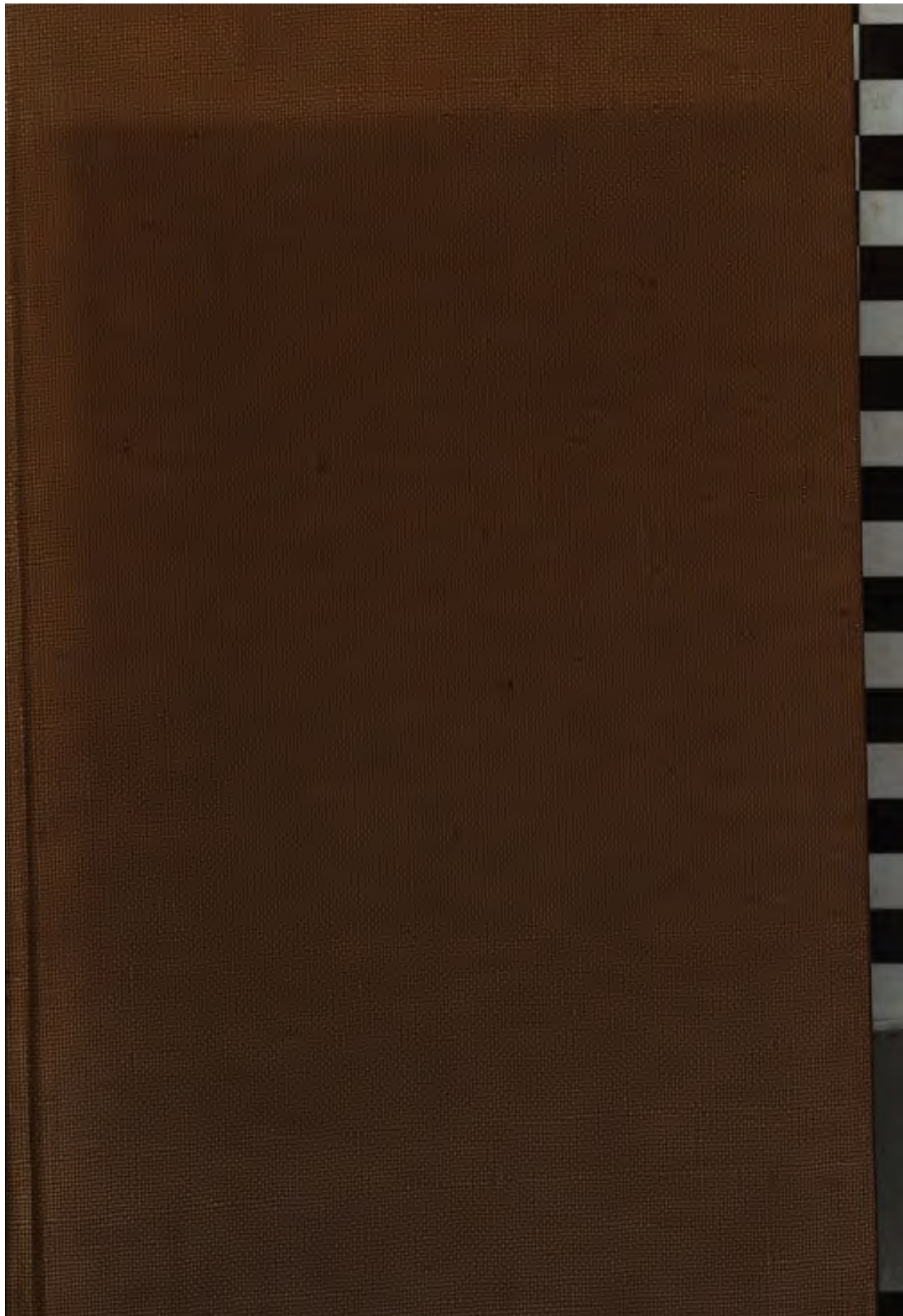
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A
D I G E S T
OF THE
DECISIONS OF THE COURTS OF ENGLAND
CONTAINED IN
The English Law and Equity Reports,
FROM THE
FIRST VOLUME TO THE THIRTY-FIRST INCLUSIVE.

BY CHAUNCEY SMITH,
COUNSELLOR AT LAW.

BOSTON:
LITTLE, BROWN AND COMPANY.
1859.



Entered according to Act of Congress, in the year 1857, by
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NOTICE.

In the Table of Cases contained in this volume, the first reference is to the Law and Equity Reports; the succeeding references are to the various English publications. The figures at the right hand refer to the page of this Digest.

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D I G E S T.

ABDUCTION.

Of a girl without consent. A girl under sixteen left her father's house by persuasion of the prisoner, who met her at an appointed place and proceeded with her to London. *Held*, that this was a taking out of the possession of the father within the terms of the statute, it being immaterial whether the girl had consented or not. *Regina v. Manktelow*, and note; *Regina v. Biswell*; *Regina v. Kipps*, xx. 601.

ABSCONDING DEBTOR.

General keeping away. A general keeping away is to be taken as a keeping away to avoid the process of the court. *The Manchester, &c. Railway Co. v. How*, xix. 269.

ACCESSORY.

1. *Who are or are not.* In misdemeanor all guilty participators are principals. Therefore, where A and one B were indicted for uttering counterfeit coin, and the evidence was that the uttering charged in the indictment was effected by B in the absence of A, but proof was given that before the uttering the two prisoners were acting together in concert, and the jury found that they were, on the evening in question, engaged in the common purpose of uttering counterfeit coin. *Held*, that A was rightly convicted as a principal. *Regina v. Greenwood*, ix. 535.

2. *When may be indicted.* The crime of aiding and abetting the escape of a prisoner being a felony, the abettor may be indicted before the principal is tried, and the prosecution need not be instituted within one year after the offence committed. *Regina v. Holloway*, v. 310.

ACCORD AND SATISFACTION.

1. *What amounts to.* A declaration stated a contract, and non-performance as to part. Plea, after right of action, but before suit, an agreement was made for a change in the manner of performance, to be taken in full discharge of all causes of action on the contract. Averment, part performance, and tender, before suit, of the residue necessary to complete the performance, refusal thereof, and defendant's continuing readiness to deliver. *Held*, that the plea was bad, as it did not show an accord and satisfaction of the whole cause of action; that it could not be taken distributively (under sect. 75 of the Common-law Procedure Act, 1852) as an answer to any part, and that a tender was insufficient. *Gabriel v. Dresser*, xxix. 266.

2. *Substituted agreement.* To an action in *indebitatus assumpsit* for work and labor, the defendants pleaded that the debt accrued to the plaintiff under an agreement, by which the plaintiff agreed with the defendants to execute certain works, that the plaintiff after he had commenced the works, stopped the same until another agreement was made with the plaintiff and one T. P., and by which the plaintiff agreed with the said T. P.

to finish the said works; that the consideration money under the last agreement was paid, and that the plaintiff accepted the same from the said T. P. in full performance of such agreement, and that the plaintiff accepted the last-mentioned agreement, and the performance thereof by the said T. P. in satisfaction and discharge of the said agreement between the plaintiff and the defendants. *Held*, a bad plea on general demurrer. *James v. Isaac*, xiv. 296.

3. To a declaration in covenant on a bond, the defendant, as surety, pleaded that after the making of the bond, and before any of the breaches of covenant alleged, the principal and others as his sureties, executed and delivered to the plaintiffs another bond, to the same effect as that declared upon, in full satisfaction and discharge of the said bond in the declaration mentioned, and of all covenants, &c. therein contained, and that the plaintiffs then accepted the said other bond in full satisfaction and discharge of the said bond in the declaration mentioned, and of all covenants, &c. *Held*, on demurrer to this plea, that it was not good either by way of accord and satisfaction, or of release. *The Mayor, &c. of Berwick-upon-Tweed v. Oswald*, xvi. 236.

4. *Abandonment of defence.* To a declaration for work and labor, the defendant pleaded that on the plaintiff's levying a plaint against him for 50*l.*, he gave him notice that he should defend himself on the ground of infancy; an agreement that he should pay and plaintiff accept plaintiff's costs and 30*l.*; performance of the agreement, in satisfaction of all causes of action against him. Averment of facts in accordance. *Held*, that assuming the plaintiff's claim to be for a liquidated demand, and that the defendant was not an infant, the plea showed a good satisfaction; as the defendant, besides paying the smaller sum, abandoned his defence of infancy in the county court, which the plaintiff otherwise would have had to litigate. *Cooper v. Parker*, xxix. 241.

5. *Reference to arbitration.* Several matters in difference existing between the plaintiff and defendants, some of which were the subject of an action, it was agreed between them, that, in consideration that the defendants would consent to refer to arbitration the matters of the action, the plaintiff would accept such agreement in satisfaction of all damages sustained by him in respect of the other matters. *Held*, that the agreement and its performance was a good bar to an action in respect of the last-mentioned matters. *Williams v. The London Commercial Exchange Co.* xxix. 429.

6. *When plea of, sufficient or not.* A plea to the further maintenance of an action on the case stated that it was agreed between the plaintiffs and the defendants that the defendants should do certain things, and that the action and causes of action should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned. The plea then averred performance by the defendants of some of the things, and readiness and willingness to perform the others. *Held*, that the plea was bad, as it did not distinctly aver that the plaintiffs accepted the agreement in satisfaction and discharge of the causes of action. *Hall v. Flockton*, iv. 185.

7. In an action upon a covenant to pay upon a contingency, an accord executed before the contingency happened, is a bad plea. *Healey v. Spence*, xx. 476.

8. For a plea which was held a good answer to an action by way of accord and satisfaction, see *Smith v. Trowsdale*, xxii. 360.

ACCOUNT.

1. *Action of.* If one of two tenants in common solely occupy the land, farm it at his own cost, and take the produce for his own benefit, his co-tenant cannot maintain an action of account against the former, under the statute 4 Anne, c. 16, s. 27, as his bailiff, by reason of the former having received more than comes to his just share and proportion. The statute applies to cases where rent or payment in money or in kind due in respect of the premises, is received from a third party by one co-tenant, who retains, for his own use, the whole or more than his proportional share. *Henderson v. Eason*, ix. 337.

2. *Between tenants in common and their heirs.* A declaration in account stated that

A and B the tenants in common in fee, made a lease with a general covenant on the part of the lessee to pay the rent (without a saying to whom) on Michaelmas and Ladyday. A died, and on the following Ladyday, the tenant paid half a year's rent to B. It appeared at the trial that the plaintiff, the heir at law of A, received 12s. 6d. from B; but he claimed 6l. 5s. which was the amount of half of the half year's rent. *Held*, that the judge rightly directed the jury that B had received more than his share of the rent, and that he was accountable to the plaintiff for the excess. *Beer v. Beer*, ix. 468.

3. *When equity will open a settled account for correction of errors.* Where parties agree to settle accounts by ascertaining the exact balance, if errors are discovered, a court of equity will open the account and correct them; but otherwise if the parties meet not to ascertain the exact balance, but to agree upon a gross sum as such balance. Fraud will, however, vitiate either kind of settlement. *Mackellar v. Wallace*, xxvi. 62.

4. *When bill for will lie.* The illegality of a transaction between principal and agent is not necessarily a bar to a suit in equity seeking for an account of such transaction. *Williams v. Trye*, xxiii. 501.

5. A bill for an account will not lie unless it refers to mutual accounts. *Phillips v. Phillips*, xii. 259.

6. A bill for an account by a principal against his agent is not sustainable where the transaction is single, not tainted with fraud, and remediable at law. *Navulshaw v. Brownrigg*, vii. 106.

7. A Calcutta firm directed their consignees in London, if in funds, to hold 10,625l. at the disposal of M., a creditor, and advised M. of the directions. The London firm received this letter on the 12th of March, 1841, and advised M. thereof, stating that they were then in cash advance to the firm to a greater amount than the expected remittances were likely to cover; and concluded: "We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." In 1842, the Calcutta firm revoked their order in favor of M. Upon bill by M. against the London firm and others, it was held by the Court below that the correspondence entitled M. to an account, as against the London firm, of the balance in their hands on the 12th of March, 1841, on their general account with the Calcutta firm, and of the consignments and remittances of the Calcutta firm to the London firm up to the revocation of the order, the London firm to have credit in such account for all dependences existing between them and the Calcutta firm on the 12th of March, 1841. Upon appeal, the Court directed the cause to stand over until the plaintiff had established his right by an action at law; and the final result of that action being, that the correspondence created no contract at law by the London firm to appropriate the proceeds of future remittances in satisfaction of the 10,625l., the bill was dismissed. *Malcolm v. Scott*, i. 72.

8. *Right of an infant to an account for rents and profits, notwithstanding statute of limitations.* The plaintiff, who attained his majority in October, 1849, brought a bill in December, 1850, claiming that the title to certain copyhold estates accrued to him in 1831, and praying for an account of the rents and profits. His title being declared, it was held, that he was entitled to an account of the rents and profits from the time his title accrued. *Hicks v. Sallitt*, xxvii. 212.

9. *What are mutual accounts.* A mutual account means not merely that one of two parties has received and paid money for the other, but that each of the two parties has received and paid money on the other's account. *Id.*

ACCOUNT STATED.

Admission of balance equitably due. The plaintiff executed a written contract of absolute sale of goods to defendant, and afterwards sued him for a sum claimed to be

due out of the proceeds of the goods sold, as a balance after paying the amount advanced by the defendant on their security. The plaintiff showed, that upon the demand of such balance, the defendant admitted the correctness of the amount, and promised to pay it over. *Held*, that though the sale was absolute in law, yet the balance might be recovered in an action upon an account stated. *Howard v. Brownhill*, xxii. 181.

ACCUMULATION.

See WILLS, (*Thelusson Act*.)

ACTION.

1. *For breach of an executory contract for the sale of a ship.* An action cannot be maintained for the breach of an executory contract for the sale of a ship, unless the contract be by an instrument in writing containing a recital of the certificate of registry. *Duncan v. Tindal*, xx. 224.

2. *By a third person against the vendor of an article, the unsoundness of which caused an injury.* An action will not lie against a tradesman who sold an article which he, at the time, believed, to be sound, but which was actually unsound, for an injury sustained by a third person, not a party to the contract of sale, in consequence of such unsoundness. *Longmeid v. Holliday*, vi. 562.

3. *Against plaintiff's brokers for deceit.* Declaration charged defendants, plaintiff's brokers, with falsely and fraudulently deceiving plaintiff by representing they had purchased tons of palm oil, to arrive, at per ton, whereas defendants by their contract were to receive the said oil only after the delivery of a certain quantity to other vendees. The vessel did not bring enough to fill the orders of the latter, and the plaintiff received none. Loss thereby. It appeared there was no fraud intended by defendants. *Held*, that an action was not maintainable on this declaration. *Thom v. Bigland*, xx. 467.

4. *Right of, after an assignment of a contract by the plaintiff to defendant.* The plaintiff and defendants entered into an agreement with a railway company to execute a contract, for making a tunnel upon a line of railway, called "the Morley contract." The plaintiff then assigned to the defendants all his right and interest in the contract, and the defendants agreed to pay a given sum to the plaintiff upon the completion of the contract. Subsequently, it became necessary to vary the levels, and the defendants agreed with the company to make the tunnel in a different direction from that specified in the Morley contract, and upon different terms as to payment. *Held*, that the plaintiff had no right to sue the defendants for the sum stipulated to be paid to him by the agreement, as the Morley contract never was completed. *Humphreys v. Jones*, ii. 366.

5. *On an incomplete agreement.* An action will not lie on an incomplete agreement, as for instance, on an unaccepted proposal to pay a certain percentage on an account on receiving proper indemnification. *Cope v. Albinson*, xvi. 470. And see also note.

6. *Right of action, when barred.* The rule of law that a personal action, once suspended by the act of the party, is gone forever, and the rule that a covenant not to sue for a limited time is no bar to an action, considered and explained. Per MAULE, J., *Belshaw v. Bush*, xiv. 269.

7. *On bonds of a public company.* The Herne Bay Pier Act enables the company to borrow money on bond, under their common seal, and the rents and profits of the undertaking are to be a security for the money so borrowed, with interest, and all bondholders shall be equally entitled to a claim or lien on the said rents and profits in proportion to the sums thereby secured, and without any preference by reason of the priority of date of any such securities, or any other account whatever. *Held*, that this clause did not prevent a creditor, to whom the company had given a bond under their common seal, conditioned for the payment of the principal money at a fixed day, and

interest in the mean time, from suing the company for the penalty of that bond; the clause at the end of the section only applying to prevent a creditor recovering under his judgment in preference to others. *Bolckow v. The Herne Pier Bay Co.* xvi. 159.

8. *Act 14 and 15 Vict. c. 105.* The 22d section of the Act 14 and 15 Vict. c. 105, which provides that, after a certain reconveyance, the Governor and Company of Copper Miners shall hold their property discharged from all rights and claims of creditors and claimants, refers to debts or liquidated claims, and is not a bar to an action for damages accruing after the passage of the act by reason of a continuing breach by said company of an agreement made prior to its passage; the damages for the breach at the time of the passage of the act being provided for in its twelfth section. *Wood v. The Governor and Company of Copper Miners, &c.* xxvi. 343.

9. *Upon judgment.* By the law of Scotland, execution cannot issue on a decree pending an appeal; but by the 48 Geo. III. c. 151, s. 17, when an appeal is lodged in the House of Lords, the Court of Session is to have power to regulate all matters relative to *interim* possession or execution, and payment of costs, and expenses already incurred according to their discretion. An "*interim* decree for payment" was made at the same time, decreeing and ordaining the pursuer to make payment to the defender, of the said sum of 494*l.*, and granting a warrant to the messenger-at-arms to enforce payment of that sum. *Held*, that the decree was not in the nature of a final judgment, and an action could not be maintained thereon. *Patrick v. Shedden*, xviii. 380.

10. *Judgment in county court.* The decision of the Court of Queen's Bench, in *Berkeley v. Elderkin*, 1 El. & Bl. 805; s. c. 18 Eng. Rep. 377, that an action cannot be maintained in a superior court on a judgment obtained in a county court constituted under the 9 & 10 Vict. c. 95, ought to be followed by courts of coördinate jurisdiction with the Queen's Bench. *Austin v. Mills*, xxiv. 491.

11. An action cannot be maintained for a cause of action in respect of which judgment has been recovered in such a county court. *Id.*

12. An action is not maintainable in a superior court upon a judgment in a county court established under the 9 and 10 Vict. c. 95. *Berkeley v. Elderkin*, xviii. 377.

13. *Upon a judge's order—Judge's order not the foundation of an action.* An action will not lie upon a judge's order whether drawn up by consent or hostilely. *Hookpayton v. Bussell*, xxvi. 478.

14. *For personal services.* *Semble*, that an action may be maintained by a party summoned as a witness for his expenses incurred in attending the trial. *Pell v. Daubney*, i. 450.

15. In an action for salvage services, it appeared that the plaintiff, being a common sailor, was ordered by the captain of his own ship to go in a boat with others, for a distance of fourteen miles, to the assistance of another vessel, which was stranded on the bar of a river, and to place himself under the command of the captain of that other vessel. *Held*, that, under those circumstances, he could not maintain an action against the owner of the vessel saved, for the personal services which he had rendered. *Lipson v. Harrison*, xxiv. 208.

16. *Of tort, may be sustained without showing special damage.* An action is maintainable for a wrong done, or an injury to a right, though no special damage be shown. *King v. The Rochdale Canal Co.* vi. 241.

17. *Against the personal representative.* An action for a tort does not lie at common law against the personal representatives of a deceased person when no cause of action existed in the lifetime of the deceased. *Per* LORD CAMPBELL, C. J., *Bryan v. Clay*, xvi. 154.

18. *Right of action against a railway company for interrupting a private way taken away by statute.* By the 6th and 55th sections of the Railway Clauses Consolidation Act, 8 and 9 Vict. c. 20, the remedy by action against a railway company for inter-

ference with a private right of way was taken away, except where special damage has been suffered. *Watkins v. The Great Northern Railway Co.* vi. 179.

19. *For injuries received through the negligence of the servants of a sub-contractor.* A, having contracted to pave a district, entered into a sub-contract with B, to pave a particular street. A supplied, and his carts were used to carry, the stones. While the paving was going on, B's men negligently left a pile of stones in the street so as to cause serious injury to the plaintiff. *Held*, that an action would not lie against A for such injury, though the act complained of amounted to a public nuisance. *Overton v. Freeman*, viii. 479.

20. *Semble*, if the contract between A and B had been to do what might, *per se*, be a nuisance, A would have been liable. *Ib.*

21. *Cumulative remedies.* A, a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the moneys agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An act of parliament was passed, declaring how claims were to be preferred and liquidated. A presented his claim to commissioners appointed under the act, and adopted the modes of proceeding provided by it; his claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the act, was paid over to the lords of the treasury. A proceeded to make his claim afresh under a petition of right. *Held*, that he had no remedy except under the provisions of the statute. *De Bode v. Regina*, xvi. 14.

22. By the Companies Clauses Consolidation Act, 1845, directors of a company have power to declare shares forfeited when a call is in arrear for a certain time, and that whether the company have sued for the amount of such call or not. By the private act of a company, power was given to cancel any forfeited shares where the market price is not sufficient to realize a sum equal to the arrears of the calls, and to issue so many new shares, and of such nominal amount as they may think fit, provided the capital to be represented by such new shares shall not in the whole exceed the capital represented by the unpaid portion of the shares which shall be so cancelled. *Held*, that the remedy given by this latter provision was cumulative, and that an action for calls was maintainable, notwithstanding that the shares had been forfeited and cancelled. *Held*, also, that it was no answer to the action, to say that new shares had been issued and sold in lieu of the cancelled shares, which realized a sum greater than the unpaid portion of the cancelled shares; but the original shareholder will be entitled to the benefit of payments made in respect of the new shares. *Inglis v. The Great Northern Railway Co.* xvi. 55.

23. *Against clerk of county court.* No action lies against the clerk of a county court for not preparing, or for negligently preparing, a notice to a defendant of an order against him to pay a debt by instalments, which order was made by the judge at the time of delivering judgment; such order being part of the judgment, and not requiring service. *Robinson v. Gell*, x. 502.

24. *Undue distress for rent.* The making a distress for rent, some rent being due, accompanied by an untrue claim or pretence, that more was due than really was due, will not support an action. *Tancred v. Leyland*, iii. 482.

25. *Obstructing a private way, Stat. 8 and 9 Vict. c. 20.* As to the right of action against a railway company for obstructing a right of way appurtenant to a messuage and dwelling-house, since the statute of 8 and 9 Vict. c. 20, unless special damage has been sustained, &c. *Watkins v. The Great Northern Railway Co.* vi. 179.

26. As to distinction between damages done by a railway company, for which compensation may be obtained under the statute, and those for which an action at law

is the proper remedy, &c. *The Lancashire and Yorkshire Railway Co. v. Evans*, xix. 295.

27. *Between a rector and his predecessor's executor.* As to the right of a succeeding rector to bring an action for dilapidations against the executor of his predecessor, see *Bryan v. Clay*, xvi. 154.

28. *Notice of.* Upon the trial of an action against an officer of the customs, it is the duty of the judge, unless the facts are admitted, to hear the evidence and decide whether the defendant did the act complained of, honestly believing that his duty called upon him to do it, in which case the provisions of the 8 & 9 Vict. c. 87, ss. 117, 118, as to notice of action, would be applicable. *Arnold v. Hamel*, xxiv. 547.

29. *Former recovery—Fresh action.* Where damages are pronounced for in case of collision, and it subsequently appears that the cargo was damaged to a greater extent than was claimed, a fresh action cannot be maintained to recover the excess of damage, the parties and cause of action being identical. *The Kalamazoo*, ix. 557.

30. *Mortgagee—Landlord—Distress—Overplus.* Where a landlord has sold his tenant's goods, under a distress for rent, the proper remedy of a mortgagee of such goods to recover the overplus money in the landlord's hands, is by an action on the case against him for not paying over the overplus to the sheriff, pursuant to 2 W. & M. Sess. I. c. 5, s. 2, the landlord not being liable to the mortgagee in an action for money had and received. *Yates v. Eastwood*, v. 519.

31. *Against guardians of the poor by the collector of rates for poundage.* The board of guardians of a union, acting in pursuance of an order of the Poor Law Commissioners, (under an act of parliament,) appointed the plaintiff collector of rates of several parishes at a certain poundage, in conformity with the terms of the order. *Held*, that an action for the poundage would not lie against the guardians. *Smart v. The Guardians of the West Ham Union*, xxx. 560.

32. *Against a vendor by a third person for injuries caused by unsoundness of articles sold.* A tradesman who sells an article which he, at the time, believes to be sound, but which is actually unsound, is not liable to a third person, nor a party to the contract of sale, for an injury subsequently sustained in consequence of such unsoundness. *Longmeid v. Holliday*, vi. 562.

33. *For Deceit—Pleadings in the Isle of Man.* Although there is not so much strictness required in pleadings in the courts in the Isle of Man as in England, yet, where a declaration in an action for deceit contains specific averments of fraud, such averments must be established by proof, to entitle the plaintiff to recover. *Moore v. Clucas*, xxiv. 70.

34. *Wrongful exercise of legal process.* To put into force the process of the law maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is injured in his person or property, an action lies for the injury. *Churchill v. Siggers*, xxvi. 200.

35. *Adjacent proprietor—Withdrawal of stratum.* The withdrawal of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action, as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. *Nicklin v. Williams*, xxvi. 549.

36. *For breach of promise of marriage by a single woman against a married man.* A, a married man, and B, a single woman, mutually promised to marry each other; the latter having no notice that A was then married. B remained unmarried and was willing to marry A until she discovered that he was already married. *Held*, that an action for breach of promise of marriage would lie against A, the plaintiff remaining unmarried being a sufficient consideration for the defendant's promise. *Millward v. Littlewood*, i. 408.

37. *For salary against trustees—No appropriation made by trustees.* The 6 Geo. IV. c. 131, for regulating the markets in the town of Burslem, provided, that out of the

first moneys received under the act, the trustees should, in the first place, pay the costs and expenses of passing the act, and apply the remainder thereof "at the discretion of the said trustees," in payment of certain rents and fines, and in certain purchases and other expenditure pointed out by the section, including the payment of "the salary to the organist of Burslem Church." *Held*, in an action on the case, by the organist of Burslem Church against the local board of health, for a breach of duty in simply refusing to pay his salary, that the plaintiff and the board stood in the relation to each other of trustee and *cestui que trust*; and, as the board had not, in the exercise of their discretion, specifically appropriated an amount as payable to the plaintiff, no action could be maintained against them for the recovery of the salary. *Edwards v. Lowndes*, xvi. 204. See, also, *Regina v. Kingston-on-Hull*, xx. 149; and *Regina v. The Governors, &c. of Hull*, xxx. 409.

38. *Against railway company for killing sheep.* A railway train, driven forty miles an hour, according to the general directions of the company to the driver, ran over and killed some sheep which had strayed on the line in consequence of the defective fences of the company. *Held*, that the train being under the direction and control of a rational agent, the company were not liable in trespass for the injury; but that the proper form of action was by action on the case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway. *Sharrod v. The London and Northwestern Railway Co.* iv. 401.

39. *Action on the case—By lessor for injury to reversion.* A lessor may sue in case for injury to his reversion, though the injury is the working a mine contrary to the terms of the lessee's covenant, for which an action on the covenant would lie. *Marker v. Kenrick*, xiv. 320.

ADJOURNMENT.

Notice of first meeting extends to an adjourned meeting. The notice of an original meeting having been duly given, such notice extends to all adjourned meetings, if such adjourned meetings are held to complete the unfinished business of the original meeting. *Scadding v. Lorant*, v. 16.

ADMINISTRATION.

- I. WHO MAY ADMINISTER; APPOINTMENT OF EXECUTOR.
- II. RIGHTS, DUTIES, AND LIABILITIES OF EXECUTORS.
- III. ASSETS, ADMISSION OF, &C.
- IV. RANK OF CREDITORS; MARSHALLING ASSETS.
- V. LEGACIES AND LEGATEES.
- VI. PRACTICE.
- VII. COSTS.

I. Who may administer; Appointment of Executor.

1. *What is an appointment.* "I request J. M. L. to assist my daughter in the execution of my will"—is not an appointment of J. M. L. as executor according to the tenor. The daughter, sole executrix and residuary legatee, being incapable of acting, administration decreed to J. M. L. for her use and benefit, on consent of all persons interested. Justification of sureties not required. *In the Goods of W. F. Stevenson*, xviii. 575.

2. *Executor according to the tenor.* Where in a will, A is called a trustee, but there is no trust, and no duty to perform as a trustee, A may be taken as executor according to the tenor; but where there is a trust, then A is not executor according to the tenor. The nephew can take administration with the will annexed as residuary legatee. *In the Goods of J. Bray*, xviii. 602.

3. *Estate of bankrupt.* In 1815, A, a trader in Somersetshire, was made a bankrupt, but did not obtain his certificate. In 1817, A recommenced business in Suffolk, which he continued to carry on until his death, in 1852. A appointed B his executor, who proved the will. On the petition of one of the creditors of A, subsequently to the bankruptcy, an order was made by the commissioner of the district in which A had been made a bankrupt, that the official assignee of A's estate should administer his estate by paying first the funeral and testamentary expenses of A, and his creditors subsequently to the bankruptcy, then the creditors previously to the bankruptcy, and handing over the surplus to B as executor. A claim was afterwards filed in chancery by B for the administration of the estate of A. *Held*, that, notwithstanding the order made by the commissioner, the estate of A ought to be administered by B, as executor, and that the usual administration decree ought to be made on the claim. *Tucker v. Hernaman*, xvii. 463.

4. *Widow appointed who had lived separate from her husband.* B. died without a will, leaving a widow and two infant children. He had separated from his wife on suspicion of her adultery, and there was a deed of separation; the children were allowed by him to live with the wife. Evidence was given as to the fitness of the widow to take the administration. *Held*, that, notwithstanding the circumstances of the separation, the court might grant the administration to the widow. *Brown v. Brown*, xxix. 609.

5. *Foreign law.* The grantee in a deed of gift from the administratrix of an Austrian, valid to pass all the intestate's estate under the laws of Austria, is entitled to letters of administration in England on filing affidavits of the foreign law, the documents giving the grantee her title, and an affidavit verifying these documents. *In the Goods of Vincenzo Frederici*, xxvi. 601.

6. *Substituted legatee for life.* A substituted legatee for life is entitled to letters of administration *de bonis* with the will annexed, in preference to a substituted legatee; but where there is a doubt whether, under the terms of the will, the person claiming as legatee for life is entitled as such, the grant will be made to the legatee whose interest is admitted. *Brown v. Nicholls*, vi. 599.

7. *Joint administration.* Where parties have chosen to be joined in administration, the court will not relax the rule of practice and grant the administration of the goods to one alone. *In the Goods of Nayler*, v. 588.

8. *To whom granted.* Bequest to A for life, then equally to the testator's three daughters; in case of the death of any one of them, her children, if any, should take her share; if no children, her share should go to the survivor, or survivors. At the death of A, two of the daughters were dead, one leaving children. Administration was granted to one of the children of the deceased daughter, the surviving daughter having renounced. *In the Goods of Duncan*, v. 584.

9. *Treasurer "for the time being" executor.* A appointed the treasurer for the time being of an institution one of the executors of his will, and a residuary legatee. At the death of A, B was treasurer, and continued so for thirty days afterwards, subsequent to which he applied to be joined in the probate. On motion, probate was decreed to B jointly with the other executors. *In the Goods of Thompson*, ix. 579.

10. *Limited administration.* Where a suit respecting the testamentary papers of the deceased, a domiciled Scotchman, is pending in Scotland, and the Scotch court has appointed a person *ad interim* judicial factor and executor dative, the Prerogative Court will not, in the absence of necessity, grant to such a person a general administration with respect to money in the public funds, but only an administration limited to receive and invest the dividends upon the stock. *In the Goods of Morgan*, ix. 581.

11. *Executors of married woman refusing to propound.* A married woman has power to dispose of her separate property by will, but where the executors named in such a will refuse to propound the same, administration will be granted to the husband as in case of intestacy. *Spitty v. Bayly*, ix. 570.

12. *Administrator of executor.* Administration limited to the fund under trust will be decreed to the administrator of the executor of the original trustee. *In the Goods of Wells*, i. 632.

13. *Will of married woman.* A married woman made a codicil revoking all other testamentary instruments, and declaring her intention to die intestate, and appointing no executor. In default of appointment, the property over which she had a power of disposition went to her next of kin. *Held*, that a sister, as next of kin, was entitled to administration with the will annexed, in preference to the husband. *Brenchley v. Lynn*, ix. 583.

14. *Administration with the will annexed.* Letters of administration were granted of the effects of one who left a will, the date of which was written on an erasure, the subscribing witnesses not mentioning their address and description, no such persons appearing, and the writing of their signatures resembling that of the testator himself—the executors, under these circumstances, formally renouncing, and the legatee declining to take administration with the will annexed. *Whiting v. Deal*, xxix. 613.

15. *Revocation.* Administration was granted describing the deceased as a widower; the administration was revoked on its being discovered he had left a widow, who had been before his death, and still was, resident in New Zealand. *In re Edwards*, i. 623.

16. *Executor of executor.* The executor of an executor represents the original testatrix, and her residuary legatee has, therefore, no right to the grant of administration. *In the Goods of Beer*, i. 631.

17. *Next of kin—Insolvent estate.* The residuary legatee and next of kin of a testator has a right to administration with the will annexed, in opposition to a creditor, though the estate is alleged to be insolvent, and the creditor is supported by the other creditors of the estate. *Crane v. Rebello*, xxiv. 593.

18. *De bonis non.* S. W. of his will appointed E. W. sole executor and residuary legatee. E. W. proved the will in the Prerogative Court, and administered the whole of the beneficial estate of S. W. E. W. died, leaving the whole of his estate within a local jurisdiction, having made a will, but appointed no executor or residuary legatee, administration with which will annexed was granted by the local authority to the next of kin. Certain stock stood in the name of S. W. as surviving trustee, which was not transferred by E. W. Administration granted to the administrators of E. W. as administrators *de bonis non* with the will annexed of S. W. *In the Goods of Wells*, ii. 599.

19. *Executor de son tort, what constitutes.* A person receiving money from another, who is an executor *de son tort*, which he applies partly in payment of a debt due to himself from the deceased, and partly in payment of funeral expenses, retaining a small balance in his hands, is not an executor *de son tort*; but it may be evidence thereof in connection with other facts. *Lysley v. Clarke*, xiv. 510.

20. *Executorship, evidence of.* An unstamped copy of an Act Book of the Ecclesiastical Court is sufficient evidence of the probate of a will to prove the executorship of the person named in it. *Dorrett v. Meux*, xxvi. 364.

II. Rights, Duties, and Liabilities of Executors.

1. *Accounts against executors—Interest.* It is the duty of an executor to distribute the assets in payment of legacies, when the time for distribution has arrived; and if, having ample funds in his hands, and there being no excuse for retaining the money, the executor, instead of paying the legacies, and dividing the residue amongst the residuary legatees, retains the money in his own hands, he is guilty of a breach of trust, and will be charged 5l. per cent. interest on the money so retained; and if he pays the money into his banker's, and mixes it with his own money, he will be considered to have had the same benefit in respect of it as if he had embarked it in trade, and will be charged with annual rests on the balances in his hands; and the burden lies on the executor to show that he has derived no benefit from the balance thus in his banker's hands. *Williams v. Powell*, x. 224.

2. *Income-tax.* The gift of an annuity "clear of legacy-duty, and every other deduction whatsoever," or "without any deduction for legacy-duty, or otherwise," will not authorize the payment of the income-tax out of the testator's estate. *Lethbridge v. Thurlow*, xi. 193.

3. *Payments by administratrix in respect of wagers.* Payments made by an administratrix in respect of wagers decided in the testator's lifetime are unauthorized, and cannot be allowed against the estate; but those made in respect of wagers not so decided are good payments, those undecided wagers being illegal contracts which either party might determine, and which she, by payment, must be taken to have determined. *Manning v. Purcell*, xxxi. 452.

4. *Continuance of assets in trade.* A mere authority, in a will, to continue the testator's assets in trade, does not authorize the executors to trade with them; and partners trading with such assets, with notice, are bound to inquire into the trusts upon which they are held, and are liable in respect of them. *Travis v. Milne*, vii. 195.

5. An executor, not proving the will until after his co-executors had improperly invested the testator's assets, cannot justify taking no step in respect of or interfering with them for a considerable period. *Ib.*

6. *Loss of assets.* Where a will contains no direction for the executors to invest the proceeds of the testator's estate, and the proceeds are left in the hands of the testator's bankers, and a residuary legatee refuses to accept his share by small sums on account, the executors will not be held liable for any loss which may ensue by failure of the bankers before the expiration of twelve months from the testator's decease. *Johnston v. Newton*, xxi. 494.

7. *Sale by acting executors—Disclaimer.* Copyholds are within the statute of 21 Hen. VIII. c. 4, and, consequently, a sale of copyhold estates made without the concurrence of one co-executor, who subsequently disclaimed to act as co-executor, the disclaimer being *primâ facie* evidence of a refusal to act from the beginning, is good. *Peppercorn v. Wayman*, xiii. 199.

8. *Power of sale.* The power which an executor or administrator possesses of making a valid mortgage, includes in it a power to give all that is properly incidental to that species of alienation; hence a power of sale may be given. *Russell v. Plaice*, xiii. 375.

9. A charge of debts on an estate devised, gives the executor an implied power of sale. *Robinson v. Lowater*, xxiii. 540.

10. *Mortgage by executor.* An executor borrowed money upon a representation that it was wanted for the purposes of his testator's estate. The money was lent upon the personal security of the executor, who afterwards mortgaged part of the testator's property as a security for the money antecedently advanced; the executor died and the mortgagee took possession of the mortgaged estates, and advertised them for sale. The plaintiff, who was both the representative of the deceased executor, and also the executor of the original testator, filed a bill praying for an injunction against the sale. *Held*, that there being no evidence that the money was not applied to the purposes of the estate, the bill ought to be dismissed. *Held*, also, that the plaintiff had a right to appear in the single character of executor of the testator and bring this bill. *Miles v. Durnford*, xiii. 120.

11. *Commissions.* Executors in India of an indigo planter were held entitled to a commission of 5*l.* per cent., on the gross assets collected by them. *Mathews v. Bagshawe*, vii. 244.

12. *Interest on executor's accounts.* It is not according to the ordinary course or practice to direct the master in taking the accounts against an executor, to calculate interest upon an unascertained residue. *Williams v. Powell*, x. 224.

13. *Executor liable to interest on balance retained.* The usual course is to charge an executor, who has merely retained balances in his hands, with interest at 4*l.* per cent.; if he has acted improperly, using the money for his own benefit, then 5*l.* per cent. In

this case, investments were made in exchequer bills, &c., not authorized by the will. There being no evidence of a bad intention, it was held that the executor should pay only 4l. per cent. *Knott v. Cottee*, xiii. 304.

14. *Wilful default—Interest.* In an administration suit by one executor against his co-executors, the pleadings raised a question of wilful default; but upon the hearing, a decree was made for the common accounts of what had been received, without any special direction or inquiry as to what might have been received but for the wilful default of the defendants. Upon the cause coming on for further directions, it was held that the plaintiff was then precluded from raising the question as to wilful default, but that if the question were still open, the plaintiff could not call upon his co-executors to account for what he jointly with them might have received. The plaintiff claimed interest upon balances remaining in the hands of the defendants. *Held*, that the court was not precluded from entertaining this question by the decree, which might have afforded materials for forming an opinion. *Jones v. Morrall*, xiii. 69.

15. *Marriage of administratrix.* If an administratrix marries without providing for the security of the trust property, she commits a breach of trust. *Derbshire v. Home*, xxi. 207.

16. *Devastavit.* A testator bequeathed an annuity of 250l. to his widow, and directed that a competent part of the money which he should die possessed of, and which should be invested in his name should, with the widow's consent, be placed out, in the names of his executors, on other security or in the funds, to the intent that the widow might, during her life, receive the annuity, as it became due, "out of the interest, dividends, proceeds, and produce" thereof; and, after giving certain legacies, the testator bequeathed the said invested moneys, and all his residuary personalty, to certain other persons. The executors paid the pecuniary legacies in full, and in course of time exhausted all the remaining assets, about 4,300l., in keeping down the annuity. *Held*, that this was no *devastavit*, because the capital fund was applicable, under the terms of the gift, in payment of the annuity. *Miner v. Baldwin*, xxi. 111.

17. *Executor who is also legatee.* When an executor, who is also a specific legatee, takes possession, *primâ facie*, he does so in virtue of his character of executor, and not in that of legatee; but the possession may afterwards become changed, either by a formal act of assent, or by conduct and dealing inconsistent with the character of executor. *Trail v. Bull*, xxi. 530.

18. *Obligee made executor of obligor.* If the obligee in a bond makes the obligor his executor, the debt remains unchanged, in equity, the same as if a stranger had been executor. *Turner v. Cox*, xxvi. 72.

19. *Assignment by one executor.* By an assignment, by one of the several executors of a leasehold estate, the property of the testatrix, which had been bequeathed to that executor absolutely for his benefit, reciting that the assignor and another executor had proved the will, (but not stating the fact that a third executor had also subsequently proved,) and reciting that the executors had assented to the bequest to the assignor, it was witnessed that the assignor, in his several capacities of executor and assignee of the testatrix, in consideration of the sum therein mentioned, sold and assigned the premises to the purchaser. The assignor, in his character of executor, was, at the time of the assignment, indebted to the estate of the testatrix in a sum greater than the value of the property assigned. On a bill by the co-executors, on behalf of the estate of the testatrix, to set aside the assignment, and recover the title deeds, it was *held*, that the assignment by the executor to the purchaser was effectual, and that, whether there had or had not been an assent to the bequest by the other executors, the court would not disturb the sale. *Cole v. Miles*, xvii. 582.

20. *Unsettled accounts—Intermediate dividends.* Where executors had invested money to answer claims on unsettled accounts between their testator and other persons, and paid the dividends to the tenant for life under the will, on a claim filed after the death of the tenant for life, by a party entitled to the fund, the court directed an inquiry before the master as to who was the party entitled to the capital, and ordered

the dividends to be paid in the mean time to the person entitled to the testator's estate. *Blackford v. Toller*, vii. 246.

21. *Suit by administrator—Staying proceedings without prejudice.* Where there has been a final decree in a suit in India, upon motion by the defendant in a similar suit in England, between the same parties and for the same purpose, the court in England will make an order staying all proceedings in the English suit, without prejudice to any proceedings which the plaintiff, an administrator, may be advised to adopt with reference to the decree and proceedings in India. *Ostell v. Lepage*, xvii. 57.

22. *Administrator de bonis non in India.* An administrator *de bonis non*, &c., in India, appointed by the authority of the plaintiff administrator in England, is substantially the same party for this purpose. *Ib.*

23. *Assent to compromise.* Such administrator in India is authorized to assent to a compromise, under the authority of the court in India, and a decree adopting that compromise is a final decree. *Ib.*

24. *Setting aside decree.* After such decree the plaintiff in England cannot, by supplemental bill or amendment under the new practice, continue the English suit, in order to obtain discovery of facts which would enable him to set aside the decree in India. *Ib.*

25. *Executor de son tort, acts of, when good.* The act of an executor *de son tort* is good against the true representative of the deceased, only where it is lawful, and such an act as the true representative was bound to perform, in the due course of administration. *Buckley v. Barber*, i. 506.

26. *Suit on bond.* The administratrix *de bonis non* of an intestate cannot in equity sue upon or enforce the administration bond given to the ordinary by the original administrator, against his estate and the co-sureties in the bond, without showing some special circumstances why the ordinary himself did not institute the proceedings. *Bolton v. Powell*, viii. 165.

27. *Payment by executor de son tort.* Where an executor *de son tort* really acts in the character of executor, and out of the assets in his hands makes a payment in satisfaction of a debt due from the deceased, to a person who at the time might reasonably suppose that he had authority to act as executor, such payment is valid and binding upon the person who afterwards becomes the rightful administrator. *Thompson v. Harding*, xx. 145.

28. *Executor indebted to testator's estate.* An executor indebted to his testator's estate creates a charge on his (the executor's) own freehold estate in favor of his wife and children, to the amount specified in the testator's will, as part of their share of his residuary estate. *Held*, that the wife and children were entitled to the benefit of the charge, although the debt due to the testator's estate remained unpaid. *Stilwell v. Mellersh*, v. 185.

29. *Assent before taking out administration.* After the death of an intestate, his widow took possession of a portion of his property, with the supposed assent of a son who afterwards took out administration. *Held*, that the administrator was not bound by that assent, supposing such to have been given. *Morgan v. Thomas*, xviii. 526.

30. *Attachment of debt.* An executor of a judgment creditor who has not revived the judgment, or entered a suggestion upon the roll in pursuance of sect. 129, of stat. 15 & 16 Vict. c. 76, is not a "creditor who has obtained judgment" within sect. 60 of the Common-law Procedure Act, 1854, and therefore is not entitled to an order for attachment of a debt due to the judgment debtor under sect. 61. *Baynard v. Simmons*, xxx. 290.

31. *Purchase from one executor.* If a co-executor, having a beneficial interest in the estate and being indebted to the same, assigns his interest to his other creditors, his co-executors have a lien on the interest so assigned in preference to the assignees. *Cole v. Muddle*, xiii. 26.

32. *Suit by administrator—Laches.* An administrator having died indebted to his

intestate's estate, and his executor having misapplied and become bankrupt, a suit was commenced by the administrator *de bonis non* of the intestate against the administrator's heirs and sureties fifteen years after his death; but no decree having been obtained thereon and the suit having been suffered to rest dormant till thirty-one years from the death of the administrator, it was held that the revival of the suit at that time must be considered as an original suit, and, as such, barred by length of time and laches. *Quære*, whether the circumstance of the administrator dying largely indebted to the intestate's estate, was a breach of condition of the bond. *Bolton v. Powell*, xv. 32.

33. *Liability on contract of intestate.* In an action against an administratrix, the first count of the declaration stated an agreement between the plaintiff and the intestate, by which, if the plaintiff succeeded in selling a certain picture, the intestate agreed to pay to him 100*l.*; and alleged that the plaintiff, after the death of the intestate, did succeed in selling the picture, "which sale was confirmed by the defendant as administratrix." Breach, non-payment of the 100*l.* *Held*, that the authority to sell was revoked by the intestate's death, and that the confirmation of the sale, as alleged in the declaration, was not a confirmation of the contract with the intestate, so as to make the defendant liable to pay the 100*l.* *Campanari v. Woodburn*, xxviii. 321.

34. *Semble*, that the defendant, after the confirmation of the sale, was bound to remunerate the plaintiff on a *quantum meruit* for effecting the sale. *1b.*

35. *Administrator ad litem.* In a creditor's suit, an administrator *ad litem* of the intestate debtor does not sufficiently represent him. *Groves v. Lane*, xiii. 529.

36. *Money lent—Payment to administrator of executor or administrator de bonis non.* A testator devised 400*l.* to his daughter M., and in the event of her dying without issue, the same to be divided among such of his other children as should be then living. M. died without issue, the testator's other children having died in his lifetime. E., the son and executor of the testator, covenanted by indenture with the defendant, another son, that the latter should apply the share of M. towards the purchase of an estate which E. had sold to him; that that sum should continue in the defendant's hands, and be payable with interest, to E. or to M., and that the defendant should be chargeable with such principal money as might become payable agreeably to the will of the testator. The defendant covenanted with E. for payment to him for the use of M., of so much of the said principal money as might become payable agreeably to the said recited will. The plaintiff was the administrator of E., the executor; and it was held that this was money lent, and that the defendant was bound to repay it to the plaintiff, and was not entitled to delay payment, for the purpose of paying it to the administrator *de bonis non* of the original testator when he should be appointed. *Dodd v. Dodd*, xxix. 411.

37. *Suit by a married woman as executrix—Stay of proceedings—Indemnifying husband against costs.* Where a married woman, who was living separate from her husband, brought an action as executrix, in which the husband was made co-plaintiff against his will, the court refused to stay the action altogether, but ordered the proceedings to be stayed until security was given to indemnify the husband against the costs of the action. *Proctor v. Brotherton*, xxiv. 518.

38. *Breach of duty.* A case of wilful default and negligence was alleged on the pleadings against the executors for not having sold the testator's estate, and, at the first hearing, accounts and inquiries were directed. *Held*, on further directions, that as at the original hearing it was not ascertained who the parties entitled under the will were, the defendants were still chargeable with their breach of duty. *Held*, also, that as the testator's widow, a co-executrix with another defendant, had received the rents and profits during the whole period, her estate was liable to make good the surplus over what she would have been entitled to, in case there had been a sale and investment according to the will. *Pattenden v. Hobson*, xvii. 16.

III. *Assets, Admission of, &c.*

1. *Equity of redemption.* In the administration of real estate not devised for the payment of debts, an equity of redemption is now legal assets. *Foster v. Handley*, i. 203.

2. Certain lands being given to A for life, previous to the passage of the Rents Act of 1834, with power of leasing, and A having leased portions of the premises after the passage of the said act, it was held, after the death of A, that his personal estate was entitled to the benefit of the provisions of the act. *Lock v. De Burgh*, vi. 65.

3. *A party acting as sole executor and trustee not to make profit—Income of colliery.* A testator, being seized of real leasehold and personal estate, (part of the leasehold being a colliery,) devised part of his real estate to his son, and the residue of his estate, real and personal, to trustees upon trust to sell at some convenient time, with the consent of the son, and secure the payment of certain trusts and annuities, and then convey the residue to the son. The two trustees were made co-executors with the son. At the time of the testator's death, the debts exceeded the pure personalty. The son proved the will alone, the trustees having disclaimed the trusts and renounced probate. The son took possession of the whole property, and made the colliery yield a profit of 27,000*l.* Held, that the son, having acted as sole executor and trustee, could not be allowed to make a profit of the trust; that the clear income of the colliery formed part of the capital of the testator's personal estate, and that, although the colliery ought to have been sold twelve months after the testator's death, yet, not having been so, the son was not entitled to have its value ascertained at that time, and to be only charged with that sum and interest, but that the 27,000*l.* must be treated as part of the general personal estate, the son being allowed his reasonable expenditure on the colliery. *Lord v. Wightwick*, xxiii. 267. See also *Lord v. Wightwick*, xxi. 299.

4. *Administrator of shareholder—Liability to calls.* In a suit for the administration of the estate of a deceased shareholder in a joint-stock banking company, the registered public officer presented a petition praying leave to prove as a creditor for the amount of a call made since the death of the shareholder in respect of the shares. Held, overruling the decision of the court below, that the deceased shareholder having covenanted to pay all calls, and the shares having vested in his executors, as part of his estate, they by law became entitled to the benefits of the deed, and were liable for the calls, there being nothing in the deed of settlement of the company overruling the rule of law. *Heward v. Wheatley*, xvii. 432.

5. *Lease of tithes.* A father, being possessed of a lease of tithes from a dean and chapter, which was renewable by custom, upon receiving notice to renew, signified verbally, to his son, that he wished him to take the renewal for his own benefit. The son paid the fine; the father died, having made the son his executor. After the father's death, the son took the new lease to himself; and in a creditors' suit against the estate of the father, the court refused to consider the new lease as part of the father's assets. *Lee v. Flood*, xix. 238.

6. *Demonstrative legacy—Payment of interest on.* Payment of interest on a demonstrative legacy, from the income of the fund out of which it was primarily given, though continued thirty years, is not such an admission of general assets as will make the executor personally liable for the legacy. *Severs v. Severs*, xxi. 88.

7. *Accounts—Legacy duty.* A and B were partners. A, by his will, gave C and D 5,000*l.* each and sums to others who, as well as D, were infants, and directed that the same should remain in the business, and interest be paid thereon. A, by his will, appointed B and three others his executors, and died. B continued the business, and transferred into his books the amount at which he estimated the estate, to an account called "The account of the executors of A," and in the same books opened accounts with C and with D, in which he credited them respectively with their legacies, and interest thereon from time to time. B paid the legacy duty on C's and D's legacies, and paid legacy duty on the estimated value of A's residuary estate. B

died, and a suit was instituted to administer his estate, and C and D claimed to be creditors thereon in respect of their legacies, and one of the Vice-Chancellors decided in their favor. *Held*, upon appeal, that the transactions of B were not an admission of assets of A; and that as the suit was for the administration of the executor's, and not of the testator's estate, all that the court would do was to direct the reservation of such dividends as are reserved in cases of claims, leaving C and D to take any steps in respect of the administration of the estate of A, and in respect of the dealings of B therewith. *Hutton v. Rossiter*, xxxi. 231.

8. A, whose whole property was embarked in business, gave to each of the children of his partner B, a legacy, directing that each of B's sons should be at liberty to draw out one fourth of the principal, and no more, by yearly instalments, on giving certain notice, and he bequeathed the residue to B. B, who was the acting executor, carried on the business, and opened an account with the executors in the books of the business, in which they were credited with the estimated amount of B's capital. He also opened in the books a separate account with the legatees, in which they were credited with their legacies, and interest on them. He also passed his residuary account at the Stamp Office, in which he took credit for the full amount of the legacies, and paid legacy duty on them, and on the estimated amount of residue. *Held*, that, under the circumstances, these acts did not amount to an admission of assets for payment of the legacies. *Hutton v. Rossiter*, xxxi. 531.

9. Payment of probate duty is presumptive evidence of an admission, but not an absolute admission, of assets to the extent covered by the amount of duty paid, *Lazonby v. Rawson*, xxxi. 123.

IV. Rank of Creditors; Marshalling Assets.

1. *Priority of landlord.* A landlord, creditor for rent against the estate of a deceased tenant, is entitled to rank above the ordinary simple contract creditors, under a decree for administration. But this right arises out of the relation of landlord and tenant, and is founded on the sacred regard which the law of England shows to rights arising from tenure, and does not apply to a debt claimed against the estate of a deceased debtor, who had entered upon the land under an agreement of such a nature, that his entry did not create a tenancy at a certain rent. Agreement to grant and accept a lease of property in Jamaica, from the 1st December, 1847, for twenty-one years, at the clear yearly rent of 2,000*l.*, the lease to contain certain covenants. The tenant entered into possession, and died in August, 1849, without having paid rent. *Held*, that this agreement would not have been an actual demise before the 8 & 9 Vict. c. 106, and that the entry thereunder created no tenancy, so as to give the landowner a right of distress, or to make any privity of estate between him and the intended lessee, and that, therefore, the owner in such case had not this right of priority. This curious result of the law of tenure does not apply to a demise of lands in Jamaica. *Vincent v. Godson*, xvii. 271.

2. *Creditor preferred to heir at law.* The title of a creditor is paramount to that of the testator's heir at law. *Held*, therefore, on claim filed by a creditor against the devisees in trust and the heir at law of a testator for payment of debts out of the testator's real estate, that the heir at law was not entitled to have the claim dismissed as against him, or to an issue *devisavit vel non*. *Spickernell v. Hotham*, vii. 138.

3. *Priority of specially creditors.* A creditor by bond, in which the heirs of the obligor are bound, is entitled to be paid out of the real estate, in preference to creditors by instruments under seal, in which the heirs are not expressed to be bound. *Richardson v. Jenkins*, xix. 37.

4. *Right of exoneration.* Where a debtor had become bankrupt, but some of his creditors never claimed their dividends, which were sufficient to pay all his debts, and remained in the hands of the assignees for thirty years after the decease of the debtor,

and were then paid over to the executor of the debtor, upon proceedings in bankruptcy, instituted by the person who was entitled to the residuary personal estate; the fund so recovered will not go to the person entitled to the residuary personalty, but will be applied to paying off the mortgages on the real estate of the debtor, which were created by him, and still continue unprejudiced. *Mellersh v. Bridger; Smith v. Bridger*, xxi. 127.

5. *Distribution of assets.* The stat. 5 Geo. II. c. 5, s. 4, made all real estate of deceased persons in the West Indies, legal assets, so as to give the same priority to specialty creditors against the real estate, as they always had against the personal estate, and it is out of the power of a testator to change the legal distribution of the assets by directing an equal distribution. *Turner v. Cox*, xxvi. 72.

6. *Legatees and annuitants.* A testator directed his debts to be paid out of a fund after provided; he directed his real estate to be sold, and out of the produce his debts and funeral expenses to be paid, the residue to be held by the trustees upon certain trusts; he afterwards gave certain legacies and annuities; and he then bequeathed his personal estate, "after and subject to the payment of his debts, funeral expenses, legacies, and annuities," to the party chiefly interested under those trusts, absolutely. *Held*, that the personal estate was the primary fund for the payment of the debts. *Held*, also, that the doctrine of marshalling was applicable in favor of legatees and annuitants, who were, therefore, decreed to stand in the place of the specialty and simple contract creditors as against the real estate devised in trust for sale, and payment of debts. *Paterson v. Scott*, ix. 261.

7. *Advance to executor.* Where a security is made by deposit of the testator's title-deeds for an advance to and for the private benefit of an executor having power to deal with the testator's real estate, and not for the purposes of the will, the person taking the advance takes the security, subject to the trusts and charges created by the will; but subject thereto, the security will extend to the beneficial interest of the executor in the testator's property, and where the executor has any such interest, the lender will have a right to marshal the assets. *Haynes v. Forshaw*, xxi. 505.

8. *Hotchpot.* Where a testator devised his real and personal estate in trust to pay debts, and afterwards acquired real estate which descended, and the personal estate and real estate applicable to pay debts being insufficient therefor, it was held that the specialty creditors had a right to resort to the descended estate as legal assets, but could not participate in the trust estate, without bringing into hotchpot what they had taken out of the descended realty. *Chapman v. Esgar*, xxiii. 597.

9. *Specialty creditor.* A, upon his marriage, assigned by deed a reversionary interest in a fund to B, upon trusts for the benefit of A and his intended wife, and the issue of A. The deed contained a covenant by A with B, for quiet enjoyment and further assurance. A received and appropriated the fund. *Held*, that B was a specialty creditor of A for the amount. *Lovell v. Sherwin*, xxiii. 534.

10. A bond creditor, being a specialty creditor, must be satisfied before simple contract creditors; and if the debt on the bond is not yet due, provision must be made to meet it in the future. *Atkinson v. Grey*, xxiii. 448.

11. *Loss by breach of trust.* A loss which occurs by a breach of trust does not constitute a specialty debt. *Adey v. Arnold*, xv. 268.

12. *Succeeding rector—Dilapidations—Distribution of assets.* The right of a succeeding rector to bring an action for dilapidations against the executor or administrator of his predecessor rests upon particular custom, derived from ecclesiastical law; and it is an incident of such custom, that the claim in respect of dilapidations is to be postponed in the distribution of assets to the payment of specialty and simple contract debts. *Bryan v. Clay*, xvi. 154.

13. *Simple contract debts—Calls for shares.* Payment of simple contract debts by executors allowed, where the testator had been a shareholder in a banking company, by deed under seal, and calls had been afterwards made in respect of the shares

held by him, to meet which calls there were no assets. *Henderson v. Gilchrist*, xix. 236.

14. Shares of infants in a testator's estate, under 20*l.* each, ordered to be paid at once to the persons maintaining them. *Farrance v. Viley*, ix. 219.

V. Legacies and Legatees.

1. *Quære*, whether a voluntary promissory note given by the testator and referred to in his will, is a good debt, or a legacy. *Longstaff v. Rennison*, xi. 267.

2. *Legacies raised by mortgage.* A legacy directed by an appointment in pursuance of a will to be raised by mortgage of the moiety of the residuary real and personal estate, on the expiration of a life-interest in such moiety, and the residue of such legacy, and another legacy directed to be raised and paid by mortgage or sale of the whole or any part of the real and personal estate, on the expiration of another life-interest, were held not to be charges primarily payable out of the personal estate, but to be apportionable between the real and personal estate. *Falkner v. Grace*, xii. 213.

3. *Priority—Demonstrative legacies.* Where demonstrative legacies were payable, in a certain order of priority, out of leasehold property held of an ecclesiastical body, under a lease which was renewable, on payment of a fine, every fourteen years, and by consent of all parties one of the legatees was allowed to continue for a long time in occupation of the leasehold property, paying out of the rent the interest of the other legacy, and the leaseholds were meanwhile twice renewed by the executors, without calling upon the legatees to contribute to the fine, it was held, that this course of dealing had destroyed the right of priority. *Severs v. Serers*, xxi. 88.

4. *Assent to legacy.* Devise of a term to Elizabeth, the wife of B., for life, and to the survivor, with remainder to S.; Elizabeth being appointed executrix. Elizabeth concealed the will, and claimed that she was entitled to the whole as next of kin. Elizabeth and her husband then took out administration to the estate, entered, and sold part. The husband survived, and appointed defendant his executrix, who proved his will, and administered to the will which had been suppressed, and then the former letters of administration were cancelled. The husband of the granddaughter, after her death, took out letters of administration to her, and mortgaged the premises, unsold, to the plaintiff. Held, that, as there had been no assent to the legacy to the granddaughter by the legal representative of the testator, under the above facts, the mortgagee had no legal title. *Webster v. Johnson*, xxix. 190.

5. *Costs of executor defendant—Indemnity.* A testator left the bulk of his property to his wife, after a few pecuniary legacies. The testator left a large contract incomplete at his death, and was the personal representative of some estates, not fully settled. The executors paid the legacies, but required, as an indemnity, to have a large portion of the residue impounded for twenty years. The widow filed a bill for administration. No claims were established with respect to the contract, &c. Held, that the period of twenty years was too long, but that the defendants were entitled to costs. *Cambray v. Draper*, xiii. 291.

6. *Action by legatee.* Legatees and annuitants are bound by the proceedings in a suit for administration, between the executors and residuary legatees and devisees; although there may be a question as to the debts being primarily charged on the real estate, and which may incidentally affect them. Therefore, after decree in such a suit, legatees cannot sustain an administration suit against the executors. *Jennings v. Patterson*, xv. 68.

7. The relation back of letters of administration is solely for the purpose of protecting the estate of the deceased. *Morgan v. Thomas*, xviii. 526.

8. *Annuities—Entail—First year's proceeds of estate, who entitled to.* A testator, by his will, gave various annuities, which he directed to be secured in the public funds, and that, as they respectively fell, the principal should be added to the residue

of his fortune, and be disposed of by his executors, as after directed, for the benefit of the heirs, under a bond or deed of entail therein mentioned. He then gave some legacies, and directed his executors to consolidate into one fund the whole of his fortune and movables, which fund they were to lay out in purchasing lands in Scotland, to be entailed upon the series of heirs specified in the bond and deed of entail already mentioned. *Held*, that the first year's clear annual proceeds of the executory estate, from the death of the testator, it being invested in consols, was properly paid by the executors to the first heir under the deed of entail. *Macpherson v. Macpherson*, xvi. 45.

9. *Election to take as legatee and not as executor.* A bequeathed certain leasehold premises to B, whom he appointed his executor, in trust to sell the same and retain to his own use a specified sum, the surplus over funeral expenses, &c. if any, to go to the testator's children. B entered on the premises and retained them during his life, and devised them to his executors. *Held*, that the act of bequeathing them showed that B elected to take the term as legatee and not as executor. *Fenton v. Clegg*, xxv. 495.

VI. Practice.

1. *Parties.* Letters of administration with the will annexed were granted to A. P. (limited to certain property,) without citing a residuary legatee, resident in foreign parts. *In the Goods of Cutler*, i. 628.

2. A testator dying in the Mauritius, appointed executors in that country, and left the residue of his property to his mother in England. The executors in the Mauritius transmitted the residue to England, but the mother of the testator having died, the amount was paid to her executors, who paid all her debts exceeding the amount to which she became entitled from the testator's estate. The plaintiff was a creditor of the testator, and filed a claim to obtain payment of his debt, or to have the testator's estate administered. *Held*, that the Mauritius executors were improperly made parties to this claim, and that the plaintiff could not have relief against the executors of the testator's mother without having a legal personal representative of the testator, constituted in this country, a party to the suit. *Silver v. Stein*, ix. 216.

3. To a suit by a creditor of an intestate, against an administrator *de son tort*, for an account and payment, it is necessary that a legal personal representative duly constituted should be a party. *Creasor v. Robinson*, xi. 332.

4. Cases in which the residuary estate of one testator having devolved upon another, it is proper to join the executors of the first testator in a suit to administer the estate of the second, and to take the accounts of both estates in one suit. *Young v. Hodges*, xvii. 570.

5. *Appearance.* The court will direct a party to appear in a suit and represent the estate of a deceased defendant, who had died intestate, though no letters of administration had been granted. *The Dean and Chapter of Ely v. Edwards*, xix. 434.

6. A defendant died, and a contest as to one of his testamentary papers prevented probate being granted. The court, on motion, appointed the executor named in his will to represent the deceased's estate in the cause, under the 15 & 16 Vict. c. 86, s. 44. *Hele v. Bezley*, xix. 305.

7. *Absent executor.* An English court may appoint the counsel of an executor residing in a foreign country, to represent (in England,) the estate of the testator. *Hewison v. Todhunter*, xv. 356.

8. *Directing action.* A claim having been brought against an estate in the course of administration in a suit, and the legal rights of the parties not appearing to the court clear and beyond all reasonable doubt, and there being also a question as to the amount of damage, the court refused to decide the question, giving leave to the claimant to bring an action at law to establish his rights. *Vigurs v. Vigurs*, xiii. 471.

9. *Prospective order.* Order made on a claim that the money to be received in respect of mortgages, forming part of the personal estate of an intestate, should be got in by the administrator, and divided from time to time by him among the parties interested. *Bullivant v. Bellairs*, vii. 51.

10. *Jurisdiction—Order for administration.* A married woman, donee of a general power of appointment over personal property comprised in her marriage settlement, by her will appointed, gave and bequeathed all the personal estate, which, by virtue of any power or authority, or by virtue of any separate right of property, she was competent to dispose of, to her executors therein named, upon certain trusts. Upon the death of the testatrix, probate of the will was granted to the executors, limited to the testatrix's interest in the property over which she had a power of disposition given to her by the deed creating the general power, and which by the will she had appointed and disposed of accordingly, but no further. *Held*, that the court had jurisdiction, under the 45th section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, to entertain an application, by a beneficiary under the will, for a summons, requiring the executors named therein to show cause why an order for the administration of the personal estate of the testatrix should not be made. *Ashley v. Sewell*, xvii. 253.

11. *Claim for administration.* In a claim for administration by residuary legatee, against executor of executrix not having proved, it is not sufficient to aver merely that the defendant is executor of his testatrix, and that his testatrix was executrix of the testator in the cause. *Boulding v. Boulding*, xvii. 62.

12. *Ecclesiastical court—Probate.* In a claim for administration of an estate, the probate or letters of administration must be produced. *Beaumont v. James*, v. 166.

13. *Prayer for relief.* A bond creditor not having prayed an account of the testator's real estates in a suit for payment of his debt, he was held not entitled to such relief under the prayer for general relief. *Chapman v. Chapman*, iii. 70.

14. *Action by legatee.* An action in the county court, under sect. 65, of the 9 & 10 Vict. c. 95, by a legatee to recover a legacy under 50*l.*, will be stayed, and the legatee restrained from proceeding, after a decree for the administration of the testator's assets, although the legatee submitted to take a judgment against the executor *de bonis propriis* only on the allegation of a *devastavit*. *Ratcliffe v. Winch*, xix. 617.

15. *Revivor.* In making an order under the 15 & 16 Vict. c. 86, s. 52, to revive a suit against the executors of a deceased defendant, the court will not order them to admit assets, or in default, direct an account of the testator's estate to be taken. *The Dean, &c. of Ely v. Edwards*, xix. 432.

16. *Copyhold—Vesting order—Service.* Copyhold premises were surrendered in 1829, by a debtor, to the use of his creditor, his heirs and assigns, upon trust that he, his heirs, executors, administrators, or assigns, should sell the same, and out of the proceeds should pay to himself, his executors or administrators, 200*l.* then due, and interest. The creditor died in 1831. In 1851 his personal representative contracted to sell the copyhold premises for 100*l.* The customary heir of the creditor was an infant. On the petition of the personal representative of the creditor, it appeared that the debtor had died intestate, that there was no personal representative, and that proof of the title of the customary heir would be very expensive. The court made an order vesting the legal estate in the copyhold premises in the purchaser, without any service either on the customary heir or on the personal representative of the debtor. *In re Wise; Ex parte Wise*, xvii. 517.

17. *Bond.* The court will not direct an administration bond to be attended with, for the purpose of being sued upon in a court of equity. *Hay v. Willoughby*, ii. 593.

18. *Appointing representative.* The 44th section of the 15 & 16 Vict. c. 86, does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the court. *Silver v. Stein*, xix. 136.

19. *Bringing money into court.* A died in a colony, and made colonial representa-

tives and bequeathed his residue to B, who afterwards died. B's representatives received from A's colonial representatives his residue. The representative of B was also a creditor of A. *Held*, that, in a creditor's suit, the representative of B could not be compelled to bring into court the money so paid to him by A's colonial representatives. *Ib.*

20. *Payment out of court.* Where a fund was entirely cestrian, and particular circumstances existed, a share which had been paid into court, was paid to a petitioner on diocesan letters of administration, the rule requiring prerogative probates and letters of administration being dispensed with. *In re Knowles*, ix. 98.

21. A was entitled to a share of the produce of certain chattels, and of no other property. She was domiciled in the diocese of L., and the chattels were in the same diocese. A died intestate. The chattels were sold by the trustee, and A's share of the money was paid into court, under provisions of the stat. 10 & 11 Vict. c. 96. After this, letters of administration to A's estate were taken out in the diocese of L.; and, on application for the payment of this fund out of court to the administrator, the same was ordered, the court holding that a prerogative administration was not necessary. *In re Spencer*, ix. 219.

22. *Taking account without suit.* The provisions of the 13 & 14 Vict. c. 35, for taking account of the debts and liabilities of deceased persons, without suit, are not applicable to the proceeds of real estate. *In re Moore*, xxiii. 220.

23. *Accounts—Vouchers.* In particular circumstances, sums will be allowed to an executor on passing accounts on his own affidavit, and without vouchers. *Caton v. Ridout*, iii. 99.

24. *Taking accounts.* Where an estate cannot be cleared until certain accounts have been taken, and is subject to a claim, whether contingent or not, upon the taking of such accounts, the court will direct them to be taken. *Brogden v. Merton*, xxi. 496.

25. *Administration suit.* A plaintiff in an administration suit, upon a reference for taking the accounts, cannot include an inquiry as to wilful neglect and default unless there is a specific charge to that effect in the bill. The general charge of neglect and default is not sufficient. *Sawyer v. Mills*, i. 186.

26. *Right to sue.* Parties interested, not being the legal personal representatives of a testator, will not be allowed to sue persons possessed of assets of the testator unless they satisfy the court that such assets would probably be lost if such suit had not been instituted. What acts will justify the institution of a suit by parties having no legal right to sue—*Stainton v. The Carron Co.* xxiii. 315.

27. *Appropriation for taking foreign testimony.* In case of a foreign commission to examine witnesses to ascertain if any relations of a testator are living in any foreign country, the court may make an appropriation from the estate for the purpose. *Heath v. Chapman*, xiii. 56.

VII. Costs.

1. In a suit for the administration of the estate of a testator, A brought in a claim upon the estate before the chief clerk. The claim was resisted by the executors, and disallowed. *Held*, that the costs of the executors incurred in resisting the claim were payable by A. *Hatch v. Searles*, xxiii. 414.

2. A contracted to sell an estate to B. Before the completion of the purchase, B died intestate. A bill was filed by A against the heir and administrator of B, praying for a resale of the estate, and for the application of the purchase-money to the payment of A's expenses and the sum agreed to be paid by B. *Held*, that A was bound to pay the costs of the heir, with liberty to add them to his own. *Popple v. Henson*, ix. 215.

See also COSTS, tit. *Administration Suits*.

ADMIRALTY.

See COLLISION, PRIZE, SEAMEN, SHIPS AND SHIPPING.

ADMISSION.

See EVIDENCE.

ADVERSE POSSESSION.

1. *Possession by a trustee cannot be set up by him as adverse.* A party who has entered upon and acquired possession of an estate under a trust for the benefit of another, cannot afterwards set up such possession as being a beneficial possession in himself. *Stone v. Godfrey*, xxvii. 318.

2. *Purchaser having notice of a will affecting the title, cannot set up.* A purchaser having notice of a will affecting the title under which he holds cannot be said to have *bonâ fide* adverse possession. *Hicks v. Sallitt*, xxvii. 212.

3. *Different settlements, who entitled under—Statute of limitations.* A., by deed dated Feb. 1807, which upon the face of it was for valuable consideration, purported to convey to B. a certain estate in trust for A. for life, remainder to B. for life, remainder to B.'s first and other sons in tail male. In June, 1807, A. and B. executed a deed, which did not upon its face appear to be for value, purporting to convey said estate to trustees in fee, upon trust for A. for life, remainder to W. for life, remainder to W.'s sons in tail male, in effect treating the deed of February as cancelled. In 1808, A. died, and W. entered into possession, and either he or his heirs have retained it ever since. In 1815 said estate was the subject of settlement, and treated as if the deed of June were valid, and that of February void. Action was brought in 1844. *Held*, that the possession of W. and his heir was the possession of B. and his heir; that the Statute of Limitations was no bar, and the trusts of the deed of February attached as if W. and his heir had held by legal conveyance. *Scott v. Scott*, xxvii. 5.

ADVOWSON.

1. *Union of—Conveyance of right of presentation.* By an act of union two advowsons were converted into one, A and B each having the alternate right of presentment thereto. Fifty years later A conveyed his right of presentation in these words: "all that the perpetual advowson, or alternate right of presentation of, &c., and all other the advowsons, &c., belonging thereto." *Held*, reversing the decision of the court below, (vi. 377,) that the act of union had the legal effect of converting the two advowsons into one, and that such advowson did pass under the terms of the deed of conveyance. *Robinson v. The Marquis of Bristol*, xii. 479.

2. *Usurpation—Stat. 7 Ann. c. 18.* Usurpation of a right of presentation, since the 7 Ann. c. 18, does not constitute a seisin, but only evidence of it. *Robinson v. Bristol*, vi. 377.

3. *Charge on living contrary to statute—Defeasance of covenant to pay rent—Equitable assignment—Void lease.* To an action by a sequestrator of the living of S. upon a covenant to pay the yearly rent in a lease of the rectory and tithes (with certain exceptions) of the living granted by the rector to the defendant before the sequestration, the defendant pleaded, seventhly, that the rector being indebted to V. and M., V. and M., at his request, consented to give time, and V. consented to advance him a further sum upon the said lease being granted to the defendant, and another deed executed appointing the defendant receiver of all the tithes, rents, &c., demised by the lease, and authorize him, after deduction of a percentage, to pay therefrom the debts of V. and M., and to keep up certain insurances for their benefit, and certain other insurances, and to carry out other purposes connected with the arrangement. The plea alleged that the lease was executed as part of the same transaction, and that the rector knew at the time that the defendant was attorney and agent for V., and that the second deed was made to enable him to apply the rent reserved by the first deed as above mentioned; that there was due from the rector to V. and M. more than was claimed in the action, and that the defendant had applied the tithes, rents, &c., as

directed by the second deed. The defendant pleaded, eighthly, that before the execution of the lease the rector was indebted to V. and M. and others, and in consideration thereof and of a further advance by V., agreed to charge the living of S. by executing the lease declared on, and appointing the defendant agent and receiver by the deed set out in the seventh plea; and that the lease was part of the same transaction to charge the living. *Held*, that the seventh plea did not show any defeasance of the covenant to pay the rent contained in the lease; but also, *held*, that there was an equitable assignment of the rent so far as necessary to pay V. and M., and that therefore the lease was void as being part of a transaction by which the living was charged, contrary to the provisions of the 13 Eliz. c. 20; and that both the seventh and eighth pleas were good. *Walthew v. Olofts*, iv. 504.

AFFIDAVIT.

I. FORM AND EXECUTION OF, &C.

II. PRACTICE AND ADMISSIBILITY.

I. Form and Execution of, &c.

1. *Jurat*. Where the jurat of an affidavit stated, that it "was sworn by A. B., at G., in the county of L., in Scotland, the 5th of June, eighteen hundred and fifty years, before me, G. R. T., a commissioner for Scotland, for taking affidavits in the court of queen's bench at Westminster," it was held that the date of swearing the affidavit, and the authority of the commissioners to take affidavits for the court of queen's bench, were sufficiently set forth. *Bell v. The Port of London Assurance Co.* ii. 193.

2. *Certificate of commissioner*. A commissioner, before whom an affidavit is sworn, ought to certify that any exhibit annexed is the document referred to in the affidavit. *In re Allison*, xxix. 406.

3. *Offensive matter in*. Affidavits should not contain offensive, irritating, or angry expressions. *Stocker v. Brockelbank*, v. 67.

4. *Must state deponent's residence*. In an affidavit the deponent described himself as "S., clerk to E. J., Esq., barrister at law, and assessor of the court of passage of the borough of L." *Held*, insufficient for not stating deponent's place of residence. *Winch v. Williams*, xiv. 228.

5. *For discharge of an imprisoned debtor*. An affidavit for the discharge of a party taken in execution upon a judgment for less than 20*l.*, and who has lain in jail more than twelve months, need not state the cause of action for which the judgment was obtained. *Passingham v. Witherden*, xxviii. 163.

6. *In support of rule for judgment*. An affidavit sworn on the 16th January, in support of a rule for judgment as in case of nonsuit, stated that notice of trial was given for the sitting after Michaelmas term preceding, and that the plaintiff did not proceed to trial in pursuance of his said notice. *Held*, sufficient. *Driscoll v. Whalley*, viii. 355.

II. Practice and Admissibility.

1. *Sworn before attorney of affiant*. An affidavit cannot be used in support of an application to the court, if it be sworn before a commissioner who is acting in the matter as attorney of the applicant, though there be no action pending and no attorney on the record. *Gray, in re*, xiv. 36.

2. *Foreign—Authority to administer the oath*. In the case of foreign affidavits the authority of the person administering the oath must be shown either by affidavit or a notarial certificate. *Cross v. Cheshire*, vi. 517.

3. *May be sworn to in open court*. An affidavit will be permitted to be sworn

in open court in case of urgency. *Mercers' Co. v. The Witham Navigation Co. &c.* vii. 57.

4. *Intituling.* The omission of a letter in the name of a party in the title of an affidavit, the word remaining *idem sonans*, is no ground for discharging a rule obtained upon such affidavit. *Gray v. Coombes*, xiv. 252.

5. *Time of filing.* Affidavits will be received, though filed after the time appointed, if a failure of justice, or great inconvenience would be occasioned by their rejection. *Anderton v. Yates*, vi. 45.

6. *Sworn to before a notary.* An affidavit sworn at a place out of the jurisdiction, before a notary public having authority there to administer oaths, and verified in the manner usual before the stat. 15 & 16 Vict. c. 86, s. 22, is still receivable as evidence in a suit. *Haggett v. Iniff*, xxxi. 202.

7. *Attestation of notary.* An affidavit sworn at New York before a magistrate, with the attestation of a notary annexed, certifying that there was such a person who was a magistrate of that city, received in evidence under the 243d section of the 12 & 13 Vict. c. 106. *Ex parte Reid*, xix. 454.

8. *Proof of commissioner's signature.* Affidavits properly sworn in a colony, before the Chancery Amendment Act came into operation, are within the 22d section of that act, and it is unnecessary to prove the signature of the commissioner of affidavits to make them evidence. *Bateman v. Cooke*, xvii. 92.

9. *Admissible in evidence under 14 & 15 Vict. c. 99, s. 10.* An affidavit, purporting to be sworn before a Master extraordinary of the Court of Chancery in Ireland is, under the stat. 14 & 15 Vict. c. 99, s. 10, admissible in evidence in a matter before this court, without proof of the signature or official character of the person before whom it is stated to have been sworn. *In re Mahon*, xii. 257.

10. *Admitted at the hearing, under 13 & 14 Vict. c. 35, s. 28.* Affidavits admitted at the hearing, under the stat. 13 & 14 Vict. c. 35, s. 28, as evidence that no appointment of trust funds had been made by deceased persons, in support of a suit by a party claiming in default of appointment. *Devey v. Thornton*, xii. 197.

11. *Of plaintiff, when evidence of claim.* A plaintiff's affidavit in support of a claim will be treated as evidence where there is no opposition or conflict of affidavits. *Shardlow v. Gaze*, vi. 69.

AGENCY.

I. RIGHTS AND AUTHORITY OF AGENTS; POWER TO BIND PRINCIPAL.

II. LIABILITY OF AGENTS.

III. MISCELLANEOUS.

I. Rights and Authority of Agents; Power to bind Principal.

1. *Revocation of agency.* The death of the principal revokes the authority of the agent to sell a picture, although for effecting such sale the principal, when living, had promised to pay a specified price. *Campanari v. Woodburn*, xxviii. 321.

2. And it seems the agent would not be entitled to recover compensation for services in such a case, rendered previous to the death of the principal. *Ib.*

3. *Revocation, effect of.* Where there had been an agreement between a principal officer and his deputy, that the latter should have certain distinct fees, and to retain them for his own use, it was held that the subsequent revocation of the appointment determined the agreement and the right to retain such fees. *Campbell v. Hewlitt*, xii. 375.

4. *Right of agent to sue in his own name.* Where action was brought to recover the deposits on shares of railway stock, subscribed for by persons other than the plaintiff in the action, who, however, had paid them with his own money; but letters

of allotment of shares and a circular, promising to return the deposits in full in case of failure to obtain an act of incorporation, had been sent to the persons subscribing at his request, and they as his nominees had executed the parliamentary contract and the subscribers' agreement, it was held that the action could be maintained in the name of the plaintiff, as in point of law the promise to return the deposits was made to him. *Londesborough v. Mowatt*, xxviii. 119.

5. *Agent, fraud on—Action by, in his own name.* An agent induced by fraud to pay the money of his principal to a person who has no claim to the money, may recover it back in an action in his own name. *Holt v. Ely*, xviii. 422.

6. *Right to sue.* A charter-party was made between the defendant as owner of the ship and the plaintiff as agent for the freighter, and concluded thus: "This charter-party being concluded on behalf of another party, it is agreed that all responsibility on the part of S. and Company ceases as soon as the cargo is shipped." The plaintiff sued as freighter, and at the trial it was proved that he was the real freighter. *Held*, that the plaintiff was entitled to sue as principal, notwithstanding the terms of the charter-party. *Schmalz v. Avery*, iii. 391.

7. *Right to sue.* A joint-stock company was formed, but not registered. A., a member of this company entered into a contract with C. that the company should supply him with certain articles on certain conditions. Those articles were supplied accordingly, and were shown to be the property of the company. *Held*, that A. might sue C. on this contract, the rule being that either the party making the contract, or he by whose authority he makes the contract, may sue on it. *Clay v. Southern*, xiv. 533.

8. *Liability of principal.* The plaintiff sold goods to T., an agent of the defendant, in his own name, treating him as principal, until after the defendant, at a reasonable time after the sale and not unduly early, had *bonâ fide* paid T. sufficient money to enable him to pay the plaintiffs. The defendant, when he settled with T., did not know who were the vendors of the goods, but supposed they had been paid; nor did he know the terms of sale. *Held*, that the defendant was liable to the plaintiffs for the price of the goods. *Heald v. Kenworthy*, xxviii. 537.

9. *Liability of Principal.* The local manager of a branch bank suggests to a lady who has a deposit an investment in a different way; she draws out the money and returns it to him, and he, as manager, gives a fresh deposit note for part, and retains the rest for purposes previously agreed on. The local manager having appropriated this money to his own use, it was *held* that the bank were liable, the jury having found that the manager intended and induced the lady to believe that he was acting as the agent of the bank, and that the transaction was within his authority as manager. *Thompson v. Bell*, xxvi. 536.

10. *Duty of land agents to deliver up documents.* Land agents paid by commission will be directed to deliver up such maps, plans, and other documents relating to the estates as were made or collected by them in the course of their employment, even though it is alleged that they were made for their own private use. *Beresford v. Driver*, xvii. 404.

11. *Fraud of agent.* Where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had not been received, the principal was held not to be responsible, because it was not within the scope of the agent's authority in the course of his employment, to give such a receipt. (Confirming *Grant v. Norway*, ii. 337; *Hubbersty v. Ward*, xviii. 551.) *Coleman v. Riches*, xxix. 323.

12. *Exceeding authority.* Where an agent enters into a contract for his principal, and, in doing so, exceeds his authority and his principal acquiesces in the contract, he is bound by the terms of it. *Stuart v. The London and Northwestern Railway Co.* x. 57.

13. *Power to bind principal.* An agent cannot bind his principal by any act

or declaration which is out of the scope of his authority. *Olding v. Smith*, xi. 424.

14. *Consignment*. In a case where A had agreed to remit certain consignments to B, and B had agreed to account with A for the proceeds of such consignments; *Held*, that it was not competent at any time afterwards for B to assert a paramount title to the proceeds of such consignments. *Zulueta v. Vinent*, xii. 145.

15. *Lien for general balance*. A party who is both factor and insurance broker cannot hold a policy of insurance effected by him as a lien for a general balance due him as factor. *Dixon v. Stansfeld*, xi. 528.

16. *Del credere commission—Factor's remedies*. The general rule of law, that where a factor makes advances to his principal, he has a personal remedy against the principal, as well as a lien upon the goods consigned, is not varied by the circumstance of the factor having or not a *del credere* commission. *Graham v. Ackroyd*, xix. 654.

17. *Consignee's power to pledge*. Under stat. 5 & 6 Vict. c. 39, s. 1, a consignee has power to pledge goods upon which he has made advances, and the pledge is valid, notwithstanding the pledgee knew that the pledgor was the consignee of the goods for sale, and not the owner. *Navulshaw v. Brownrigg*, vii. 106; s. c. xiii. 261.

II. Liability of Agents.

1. *For non-delivery of goods by principal*. *Semble*, that an agent who sells goods for a foreign principal, is responsible for a breach of contract by his principal in not delivering them. *Peterson v. Ayre*, xxiv. 382.

2. *For freight*. Where a charter-party contained a clause, "that this charter-party being concluded by C. T. J. (the defendant) on behalf of another person, it is agreed that all liability of C. T. J. ceases as soon as he has shipped the cargo," evidence that the defendant had bought the goods in his own name, and that at the port of destination they had been delivered to a person who produced an unsigned bill of lading, was held insufficient to render the defendant liable in an action for the freight, there being proof of his agency and no proof to the contrary. *Carr v. Jackson*, x. 526.

3. *Principal not named*. *Semble*, that if a person describes himself in a written contract as an agent for a principal not named, he is liable upon the contract, if proved to be the real principal. *Id.*

4. *On contract—For damages*. Where a person acting as agent fairly contracts as such agent, in the name of his principal, and professes to make that principal liable, the agent is not liable to be sued on the contract, even though it should prove that he had no authority thus to contract, but he may be sued for the damages sustained by the party with whom he contracts. *Lewis v. Nicholson*, xii. 430.

5. *On contract*. A contract expressed to be between M. and V., a foreigner residing abroad, was signed in London by M. and by K. "for V." *Held*, that K. was not liable for a breach of the contract by V. *Mahony v. Kekulé*, xxv. 279; *The York, &c. Railway Co. v. Crisp*, xxv. 396.

6. *On contract signed by agent in his own name*. By a written memorandum made between the defendant on the part of N. of the first part, and the plaintiff of the second part, the defendant, on the part of N. agreed to let, and the plaintiff agreed to take, certain premises for a term of years, paying rent to the defendant, for the use of N.; and it was also agreed that no auction should be committed on the said premises without the license, in writing, of the defendant on the part of N., and that the plaintiff should take a lease and execute a counterpart thereof when called upon to do so by the defendant on the part of N. The memorandum was signed by the defendant in his own name without any reference to N. *Held*, that the defendant was personally liable to be sued upon this agreement. *Tanner v. Christian*, xxix. 103.

7. *On purchase at auction*. Where B purchases premises at auction declaring him-

self to be the agent of C, but signs the agreement to purchase instead of C, he makes himself personally liable to perform the contract. *Chadwick v. Maden*, xii. 180.

8. *Specific performance.* In such case a bill for specific performance having been commenced against B and C by the vendors, and dismissed against C at his instance, C will not be allowed to set up, in a suit by B against him, that the decree against B was obtained in his (C's) absence. *Ib.*

9. *To action for money had and received.* An action for money had and received lies to recover back money which has been obtained through compulsion, even although it has been received by an agent who acted for the principal. *Parker v. The Bristol and Exeter Railway Co.* vii. 528.

III. Miscellaneous.

1. *Notice to agent.* If an agent of an insurance company receives the regular premiums from the insured, knowing that a condition of the policy has been broken by the insured, this knowledge of the agent is constructive notice to the company of the breach, and the acceptance of the premiums is a waiver of the forfeiture by the company. *Wing v. Harvey*, xxvii. 140.

2. *Account—Equitable relief.* The illegality of a transaction between principal and agent, is not necessarily a bar to a suit in equity seeking for an account of such transactions. And the principal may obtain relief in equity notwithstanding he has a remedy at law. *Williams v. Trye*, xxiii. 501. See also *Mullock v. Jenkins*, ix. 30.

3. *Negligence of agent.* The neglect of an agent to inform his principal of the acceptance of an offer by a third party, cannot avoid the contract to the prejudice of the party so accepting the offer. *Wright v. Bigg*, xxi. 591.

4. *Intromission.* "Intromission" is a term partly legal, partly mercantile, and signifies dealing with stock, goods, and cash of a principal, coming into the hands of his agent, and to be accounted for by the agent to his principal. *Stewart v. M'Kean*, xxix. 383.

5. *Receiver's accounts at bank—Bankers' liability.* A receiver of an estate, who had a private account at his bankers', opened another there, under the name of the estate, under such circumstances as to inform the bankers that the money which would be paid in to that account would belong to the owner of the estate. The receiver drew a check on the estate account and paid it into his private account. Held, that the bankers were liable to repay the amount to the owner of the estate. *Bodenham v. Hoskyns*, xiii. 222; s. c. xxi. 643.

6. *Payment to agent.* A, as agent for C, who was the guardian of D., (an infant,) lent a sum of money, the property of the infant. The note given ran, "We promise to pay to C., as guardian for D.," &c. A. held the note, and, as agent, received the interest from time to time; ultimately he received the principal sum, and delivered up the note, and afterwards died insolvent. Held, upon an action by D. and C., against the makers of the note, that their payment to A. was not a good discharge of their liability to D. and C. *The River Clyde Trustees v. Duncan*, xxv. 19.

7. *Evidence of agency.* A purchaser alleged, by his answer to a suit for specific performance, that he acted as a puffer in bidding for a lot, which was knocked down to him; and that he therefore purchased the lot, and signed the agreement for the purchase; but the statement in his depositions of the circumstances attending the signature was somewhat different from that in his answer, and he had signed an order on his attorney for payment of the deposit money. Held, that there was not sufficient evidence of agency, and the defendant was held to have purchased on his own account. *Bennett v. Smith*, x. 272.

8. *Fraud of agent.* A chartered a ship in his own name, and consigned it to B, in Cuba, under an agreement that B should ship goods and consign them to A, and that

A should accept B's bills for their value. After A had accepted bills on the faith of the agreement, B sold the cargo to C, who had notice of the terms of the charter-party, and it was consigned to another person. *Held*, that assuming that the fact of A's appearing principal on the charter-party made it incumbent on C to ascertain the relations between A and B, yet that, as B was actually the principal, and not the agent of A, C could safely deal with him for the cargo, and that the circumstance that B had committed a fraud on A did not prevent C from obtaining a good title to the goods. *Zulueta v. Tyrie*, xxi. 582.

9. *Foreign correspondent—Paramount claim.* A merchant in Cuba sold part of a cargo shipped by him to B, and C, (who was A's correspondent in England,) being informed thereof by B, made no claim until four months afterwards, when he insisted on a paramount right over B to the cargo. *Held*, that even assuming he had originally such right, his conduct had been such, that a court of equity would not allow him to enforce it against B. *Id.*

AGREEMENT.

See CONTRACT; SALE.

ALIEN.

Illegitimate child born out of allegiance. The child of a natural-born subject, born out of allegiance to the crown of Great Britain, must, in order to bring himself within the provisions of the Alien Act, 3 Geo. II. c. 21, make out, that at the time of his birth, his father was a natural-born subject. Hence the illegitimate child of a domiciled Scotsman born out of the allegiance, but whose parents afterwards marry, and thereby, perhaps, according to the law of Scotland, make him legitimate, is nevertheless an alien; for at the time of his birth he is *filius nullius*, and alienage attaches irreversibly. *Shedden v. Patrick*, xxviii. 56.

ALIEN ENEMY.

The plea of "alien enemy," is one which the courts discourage, and against which they will make every intendment. The defendant was put under terms to plead issuably by an order of March 23. On the 28th war was declared against Russia, and the next day the defendant offered to plead "alien enemy," which was refused. *Shepeler v. Durant*, xxv. 334.

ALIMONY.

See DIVORCE.

AMBASSADOR.

Who so considered—His appearance in an action—Privileges of. A councillor of a foreign legation, acting as *chargé* in the absence of his superior, is "a public minister of a foreign prince," within the 7 Ann. c. 12. An ambassador who voluntarily appears in an action brought against him as a joint defendant, in this country, cannot afterwards claim to have the proceedings stayed as against him, on the ground of his privilege, if the plaintiff have taken no steps to interfere with his person or property. It seems that when the privilege of an ambassador attaches, it is not lost by the ambassador being engaged in trade. *Quære.* If an ambassador can be sued, *in invitum*, when process is not directed against his person or goods connected with his official character? *Taylor v. Best*, xxv. 383.

AMENDMENT.

I. AT LAW.

II. IN EQUITY.

I. *At Law.*

1. *When allowable.* Section 222 of the Common-law Procedure Act authorizes a judge at *Nisi Prius* to make only such amendments as are necessary for determining the real question in controversy; i. e. the question intended for trial by the parties. The judge at the trial is to determine as a matter of fact what this question is. *Wilkin v. Reed*, xxvi. 312.

2. *Allegations of fraudulent representations.* The declaration alleged that the defendant had fraudulently misrepresented to the plaintiff, that he had discharged P. (a clerk) on account of the decrease in his business, and knowingly suppressed the fact that he had dismissed P. for dishonesty. The evidence showed that the defendant had given the true reason of P.'s dismissal, but had not stated that P. while in his employ had committed acts of dishonesty. *Held*, that the judge at *Nisi Prius* rightly refused to allow the declaration to be amended by striking out the allegation that the defendant fraudulently represented the reason of dismissal, and substituting an allegation that the defendant fraudulently suppressed the fact that P. had been guilty of dishonesty. *Id.*

3. *Discretion of judges as to allowing.* Section 222 of the Common-law Procedure Act does not render it imperative upon a judge to amend the pleadings at the trial, so as to entitle the party applying for the amendment to a new trial, upon his satisfying the court that the amendment was necessary for the purpose of determining in the existing suit the real question in controversy between the parties. The propriety of allowing the amendment is left to the discretion of the judge. *Bridger v. Gay*, xxviii. 162.

4. *Refusal of, not a ground of error.* Error was brought on judgment on demurrer for the plaintiff, in the Court of Exchequer, on the ground that the judge had permitted an amendment of the declaration, without power so to do. *Held*, that, the judge having jurisdiction, the court above could not inquire whether he permitted it rightly or wrongly. *Webster v. Emery*, xxix. 442.

5. *Affidavit—Newly discovered evidence.* The court allowed a party to amend without swearing that the newly discovered circumstance, of which he was not aware at the time of instituting the suit, could not have been earlier discovered by reasonable diligence. *Bolton v. Ridsdale*, xxvii. 554.

6. *Of plea of "not guilty by statute," after verdict and rule nisi.* The court allowed the defendant to amend a plea of "not guilty by statute," by inserting in the margin statutes necessary to justify the trespass complained of, after verdict for the defendant and a rule *nisi* to set it aside. *Edwards v. Hodges*, xxx. 416.

7. *What taken as made.* Where a pleading is amended at *Nisi Prius*, any formal defects in other parts of the pleadings requiring to be amended to conform to the amendment made, must be taken as amended. *Buckland v. Johnson*, xxvi. 328.

8. *Of corporate name.* Where a *mandamus* had issued to the "D. S. and W. Junction Railway Company," the true corporate name being "D. S. and W. Junction Railway," the court upon the argument of the *mandamus* ordered it to be amended. *Regina v. The Derbyshire Railway Co.* xxvi. 101.

9. *Action on judgment by substituting proper date.* In an action on a judgment, after plea of *nul tiel record*, the court allowed the plaintiff, on application, to amend the declaration by substituting the true date for a wrong one. *Noble v. Chapman*, xxv. 276.

10. *Of a claim.* A claim may be amended after it has been set down for hearing *Potts v. The Thames Haven Dock & R. Co.* v. 228.

11. *By adding parties.* Under the rules of May, 1845, an amendment by adding parties after replication, no new issue being tendered, is allowable. *Brian v. Wastell* xxiii. 511.

12. *By striking out party.* In an action upon a joint retainer, one of the defendant, having suffered judgment by default, it appeared that the retainer was separate

Held, that the judge might amend the record by striking out the name of the defendant who had suffered judgment by default. *Greaves v. Humphreys*, xxx. 256.

13. In an action against a firm, plaintiff was nonsuited, because two of the defendants were not members of the firm when the cause of action accrued. Negotiations on the subject of the action had been going on for several years, during which the defendants had not questioned their liability to be sued, and in a bill in equity filed by them against the plaintiff after pleading, and before trial, had stated that the liabilities of the previous firm had been transferred to themselves. The court set aside the nonsuit, and gave the plaintiff leave to amend. *Crawford v. Cocks*, iii. 594.

14. *Practice—Pleading.* It is proper for a judge to make an order for amending a declaration by striking out the name of one joint defendant, even though the same subject-matter has before been in action, in which action the plaintiff has failed to prove joint liability, and after the trial, has applied for a new trial, on the ground of surprise, stating that he could have proved the joint liability. *Cowburn v. Wearing*, xxiv. 467.

15. *Of record—By striking out party.* The declaration in ejectment stated a joint demise by H. and M., his wife. Proof that H. was devisee in trust for the sole use of M. *Held*, that the judge had no power under the 3 & 4 Will. IV. c. 42, s. 23, to amend the record by striking out the name of M. in the demise. *Wilton v. Beck*, xiv. 255.

16. *Of order.* An alteration may be made in the original order by amendment, even when the matter has arisen since the date of the order. *Windsor v. Cross*, xiii. 470.

17. After a lapse of twenty-four years the court rectified an error in an order, though the records had been deposited in the Tower. *Ex parte The Justices of the Peace of the County of Essex*, xv. 571.

18. Where a petition was for payment of a fund in court to the petitioner, and after the order had been drawn up, it was first discovered that one of the petitioners was a *feme covert* at the time of presenting the petition, leave was given to amend the petition, by stating this fact, and praying payment of this petitioner's share to her husband. It was now sought to have the order similarly amended, in conformity with the amended prayer, and allowed. *Hoole v. Roberts*, xvii. 56.

19. *Improper allegations.* If an allegation is improperly introduced into the declaration, an application may be made at once to strike it out, but if the defendant traverses it and a demurrer follows, it is too late to strike it out. *Tallis v. Tallis*, xi. 455.

20. *What amendments are within the discretion of the court.* Where the pleadings are informal, and do not raise the question they were intended to, the court is bound to alter them in accordance with the intention. But when they raise the question in dispute, it is a matter of discretion with the court to allow others to be substituted, to raise some other question; as, for instance, the allowing the plea of illegality of consideration to be substituted for *nunquam indebitatus*, in debt. *Ritchie v. Gelder*, xxv. 523.

21. The allowance or disallowance of a plea by the court or a judge, is to be determined on—not by its goodness or badness in law, (assuming it not to be wholly frivolous,) but with reference to any other pleas which may be proposed, and especially upon the consideration whether the question it is desired to raise upon it arises under any other plea. And *semble* that they will grant leave to plead any pleas necessary to raise every question that can be justly suggested on any fair construction of a contract declared on—even a construction of which they disapprove. *Gether v. Capper*, xxv. 417.

22. *Amendment in particulars required by statute.* The plaintiff's declaration omitted certain words required by the form in the statute. Defendant pleaded *nunquam indebitatus*, and, after verdict for plaintiff, the court refused to arrest judgment, holding the defect cured by pleading over. The defendant brought error. The

plaintiff applied to a judge at chambers for leave to amend. The judge referred it to the court. *Held*, first, that the application to amend was rightly made to this court, and not to the court of error. Secondly, that the court had power to make the amendment; and, thirdly, that the amendment ought to be allowed, on payment by the plaintiff of the costs of the motion in arrest of judgment, of the proceedings in error, of the summons at chambers, and of the rule to amend. *Wilkinson v. Sharland*, xxix. 521.

23. *Of variance between the declaration and record.* Where, on an issue, on a plea of *nul tiel record*, there appeared a variance between the sum recovered, as stated in the declaration and on the record, on motion for judgment the court allowed the declaration to be amended by inserting the amount as it appeared by the record. *Hunter v. Emmanuel*, xxviii. 345.

24. *In case of misjoinder.* In case of a misjoinder of defendants in an action on contract, the amendment of striking out the name of the defendant or defendants misjoined, if made at all, must be made at the trial, and cannot be made afterwards on motion before the court. Section 222 of the Common-law Procedure Act is not applicable to an amendment for misjoinder of parties. *Robson v. Doyle*, xxv. 204.

25. *After trial.* The court will give leave to amend after trial in certain cases. *Robson v. Doyle*, xxv. 320.

26. *In case of delay.* Although delay may be a ground for refusing leave to amend the declaration on the eve of the trial, it is no ground for ultimately refusing it, unless it would involve some prejudice to the defendant, as by reason of the expected absence or death of a witness. And, except under special circumstances, the court will allow the plaintiff amendment at any time before trial, on the usual terms. *Tricket v. Jarman*, xxv. 414.

27. *Introducing new claim.* In an action against the defendant for wrongfully dismissing the plaintiff from his service, the amount claimed was 32*l.* for four weeks' salary, which the defendant paid into court, together with the costs, and which was taken out by the plaintiff. It was held that the court had power to allow the plaintiff to amend and claim the salary for subsequent months. *Emery v. Webster*, xxii. 571.

28. *Changing the promisee.* On a case stated, the plaintiff was allowed to amend by stating a promise to himself as administrator after the death of his wife, in lieu of an allegation that the promise was made to his wife when *sole*, and within six years, which last-recited allegation was not supported by the evidence. *Bodger v. Arch*, xxviii. 464. See also *Plummer v. Hedge*, xxviii. 226; *Forsyth v. Bristowe*, xvi. 523; *Metzner v. Bolton*, xxiv. 537; and *Fischel v. Scott*, xxviii. 404.

II. In Equity.

1. *Delay in making.* A bill of 1500 folios was filed in February, 1850, and the answer of 900 folios was filed in June. On motion to dismiss for want of prosecution in January, 1851, the plaintiff desired time to amend. *Held*, that the delay was inexcusable, and the bill must be dismissed, unless the plaintiff filed his replication forthwith. *Thruston v. Smith*, vii. 168.

2. *Leave to amend generally.* In a case held not obnoxious to the 68th order of May, 1845, leave was given to the plaintiff to amend generally. *Macintosh v. The Great Western Railway Co.* vii. 52.

3. *When to be made under the orders of May, 1845.* Under the orders of May, 1845, the plaintiff may amend his bill within four weeks from the time at which the suit is, or ought to be, at issue. And whenever time is to be calculated with reference to the state of a cause, touching the matter of amendment the court treats the case upon the consideration of what is not only the actual state of the cause, but what ought to be the state; and if the cause ought to be at issue, it will act as if it were at issue. *Collett v. Preston*, vii. 237.

4. *Right of, as affected by motion to dismiss.* Where the answer of a defendant, who moved to dismiss the bill for want of prosecution, had long been deemed sufficient, but the answer of another important defendant was still outstanding, leave to amend will be granted to the plaintiff, although he might have taken the bill *pro confesso* against the latter defendant. *Ib.*

5. *Affidavits on motion for.* The affidavits on a motion for leave to amend a bill under the 68th general order of May, 1845, must not be affidavits of opinion merely, as to the materiality of the proposed amendments, and the use of due diligence, but must also state circumstances from which the court may draw its own conclusion upon those matters. *Stuart v. Lloyd*, iv. 1.

6. *Application after abandoning appeal.* The plaintiffs, having amended three times excepted to the answer. The exceptions were disallowed by the court. The plaintiffs entered a caveat with a view to appeal, but finally abandoned their intention to appeal, and, a year after the answer had been found sufficient, applied for leave to amend on the usual affidavit. Application refused. *Lander v. Weston*, i. 112.

7. *Of the return of a commission.* Where it appears from the affidavit of one of the commissioners, that the omission to state in the return of a foreign commission that the commissioners and their clerks had taken the oaths was purely accidental, and that the oaths had been duly taken, the court will order an amendment and according to the fact, though the commissioners have not affixed their signatures to the interrogatories. *Davis v. Barrett*, vii. 207.

8. *Of clerical error in master's report.* The court of chancery sanctioned an alteration made to rectify a clerical error in the master's report, and allowed the subsequent proceedings to be rectified in conformity. *Richardson v. Ward*, iv. 69.

9. *Contradicting affidavit.* In case of amendment of a bill, after dissolution of a common injunction upon bill and answer, and an affidavit verifying the truth of the amendments, the defendant cannot contradict the affidavit, but may show that the answer affords no defence at law, and does not materially vary the case. *Zukueta v. Vincent*, vi. 122.

10. *Affidavits required to change a party from plaintiff to defendant.* By the new practice affidavits are required in case of motions for leave to amend by striking out the name of a plaintiff, and making him a defendant. *M'Leod v. Lytleton*, xv. 252.

ANNUITY.

- I. CREATION OF.
- II. ASSIGNMENT OF.
- III. UPON WHAT TO BE CHARGED.
- IV. DURATION OF.
- V. MISCELLANEOUS.

I. Creation of.

1. *Annuity acts—When grant within.* Where a widow, having a life interest in a certain sum of money, to which her daughter was absolutely entitled on her death, assigned it at once to the daughter, the latter and her husband agreeing to pay her interest thereon during her life, it was held that this was not a grant of an annuity within the annuity acts, and that no enrolment of a memorial was necessary. *Evatt v. Hunt*, xxii. 103.

2. *Granted under special acts.* An act authorized the raising of money for church repairs by the grant of annuities at certain restricted rates. An annuity was granted at a higher rate than that prescribed. A subsequent act provided for paying annuities already granted. *Held*, that if the grant was void under the first act, the

defect was cured by the last, but *semble*, that the restriction contained in the first was directory and not prohibitory. *Delarue v. Church*, iii. 160.

3. *Power of court to grant annuity.* If a testator makes provision for an annuity to any future wife of his son, the court may make an order providing for a contingent annuity for the life of any such future wife. *Aaron v. Aaron*, xv. 244.

4. *Estate, when to be charged with.* The guardian of an infant tenant in tail redeemed the land-tax on the estate but made no declaration, in pursuance of the 38 Geo. III. c. 60, so as to make the land-tax a charge on the inheritance. In a suit by the guardian, who was also administrator of the infant tenant in tail, it was declared, that the land-tax was an annuity or rent charge in favor of the infant's personal estate. *Held*, that the declaration effectually charged the inheritance; and (the legal charges executed by the tenant for life and tenant in tail having failed) the tenant in remainder, after the determination of these estates, was directed legally to charge the estate with the annuity. *Ware v. Polhill*, xvii. 529.

5. *Right of election to purchase under a will.* A will directed the executors to purchase annuities for F. in their names, which was never done. It was held that F. had a right to elect that a sufficient sum be paid to him, wherewith to purchase such annuities. *Ford v. Batley*, xxiii. 257.

II. Assignment of.

1. *Rights of a purchaser.* A took an annuity under a will in accordance with which a fund was set apart to pay it. The will declared that, in default of the income of the trust fund to meet the annuity, it should be made good out of the residue of the estate. A, who was one of the trustees, sold the annuity by an assignment reciting that a certain sum (sufficient) had been set apart to pay the annuity. Afterwards with the knowledge of his co-trustees, he called in the fund, and misapplied it. The purchaser was not allowed to contradict the recital of the assignment; and, although the annuitant was one of the trustees, it was held that the purchaser could take no part of the assets till the defalcation was made good; and that, therefore, he had no claim on the residue. *Barnett v. Sheffield*, xii. 150.

2. *Right of annuitant to assign.* A bequeathed to W. B. an annuity and by his will declared that the receipt of W. B. should be the only receipt which his executor, H. C. B., should be bound to accept, and that it should be lawful for H. C. B. to require W. B. to attend at the town hall in order to give receipts for the annuity, and to suspend payment until such requisition should be complied with; and subject to such annuity the testator gave all his estate to H. C. B. *Held*, that such annuity was assignable by W. B. without H. C. B.'s consent, notwithstanding the power in H. C. B. to require W. B.'s attendance to receive payment at a particular place, and that the right in H. C. B. to suspend payment did not amount to a "gift over" to him. *Arden v. Goodacre*, x. 468.

3. *Alteration of annuity by assignment.* An annuity duly charged on freeholds was by deed assigned, and by that deed a further security was given by the grantors upon copyholds, in consideration of an additional sum of money paid to the grantors, and the sum payable for redemption was increased in amount. The assignees of the annuity appeared in the memorial to be trustees for other persons, but the trust was not disclosed on the deed of assignment. *Held*, that the deed of assignment so far as it affected the copyholds, and so far as it contained any alteration of the term on which the original annuity was granted, was void, but that it was valid as an assignment of the original annuity. *Tidd v. Lister*, xxvii. 462.

III. Upon what to be charged.

1. *From what estate payable.* If a testator gives all his real and personal estate to

trustees, charging the whole with an annuity and other sums, and charging a legacy on the personal estate, the annuity is primarily payable out of the personal estate. 1 H. L. C. 406. *Tench v. Cheese*, xxxi. 392.

2. *Sale of estates for payment of arrears.* A testator devised his real estate (subject and charged with the payment of his annuities) to trustees, as to part for his wife for life, and then, in the first place, out of the rents, to pay the annuities, and, subject to the life-estate of his wife and the annuities, to A for life, &c. &c. *Held*, that the real estates were liable to be sold for payment of the arrears of the annuities. *Picard v. Mitchell*, vii. 252.

3. *Arrears, when chargeable upon the corpus of estate.* Where a testator directed his trustees to raise an annuity out of the income of the devised estate, and the income proved insufficient, the arrears were held to be a charge upon the income and *corpus* of the estate. *Playfair v. Cooper*, xxiii. 329.

4. *Arrears—Successive estates—Payment.* An annuity was charged upon an estate which was subject to successive interests. Arrears having accrued in consequence of a deficient fund, it was *held*, that the arrears were not a primary charge on the interest of the tenant for life, but that they formed a charge on the estate, the interest of which alone must be kept down by the tenant for life. *Playfair v. Cooper*, xxiii. 332.

5. *Created by deed, when satisfied by gift by will.* If an annuity be given by a father to a son by deed, the annuity to be charged on the real estate, the gift is not satisfied by a gift by will of an annuity for the same amount, payable generally out of the rents of real estate. *Lethbridge v. Thurlow*, xi. 193.

6. *When to be paid from the corpus of grantor's estate.* Where there was a gift by will of an annuity to be derived from the income of the residue of the testator's personal estate, and after the death of the annuitant the corpus of the fund to be paid to other persons, and the residue proved insufficient to pay the annuity, it was *held* that the annuitant was entitled to have the deficiency supplied by sale from time to time of part of the *corpus* of the estate. *Wright v. Callender*, xii. 337.

7. *Annuitant, when entitled to money paid into court.* A testator devised real estate to B, charged with an annuity to A, for her life, with powers of distress and entry. The rents fell short of the annuity, and an arrear became due to A. A sum of money (less than the arrear) was paid into court by a railway company in respect of a part of the estate which had been taken by them. *Held*, that A was entitled to this sum in respect of her arrears. *In re Tinkler's Trusts*, xiii. 127.

8. *When payable from both real and personal estate.* An annuity bequeathed by will, and directed to be paid out of a moiety of the rents, issues, profits, dividends, interest, and proceeds of the real and personal estate of the testator, after the expiration of a life-interest therein, *held* not to be primarily payable out of the personal estate of the testator, but to be apportionable between the real and personal estates. *Falkner v. Grace*, xii. 213.

IV. Duration of.

1. *Ceasing upon marriage of annuitant.* A bequest of an annuity to a single woman during the term of her natural life, "if she shall so long remain *sole* and unmarried," *held*, to be a limitation as distinguished from a condition, and that the annuity ceased upon the marriage of the legatee. *Heath v. Lewis*, xvii. 41.

2. *Whether for life only or perpetual.* Bequest to Y. of "one clear annuity of 100*l.* per annum, for and during his natural life; and should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother. *Held*, that the child of Y. did not take a perpetual annuity, but for life only. *Held*, also, that the direction as to payment, "to be paid to his or her mother," did not cut down the annuity to the minority of the child. *Yates v. Madden*, viii. 178.

3. *Perpetual—What estate charged with.* A testator charged on his freehold house an annuity to E. P. for 50l. a year, for her and her three children, and after her decease he directed the money to be paid to each of them as they should attain twenty-one, but if either of them should die, to be paid to the survivor. *Held*, an annuity of 50l. in perpetuity to the children of E. P.; and a charge on the house for such sum as would produce that amount. *Potter v. Baker*, ii. 92.

4. A testator, by his will, gave to E. L. "50l. per year for she and her children, and after her decease the money shall be paid to each of them as they attain the age of one and twenty; but if either of them die, to be paid to the survivor." *Held*, affirming a decision of the Master of the Rolls, that the bequest was of a perpetual annuity. *Potter v. Baker*, viii. 262.

5. *Will.* A testator directed his property to be invested in the funds, for the best advantage of those he should after name; and he bequeathed 50l. a year to A, for life, and, after her decease, then that the 50l. a year should go, half to B, and the other half to C. *Held*, that the annuity was perpetual, and that B and C were entitled to such a sum in the funds as would produce 50l. a year. *Potter v. Baker*, xxi. 548.

6. If real estate be devised in fee charged with annuities, the annuitants take the same for life. *Nicholls v. Hawkes*, xv. 473.

7. A testator gave an annuity of 600l. "to A for her life, and the issue from her body lawfully begotten; on failure of which, to revert to my heirs; and I request B and C to act as my trustees for A, so that the said annuity may be secured for her separate use." *Held*, that A was entitled for life only to the annuity, with remainder to her issue, and assuming the word "issue" to have been a word of limitation, A's life-estate would not have coalesced with the estate in remainder, as the one estate was equitable and the other legal. *Re Wynch's Trust*, xxvii. 375.

8. If one give an annuity to A for life, and after her death the principal is to revert to A's father and his children, the investment not to be altered without A's consent, and the overplus of the income to go to the father and his children, this constitutes a gift of an annuity for life and a gift over of the property subject to the annuity; and the case is that of an annuitant and residuary legatee, and not that of a tenant for life and remainder-man. Hence the annuity must be paid in full. *Croly v. Weld*, xxi. 425.

V. Miscellaneous.

1. *Decease of annuitant—Survivorship—Residuary legatee.* In case of a gift in trust to pay two annuities to A and B respectively, the remainder of the interest, &c., equally to C and D, and if either C or D dies without issue before both the annuitants are dead, then the whole principal sum to be transferred to the survivor on the decease of the last surviving annuitant, and in the event of either C or D dying without issue in the lifetime of the annuitants, her share should not lapse, it was held, that on the decease of one of the annuitants, her share accrued for the benefit of C and D, and not for the benefit of the general residuary legatee. *Boodle v. Partington*, xii. 301.

2. *Falling into residuary estate—Children of annuitant not entitled.* A testator directed his trustees to set apart stock to pay, among others, a certain annuity to his brother A for life, and after A's decease to continue it among A's children for life. At the decease of any of them, the stock from which the annuity arose, was to be sold and the produce divided equally among the children of him or her so dying, as they should severally attain twenty-one, with interest in the mean time to be applied for their benefit; and he said: "I give them vested interest therein;" and if any of his brother's children should at his decease be dead, and have left issue, such issue should be entitled amongst them to the money they would eventually have been entitled to had their parent outlived his brother. The testator then appointed his trustees, exec-

utors, and residuary legatees. The testator's brother Thomas died, leaving six children, of whom Richard was one, living at the date of the will, and he, after the decease of his father until his death, received his share of the annuity. Richard died leaving three children surviving, one of whom was born in the lifetime of the original testator. *Held*, that the children of Richard were not entitled to the money representing the annuity to which he was entitled, but that it fell into the testator's residuary estate. *Greenwood v. Roberts*, ix. 189.

3. *Out of foreign securities*—*Trustee declining to exercise discretion as to investment*. A testator, possessed of personal estate, vested mostly in foreign securities, bequeathed to trustees so much, to be set apart at their discretion, as would at the time of his decease produce a certain annual income, to be paid to his widow during widowhood, she to take the risk of an increase or decrease of said income. The trustees had the most ample discretion as to leaving the property in foreign securities, or reinvesting it. The acting trustee declined to exercise his discretion as to setting apart so much of the estate as would meet the annuity. The annuitant filed her bill to have a sufficient amount of the foreign securities sold, and the proceeds invested in the 3l. per cents. *Held*, that it did not appear that the testator intended a specific gift of foreign securities, nor that they should specifically be set apart to provide for the annuity. The trustee having declined to exercise his discretion as to setting apart, the court could exercise no discretion, but must follow its known rule, and order an investment in the 3l. per cents., unless the testator directed to the contrary. *Prendergast v. Prendergast*, iii. 1.

4. *May be comprised in term "legacies."* "Annuities" may be comprised in the word "legacies," and in this case the separate specification of "annuities" in some parts of a will was held not to prevent them from being comprehended under the expression "legacies" in another part. *Heath v. Weston*, xxvii. 417.

5. *Insurance on annuitant's life*. The testator being entitled to an annuity during the life of A, effected an assurance on A's life, and bequeathed the annuity to B. *Held*, that the policy did not pass. *Hamilton v. Baldwin*, xix. 283.

6. *Tax upon annuity*. A civil servant of the E. I. C. in receipt of an annuity out of the Civil Service Pension Fund, is entitled, while resident abroad, to receive it free from income tax. *Udney v. The East India Co.* xxiv. 290.

7. *Apportionment of quarterly payments*. An annuity to the queen was "to commence and take effect immediately after the decease of the king, and to continue thenceforth during the natural life of the queen, and to be paid and payable at the four most usual days of payment, viz: the 31st of March, the 30th of June, the 30th of September, and the 31st of December, by even and equal portions, the first payment to be made on such of the said days as should first and next happen after the decease of the king." The king died on the 25th of June, 1837, and upon the 30th of the same month a full quarter's annuity was paid to the queen. The queen died on the 2d of December, 1849. *Held*, that no apportionment of the quarter's annuity which would have been payable on the 31st of December could be made in her favor. *Regina v. The Lords of the Treasury*, iv. 277.

8. *Return of consideration money*. The grantor of an annuity, immediately after the execution of the annuity deed, gave back to G., the agent of the grantee, who also acted as his agent in the transaction, a part of the consideration for the purchase of the annuity, in payment of a debt due from himself to G., and also for the expenses in relation to the transaction. *Held*, that there was no return of the consideration money within sect. 6 of stat. 53 Geo. III. c. 141. *Aberdeen v. Jerdan*, i. 296.

9. *Annuitant, when bound to convey under deed of trust*. The grantor of an annuity, which was the third incumbrance on his real estates, executed a trust-deed (to which the annuitant was not a party) whereby the estates were conveyed to trustees on trusts for sale to discharge the incumbrances according to their priorities; and the first trust of that deed was to pay the costs of the trustees in the conduct of the sale.

After the execution of the trust-deed, the trustees applied to the annuitant for his consent to the sale. In answer to that application, the solicitors of the annuitant offered to facilitate the sale, but asked for a copy of the trust-deed, adding: "When we have seen the deed, we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." And, in answer to a subsequent application, they assented to the appropriation of a part of the rents towards rendering the property more eligible for sale. Part of the property was sold, the annuitant concurring in the sale, whereby a sufficient sum was realized to pay the prior incumbrances; but it being apprehended that the residue of the property would not realize enough to pay both the costs of the trustees and to redeem the annuity, the trustees applied to the annuitant for leave to retain, in the first place, out of the future proceeds of sale, a sum sufficient to pay their costs. This being refused, and a bill being filed to compel the annuitant to join in the conveyances, it was held, under the circumstances, that he was not bound to do so, except upon the terms of having the annuity redeemed. *Crosse v. The General Reversionary, &c. Co.* xxvii. 424.

10. *Interest upon arrears of annuity.* Interest is not payable upon the arrears of an annuity; and it forms no exception to that rule, that the annuity is for maintenance, and is secured by bond. *Lainson v. Lainson*, xxiii. 15.

ANSWER.

1. *Sufficiency of answer.* If a bill alleges that the defendant has procured an order vesting certain lands in himself by fraud, and calls for names, terms, &c., and the documents alleged to be fraudulent, it is no sufficient answer to say, that the documents would be of no avail to the plaintiff in his endeavors to establish the right to the lands in himself, and are therefore immaterial, and that, by the plaintiff's own showing, the effect of the documents would be to expose the defendant to a prosecution for perjury. *Chadwick v. Chadwick*, xiii. 525.

2. *Exemption from answering, from liability to penalty.* An allegation in answer to a bill against brokers, partners, for an account of dealings in stock, that discovery would expose the defendants to penalties under the Stock-jobbing Act, is sufficient to protect the defendants from discovery. *Robinson v. Lamond*, ii. 144.

3. *Jobbing in railway shares does not subject a broker to the penalties or forfeiture imposed by stat. 7 Geo. II. c. 8, and therefore, in a bill filed against a broker for an account, held, that he cannot refuse to answer interrogatories seeking discovery as to such transactions, on the ground that so doing would tend to subject him to the penalties imposed by that statute.* *Williams v. Trye*, xxiii. 501.

4. *Equity confessed.* The rule that there must be equity confessed on the answer, to entitle the plaintiff to certain remedies, is understood to mean that the answer must admit that the rights to be decided depend upon matters peculiarly cognizable in equity. *Owen v. Homan*, iii. 112.

5. *Statement of accounts.* If a bill requires a detailed statement of accounts and the defendant offers to produce them, but states that he is unable, from their length, to investigate them personally, the answer is sufficient. *White v. Barker*, xv. 325.

6. *When mistaken admission in by trustees not binding.* A bill alleged that certain purchase-money had been invested in the name of trustees. The trustees, by their answer, admitted this to be a fact, though the money had been paid to one only of their number, without the knowledge of his co-trustees, who were assured at the time of making the answer that the money had been invested in their names, whereas the trustee who took the money had applied it to his own use; he afterwards became unable to restore it. Held, that, under the circumstances, this admission of the trustees in their answer did not bind them. *Derbishire v. Home*, xxi. 207.

7. *Must traverse that part of an interrogatory not intended to be admitted.* Where the defendant is interrogated about a certain fact, and he answers, by denying his knowledge of the fact beyond what he had heard from a third person, without stating

from whom the communication came or what it was, the answer is insufficient. The answer should traverse the interrogatory, or so much thereof as is not intended to be admitted; and this cannot be done by a negative pregnant. As there are no degrees of insolvency, no weight is to be attached to qualifying words like "utterly" in an interrogatory. An answer denying that a certain person had made to the defendant certain communications mentioned in a bill, but excepting certain false representations, without stating what those representations were, is insufficient. *Patrick v. Blackwell*, xxi. 48.

8. *Impertinence*. Repetitions in answers in examinations are impertinent, and ought to be expunged. *Alfrey v. Alfrey*, vi. 39.

9. *Confidential communications*. An answer to a bill containing the usual interrogatories as to books and papers, stated that the defendant had documents, procured since the institution of this suit, and with a view to the defence, and that the same were, as defendant was advised, confidential communications, and for that reason the defendant refused to set forth any list of or to produce such documents. *Held*, insufficient. *Balguy v. Broadhurst*, i. 188.

10. *Sufficiency of description in*. In answer to the usual interrogatory as to deeds, &c., the expression "banker's pass book," is a sufficient description. *Houghton v. Barnett*, vi. 131.

APPEAL.

I. TO HOUSE OF LORDS AND PRIVY COUNCIL.

II. FROM COUNTY COURT.

III. FROM OTHER COURTS.

IV. NOTICE OF.

V. MISCELLANEOUS.

I. To House of Lords and Privy Council.

1. *Point must be doubtful and important*. The court will not grant an appeal to the House of Lords unless it is of opinion that the point is one both of sufficient doubt and of sufficient importance. *Ex parte Bateman*, xxvii. 261.

2. *From decree on peremptory plea*. A Scotchman was married in England to an Englishwoman, and then returned to Scotland, where he was domiciled. Some years afterwards, the wife quitted Scotland, and returned to England, where she lived separate from her husband. He came to England, and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and on that charge prayed for a divorce *a mensa et thoro*. Judgment was given in her favor. The husband returned to Scotland, where the wife instituted a suit for a divorce *a vinculo*. The husband pleaded the proceedings in the Arches Court as a bar to further proceedings in Scotland. *Held*, that this plea was a peremptory and not a dilatory plea, within the 6 Geo. IV. c. 120, s. 5, and that a decree thereon might be subject of appeal to the House of Lords. *Geils v. Geils*, xiv. 1.

3. *Decision by court of chancery on question which might have been sent to jury*. *Semble*, where there is a question before the Court of Chancery which the court may, according to the course of the court, either decide itself or send to a jury, and the parties say to the court "We do not ask you to send it to a jury," and the court comes to a wrong decision upon the matter, such decision is not exempt from review by the House of Lords. *Dudgeon v. Thomson*, xxix. 12.

4. *From royal court of Jersey*. An appeal will lie to the lords of the committee of council from a provisional order of the Royal Court of Jersey. *In re Belson*, iii. 49.

II. From County Court.

1. An appeal lies from a county court if the claim be for a sum above 20*l.* and not exceeding 50*l.* though the verdict be for an amount under 20*l.* *Harris v. Dressman*, xxv. 526.

2. The right to appeal against the decision of a county court judge, under 13 & 14 Vict. c. 61, s. 14, does not depend upon the amount claimed in the plaint, but upon the amount legally recoverable. *Graham v. Burgess*, xxx. 231.

3. No appeal lies from a county court, though the plaint be for above 20*l.* and for unliquidated damages, if the nature of the cause of action be such that the judge cannot lawfully give damages to the amount of 20*l.* *Mayer v. Burgess*, xxix. 81.

4. The appeal given by stat. 13 & 14 Vict. c. 61, s. 14, applies only to judgments of county courts, and not to orders of committal under the 99th section of stat. 9 & 10 Vict. c. 95. *Rackham v. Blowers*, v. 347.

5. No appeal lies from the decision of a county court judge in an action for an amount exceeding 50*l.*, brought before him by consent, under sect. 17 of the 13 & 14 Vict. c. 61. *Groves v. Janssens*, xxiv. 481.

6. No appeal lies from the decision of a county court judge on an interpleader proceeding arising out of a claim to goods taken in execution to satisfy a judgment of the county court. *Beswick v. Boffey*, xxiv. 477.

7. *Quære*, per Maule, J., whether any appeal will lie from the decision of a county court, except in cases in which a jury has been summoned to decide on the facts. *The East Anglian Railways Co. v. Lythgoe*, ii. 331.

III. From other Courts.

1. *From judge at chambers, rule respecting.* The rule respecting appeals from a judge at chambers is, that the court will entertain them in cases where the judge is merely acting as delegate of the court to transact its business: *aliter*, where he is exercising an independent jurisdiction conferred on him by the statute. *The Kilkenny Railway Co. v. Fielden*, ii. 388.

2. *To quarter sessions—Order for the payment of wages.* There is no appeal to the Quarter Sessions against an order for payment of wages made by a justice under stat. 4 Geo. IV. c. 34, s. 5, upon a complaint made in pursuance of stat. 20 Geo. II. c. 19, s. 1, although the order may have been made without jurisdiction; the latter being repealed by the former. *Regina v. Bedwell*, xxix. 173.

3. *Stat. 6 Vict.—Question of fact not a ground of appeal.* The stat. 6 Vict. c. 18, s. 65, gives no appeal upon questions of fact or admissibility of evidence. *Burton v. Brooks*, vii. 483.

4. *Common-law procedure act—Information of intrusion.* *Quære*, whether the Common-law Procedure Act, 1854, s. 34, giving an appeal in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused, or granted and then discharged or made absolute, applies to an information of intrusion. *The Prince of Wales v. The Bristol Waterworks Co.* xxx. 565.

5. *Indictment.* *Quære*, whether an appeal under the 35th section of that act, lies in the case of an indictment. *Regina v. The County of Bedford*, xxix. 89.

IV. Notice of.

1. *Withdrawal of one notice and giving another.* Judgment was rendered against the defendant in the county court, January 17, and, five days thereafter, he gave the plaintiff notice of appeal and executed a bond for the payment of the costs of the appeal, whatever the event might be. On the following day he withdrew that notice and gave another, which included additional grounds of appeal, but he did not renew the bond

Held, that the Court of Common Pleas had jurisdiction to hear the appeal. *Daniels v. Charsley*, vii. 524.

2. *Justice not to determine sufficiency of notice of appeal—Affiliation.* If a party against whom an order of affiliation has been made applies to a justice, stating that he has given notice of appeal, and requires the justice to take his recognizance to appear and try the appeal, and to pay costs if awarded, the justice has no jurisdiction to decide whether the notice of appeal be sufficient, for that is a question for the sessions on hearing the appeal. *In re Carter*, xxix. 148.

3. *Notice may be signed by attorney of parish officers.* A notice of appeal against an order of justices for the removal of a pauper may be signed and given by an attorney on behalf of the parish officers of the appellant parish. *Regina v. The Justices of Middlesex*, i. 311; *Regina v. The Inhabitants of Carew*, i. 304.

4. *Need not state the grounds of appeal.* The term "notice of appeal," in section 9 of the stat. 11 & 12 Vict. c. 31, which provides that no appeal shall be allowed against an order of removal, if notice of such appeal be not given as required by law within a certain specified time, does not in any way apply to the "statement of the grounds of appeal." *Regina v. The Recorder of Derby*, i. 314.

5. *Notice to the wrong court—Improper entry—Pauper.* A notice of appeal from an order as to the settlement of a pauper, stated an intention of appealing to the borough sessions. The parties appeared accordingly, but the appeal was dismissed, on the objection of the respondent that the appeal lay to the county sessions. The appellants entered the appeal at the county sessions, but the court refused to hear it on the ground of want of valid notice. *Held*, that they had decided rightly, as the appellants having acted upon the notice as a notice of appeal to the borough sessions, could not afterwards treat it as a notice of appeal to the county sessions. *Regina v. The Justices of Salop*, xxix. 121.

6. Within twenty-one days after service of an order of removal, the appellant parish gave notice of appeal to the borough sessions, but afterwards entered and respited their appeal at the county sessions. The respondents objected that the notice of appeal was bad; and the court being of that opinion dismissed the appeal. *Held*, first, that the notice was sufficient, inasmuch as the erroneous statement that the appeal would be to the borough sessions might be rejected as surplusage. Secondly, that the court would interfere by *mandamus*, because it appeared that the justices had not decided as to the reasonableness of the notice, but had treated the objection taken to it as necessarily fatal in point of law. *Regina v. The Justices of Bucks*, xxix. 206.

V. Miscellaneous.

1. *When courts have appellate jurisdiction.* Appellate jurisdiction cannot be entertained by a court not having authority to render the judgment appealed from. Thus a recorder of a borough not having power to grant a license for the sale of liquor, cannot entertain an appeal from the decision of an inferior court upon a question of the granting of a license. *Regina v. The Recorder of Bristol*, xxviii. 291.

2. *Objections must be raised below.* Upon an appeal the parties are bound by the case as it is stated for the opinion of the court, and cannot travel out of it. On such appeal, only such objections can be raised as were taken in the court below. *Watson v. The Ambergate, &c. Railway Co.* iii. 497. See, also, *Turner v. Cox*, xxvi. 72; *Cuthbert v. Cumming*, xxx. 604; *Yorke v. Smith*, ix. 342; *Smith v. Pincombe*, x. 50.

3. *When party may be heard on.* A party may be heard on appeal from the decision of the master, even though he is in contempt for not producing certain documents. *Ex parte Chadwick*, v. 83.

4. *Hearing on appeal may be had without the original order of removal.* It is not an essential preliminary to the hearing of an appeal against an order of removal that

the original order should be in court. *Regina v. The Recorder of Manchester*, v. 352.

5. *Semble*, it is sufficient for the appellants to file a copy of the original order, with the clerk of the peace at the time of entering the appeal, and give notice to the respondents to produce the original order; and such appears to be the practice. *Id.*

6. *The appellate court will look at the direction of the judge.* The functions of the court of appeal are not limited to answering the questions put in the case, but the court has power to look at the direction of the judge set out in the case, and if that is erroneous, to order a new trial. *Stancliffe v. Clarke*, ix. 492.

7. *When may be heard.* Upon proof of notice of appeal, it may be heard though no counsel appear for the appellee. *Pownall v. Hood*, vii. 489.

APPOINTMENT.

1. *Power of, general or limited.* M. B. by her marriage settlement assigned, among other things, certain real estate in trust to certain uses, one of which was "to the use of the child and children of the said M. B. by the said J. C., or other person or persons, and for such estate, &c., as the said M. B. should by deed appoint." *Held*, that the power of appointment could only be exercised in favor of the child or children of M. B. by J. C. or other after taken husband. *Beech v. Nall*, iii. 572.

2. *Powers of, joint and separate.* By the settlement made on the marriage of A and B, certain real estates were conveyed to trustees upon trust to pay the rents to A for life, and after his death, to B for life, and after the death of A and B upon trust for such one or more of the children of the marriage, as A and B should by deed jointly appoint; and, in case of the death of A in the lifetime of B, before any such appointment should be made, as B by deed should appoint. A and B jointly appointed two fourths of the estate to two of their children. A died, and B appointed the other two fourths to two other of the children, and it was held that the appointments made by B were valid. *In re Simpson's Settlement*, vi. 58.

3. *Testamentary—Power to be exercised during coverture.* By a marriage settlement provision is made for an intended wife for life; and after her decease, in trust for such persons and in such manner as she, "in and by her last will and testament, or instrument testamentary, or in the nature of a will, in writing, to be signed and published by her in the presence of three or more credible witnesses, upon testamentary considerations only, during her intended coverture should direct or appoint." *Held*, that the words "during her intended coverture" applied to the whole clause, and that an appointment made by the wife after the death of the husband was an invalid execution of the power. *Holliday v. Overton*, xiii. 302.

4. *Defective, to be aided in equity—Husband and wife—Escheat.* By a marriage settlement in 1815, funds, &c., were settled to the general appointment of the wife, during the joint lives of herself and her husband; and subject to this power, to the separate use of the wife for life, with remainders over. The same year of the marriage the husband made a will, giving all his property to his wife and making her sole executrix. After the marriage the wife executed several powers of attorney to enable her bankers to sell various parts of the funds; the proceeds were paid into the husband's name. The current expenses of the family were paid from the wife's separate estate. With the proceeds of the sale of the wife's funds many debts were paid and some 8,000*l.* were in 1821, standing in the name of the husband, invested in different stock. In 1826, the husband purchased an estate, at the request of the wife, and the purchase was taken in the name of the husband alone in fee. Previous to this he had allowed a legacy of money to pass into the hands of the wife. In 1844, the husband died intestate, except so far as the will of 1815 extended, which did not pass the after purchased estate; he had no heir at law. The trustees of the settlement had never acted, but after the death of the survivor, the personal representative of the last sur-

living trustee brought this bill to establish a lien on the lands for the amount of the purchase-money, and it was *held*: First, that there had been no such laches as to deprive the plaintiff of his right to sue; on the contrary, he was bound to sue. Secondly, that the power of appointment was not well exercised by Lady W., in the powers of attorney, nor by the assignments of mortgage. Thirdly, that there was not a defective power of appointment which a court of equity would aid, so far as related to the moneys invested in land. Fourthly, that there was a defective appointment which a court of equity would aid, so far as respected the sums of money expended by Sir J. W. and Lady W., in keeping up their establishment, which was beyond their annual income. Fifthly, that the lands are subject to the lien of the trustee, to the above extent, in the hands of the lord claiming escheat. Lady W., surviving her husband, had formally exercised her power of appointment in favor of E., whom she also made her executrix. E died, leaving B. her executor. *Held*, sixthly, that B was a necessary party to the suit. *Hughes v. Wells*, xiii. 389.

5. *By wife, of her personal property—What passes.* An assignment by a wife in her marriage settlement of all her personal property, and all to which she or her husband in her right should be entitled, does not amount to a covenant to exercise a general power of appointment in her own favor; and property over which she afterwards acquired a general power of appointment, is not property within the meaning of the parties, and consequently does not pass under the assignment. In such case, the appointment by the wife, of a gross sum, and also an annuity, to herself, reserving a power of revocation and new appointment, is a good exercise of such power; and under such appointment the gross sum made payable absolutely to her is irrevocably bound, and is subject to the trusts of the settlement, but the annuity is not. *Ewart v. Ewart*, xxi. 192.

6. *By deed or will—Revocation and new appointment.* A B having a power under a settlement to appoint an estate in fee by deed or will, executed the power by deed in 1830, and appointed the estate to certain uses, amounting to a disposition of the fee, but reserving to herself a power of revocation and new appointment by deed. By a subsequent deed of 1833, she revoked the uses limited by the last deed, and appointed new uses, again reserving a power of revocation and new appointment by deed. She then executed a third instrument, in 1835, of a similar nature, revoking the uses limited by the deed of 1833, appointing new uses, and reserving a power of revocation and new appointment by deed. She afterwards executed a fourth deed in 1836, by which she revoked the uses limited by the third deed, but did not go on to exercise the power of new appointment. She then made her will, which purported to be an execution of the power given her by the original settlement. *Held*, that from the time of the execution of the deed of 1830, the original power of appointment by deed or will, which was created by the settlement, was at an end and incapable of being exercised, and that the appointment purported to be made by the will, was not a valid disposition in fee-simple of the estate. *Evans v. Evans*, xxi. 475. Decision reversed, see *Evans v. Evans*, xxxi. 366.

7. *Of a moiety of a fund.* F. H. had a power to appoint a certain sum to her daughters after the decease of herself and her husband. Upon the marriage of her daughter G. she appointed a moiety of the fund to her, or her husband in her right, to the end that on the decease of the tenants for life, it might be paid to her husband, his executors, administrators, or assigns, to and for his and their own use and benefit. No appointment was made of the other moiety of the fund. *Held*, that there was a valid appointment of one moiety of the fund; that the remaining moiety was unappointed, and was divisible between G. and her sister. *Wombwell v. Hanrott*, vii. 61.

8. *Conditional.* The condition in a deed of appointment, that if the appointee shall, at the request of other parties, convey certain other estates to B, then the appointee shall receive the benefit of the appointment, is a valid one. *Stroud v. Norman*, xxiii. 146.

9. *Time.* If no limited time is mentioned in which such request shall be made, then the limit of time may be inferred from the settlement, or other documents, which conferred the power of appointment, or from the circumstances of the case. *Id.*

10. *Of fund among children—Construction of power.* If, by the terms of a settlement, a power be given to the donee to transfer the estate to his child or children, at such age, or ages, and in such shares and proportions, if more than one, as he should appoint, then the donee has full power to give the estate to any one of the children, to the exclusion of the others, and the estate may vest in the child or children in his or their infancy. *Fearon v. Desbrisay*, xi. 157.

11. *Of executors and administrators.* R. M. settled moneys to become payable on policies of insurance upon his life upon trust for B. M. his wife, for life; after her decease, upon trust for his appointees; in default of appointment, in trust for the children of the marriage; and appointed his executors and administrators. *Held*, reversing the decision of the Vice-Chancellor, that the effect of the appointment was to make the property a part of the personal estate of R. M., subject to the life interest of B. M.; and that neither the next of kin of R. M. were designated by the appointment, nor were the executors or administrators to take beneficially. *Mackenzie v. Mackenzie*, viii. 67.

APPRENTICE.

1. *Binding of, voluntary and by parish officers.* The necessity for stating in the indenture that a child apprenticed to a chimney-sweeper is above eight years of age, and that the consent of two justices has been obtained, according to the 28 Geo. III. c. 48, applies only to bindings of poor children by parish officers, and not to a voluntary binding of himself by a child provided he is, in fact, above eight years of age. *Regina v. The Inhabitants of Epsom*, xxx. 247.

2. *Jurisdiction of justices in binding apprentices.* The allowance of justices to an indenture for binding a parish apprentice under the 48 Eliz. c. 2, is a judicial act, and it must appear on the face of the allowance that the justices were at the time of granting it acting within their jurisdiction. *Staverton v. Ashburton*, xxix. 181.

3. So too an order of justices for binding an apprentice under 56 Geo. III. c. 139. *Regina v. The Parish of St. George, Bloomsbury*, xxviii. 300.

4. *Parish, indenture for binding.* By the 3 & 4 Will. IV. c. 63, indentures for binding parish apprentices within any city, &c., are to be allowed by two justices, one acting on behalf of the county, and the other on behalf of the city, &c., within which the child is bound. By the 2 & 3 Vict. c. 71, a single police magistrate sitting at a police court may do any act directed to be done by more than one justice. *Held*, that under that act an indenture of apprenticeship, under the act first mentioned, was properly allowed by a single police magistrate. *Regina v. The Parish of St. George, Bloomsbury*, iv. 302.

5. *Validity of indenture.* The regulations of the Poor-law Commissioners for regulating the binding of parish apprentices, are merely directory, and an omission to comply with them would not affect the validity of an indenture; and the certificate of a magistrate affords a presumption that the rules have been properly complied with. *Regina v. The Inhabitants of St. Mary Magdalen*, xxiv. 161.

6. *Desertion of apprentice.* By indenture of apprenticeship, an infant put himself apprentice to a person described as "an auctioneer, appraiser, and corn-factor," to learn his art and with him to serve" for a specified period. The father was party to the indenture, and entered into the usual covenants for performance by the apprentice. *Held*, that the master's having, during the apprenticeship, relinquished the trade of corn-factor, was an answer to an action of covenant brought by him against the father for a desertion by the apprentice; though the father had by parol consented to the discontinuance of that trade, and allowed the son to serve after it. *Ellen v. Topp*, iv. 412.

ARBITRATION.

- I. AGREEMENT TO REFER.
- II. WHAT MAY BE REFERRED.
- III. ARBITRATORS; APPOINTMENT, DUTIES, AND LIABILITIES OF.
- IV. ENLARGING TIME FOR MAKING AWARD.
- V. REFERENCE BACK TO ARBITRATOR.
- VI. AWARD; REQUISITES, AND VALIDITY OF.
- VII. SETTING ASIDE AWARD.
- VIII. ENFORCING AWARD.
- IX. COSTS.

I. *Agreement to refer.*

1. *Agreement to refer made a rule of court.* Where an order of reference of an inferior court of record, made by consent of the parties, contained a clause that the order might, at the option of either party, be made a rule of her Majesty's Court of Queen's Bench, under the stat. 9 & 10 Will. III. c. 15, it was held, that, as an agreement of reference between the parties, it might be made a rule of court. *Harlow v. Winstanley*, iii. 492.

2. *Consent of parties to an agreement to refer.* An action and a chancery suit were, with the consent of the parties, referred, at *Nisi Prius*, to arbitration. A party to the suit was not a party to the action, but nothing was said, when the suit was referred, as to obtaining his consent to the reference. His refusal afterwards to concur therein was held to be no reason for rescinding the order of reference. *Wilson v. Morrell*, xxix. 345.

3. *Two actions—Order of reference.* Where a plaintiff, having brought two similar actions, one in his own right, and another as agent for another party, against the same defendant, agrees with the defendant to refer both actions to arbitrators, the agreement to refer both actions does away with the formal objection that the order of reference does not sufficiently make it appear that both causes have been referred, as also the objection that the party for whom the plaintiff has sued as agent has given no consent thereto. *Hancock v. Reede*, vi. 368.

4. *Revocation of appointment—Jurisdiction of court.* The defendant appointed the plaintiff auditor of his estates at a yearly salary, during so long as he should hold the office; and, in case the defendant should revoke the appointment without adequate and just cause, he was to pay him a retiring pension of 1,000*l.* a year; and it was provided that the adequacy and justice of the cause should be determined by J. W. *Held*, that the defendant had no power of dismissing the plaintiff without giving him a right to the pension of 1,000*l.* a year, until he, the defendant, had previously ascertained by a reference to J. W. that he had adequate and just cause to revoke the appointment. *Lowndes v. The Earl of Stamford*, xiv. 23.

5. *Ouster of jurisdiction.* *Held*, also, that the jurisdiction of the court to enforce payment of the retiring pension was not ousted. *Ib.*

6. *Legality and construction of agreement to refer.* A contract was made for a cargo of wheat, with a proviso that any difference arising under the contract should be referred to arbitrators. The cargo on arrival proved smaller than stipulated; plaintiff claimed damages, and a reference. *Held*, that the stipulation in the contract was lawful; that the difference was one arising under the contract, and that an action would lie for the refusal to refer. *Livingston v. Ralli*, xxx. 279.

7. *Specific performance of.* A court of equity will not enforce an agreement to refer to arbitration. *The South Wales Railway Co. v. Wythes*, xxxi. 226.

8. *Practice in drawing up rule of reference.* On showing cause against a rule it was agreed by indorsements on the counsels' briefs, that the matters should be referred

to a barrister, who should be at liberty to certify what rule, if any, should be drawn up. The arbitrator certified that a rule should be drawn up in certain terms. The court thereupon permitted a rule of reference to be drawn up in the terms of the indorsements, and then a second rule pursuant to the certificate of the barrister. *Branden v. Smith*, xx. 99.

9. *Forms requisite to validity of.* Where parties agree to refer a question of disputed compensation for land required by a railway company, and the secretary, on behalf of the company, signs the appointment of the arbitrator, an award made under such submission is valid, although all the previous forms imposed by the statute have not been complied with, those forms being necessary only in the case of a compulsory arbitration. *Collins v. The South Staffordshire Railway Co.* xii. 565.

II. What may be referred.

1. *Disputes as to amount.* Where a statute requires that "disputes as to amount" shall be settled by arbitration, as provided in the statute, it does not include cases where the parties made liable under certain circumstances, dispute that they are liable at all, and an award made in such a case is invalid. *Regina v. The Metropolitan Commissioners of Sewers*, xviii. 213.

2. *Submission by bankrupt.* Where a bankrupt submitted matters to arbitration which had passed to his assignees, and the arbitrator awarded that the bankrupt should pay the costs of the award, it was held, that the submission was not void; and the court made absolute a rule upon the bankrupt to pay. *In re Milnes*, xxviii. 362.

3. *To what questions statute applies.* The provisions as to arbitration contained in the 27th section of the act 10 Geo. IV. c. 56, and which are incorporated into the act 6 & 7 Will. IV. c. 32, do not apply to questions such as those raised on a claim, the determination of which depends partly on the construction of the rules of a society and partly on the meaning of a mortgage deed and the mode of giving effect to it. *Fleming v. Self*, xxvii. 491.

4. The master of the grammar school of G., the governors of which were seised in fee of the school, the schoolhouse and premises, and had power to elect and remove the master as often as, according to their discretion, they might see necessary and convenient, has no greater interest in such premises than as tenant for a year, or from year to year; and any claim which he may have against a railway company, for compensation for the taking of a part of the premises by such company, must be enforced under the 121st section of stat. 8 & 9 Vict. c. 18, his interest in the premises not entitling him to proceed by arbitration, under sect. 121 of that act. *Regina v. The Manchester, &c. Railway Co.* xxix. 180.

III. Arbitrators; Appointment, Duties, and Liabilities of.

1. *Appointing umpire by lot.* An umpire may be appointed by lot, if the parties to the reference assent to such a mode of election. *Taylor v. Backhouse*, ii. 184.

2. *Validity of appointment of.* A local inclosure act, which provided for the appointment of commissioners and the allotment of lands, pointed out a mode for the election of a new commissioner in case of the death of J. C. An award made after J. C.'s death, by a person who had acted in the same capacity, was held sufficient without proof of his having been appointed in the mode specified by the act. *Doe d. Roberts v. Mostyn*, xi. 504.

3. *If more than one arbitrator.* Where a submission to arbitration requires that the award shall be made by more than one arbitrator, the award must be the joint act of the arbitrators, and executed in the presence of each other. *Wade v. Dowling*, xxviii. 104; *Peterson v. Ayre*, xxx. 535.

4. *Notice to parties.* A usage for arbitrators appointed to determine, as between outgoing and incoming tenants of a farm, the value of the away-going crop and the

deductions for want of repairs, to make their award, on inspection of the crops and premises, without notice to the parties and without evidence, may be good; but no usage can justify the arbitrators in hearing one party and his witnesses only, in the absence of and without notice to the other party. *Oswald v. Grey*, xxix. 85.

5. *Remission of award—New award.* By the terms of an arbitration the costs of the reference and award were in the arbitrator's discretion, and there was also a clause empowering the court, in the event of application to them, to send the matters referred, or any of them, back to the arbitrator, for reconsideration. The original award, after deciding all matters in difference, added, that for the better defining the height of the weir such permanent marks should be placed as B. should direct. This direction being held bad as a delegation of authority, the court remitted the award to the arbitrator for the purpose of reconsidering the prospective directions that should be given for defining the depth at which the defendant might maintain his weir. The arbitrator, without calling the parties before him, made a new award, repeating *verbatim* the terms of the old award, as to all matters, except as to the prospective directions. *Held*, that the arbitrator had adopted a proper course in making a new award; repeating the old adjudication as to the matters not sent back to him, and that it was not necessary for the arbitrator to give the parties an opportunity of being heard before him, either with respect to the prospective directions, or the costs of the second reference and award, as incidental thereto. *Johnson v. Latham*, iv. 203. As to the examination of witnesses, see also *Eads v. Williams*, xxxi. 203.

6. *Employing person to draw up the award.* *Semble*, that a lay arbitrator may employ a professional person to prepare his award; per Maule, J., that he ought to do so. But where a separate charge was made for an attorney's costs of preparing the award, the arbitrator having charged a sufficient sum for the award, it was *held*, that the master was right in disallowing the amount of the attorney's bill in the costs. *Galloway v. Keyworth*, xxvi. 360.

7. The attorney of one of the parties may be employed by an arbitrator to draw up the award. *Behren v. Bremer*, xxx. 490.

8. *Action against arbitrator.* *Quære*, whether an action will lie against an arbitrator for any thing done by him while acting strictly in that capacity? *Jenkins v. Betham*, xxix. 283.

9. *Claim against railway company.* Where a party has proceeded to have the amount of his claim for compensation against a railway company settled by arbitration, in accordance with the provisions of the Lands Clauses Act, the arbitrator is bound to make his award within three months of the time when the matter is referred to him for arbitration. *Evans v. The Lancashire &c. Railway Co.* xviii. 425. As to the declaration by arbitrator in such case, see *Davies v. The South Staffordshire Railway Co.* ix. 276.

IV. *Enlarging Time for making Award.*

1. *Reference back, and enlargement as affected by delay.* The court will not refer matters back to an arbitrator, or enlarge the time for his making an award, where there has been a long delay (e. g. three years) since the last step was taken upon the award, and such delay is not satisfactorily explained, because the position of the parties may be altered, and they may be unable to produce their witnesses. *Doe d. Maynes v. Cannew*, xvi. 136.

2. *Enlargement of.* An arbitrator may enlarge the time for making an award, if the power thus to enlarge can in any way be inferred from the agreement to refer. *Kirk v. Unwin*, vi. 477.

3. The power of the court to enlarge the time for making an award under 3 & 4 Will. IV. c. 42, s. 39, extends to cases where the arbitrator had power to enlarge, but refused or neglected to exercise it. Where one party has died, the court will seldom enlarge. *Edwards v. Davies*, xxv. 229.

4. The power given by statute to the court or a judge to enlarge the term for the making of an award by an arbitrator may be exercised after the arbitrator has made his award; and a rule *nisi* for such enlargement, or for remitting the matters back to the arbitrator, or for entering judgment after the award, need not, in terms, be drawn up "upon reading the rule of court making the submission in the cause a rule of court," if it sufficiently appear by the affidavits that the submission has been made a rule of court. *Brown v. Collyer*, vi. 239.

5. *Practice respecting enlargement.* Arbitrators were to award by the 25th of June, with liberty to them to enlarge their time, but not to exceed the 31st of August; if they did not award within the time limited for them, the matters were to be determined by an umpire, chosen by them, who was to make his award within two months from his appointment, with liberty to him to enlarge his time, but not exceeding another two months. On the 20th of April, the arbitrators appointed an umpire, and in the appointment stated that his duties should commence officially on the 1st of September, and should terminate before the first of January following. The arbitrators could not agree on an award. The umpire did not enlarge his time, and the 31st of October passed. The court, without deciding as to the validity or effect of the umpire's appointment, granted a rule enlarging the time of the umpire for making the award until the end of December. *In re Johnson*, xxviii. 278.

6. A cause was referred to arbitration, after which both parties having delayed proceeding with the reference, and the arbitrator having omitted to enlarge the time for making his award, the court refused, under the 3 & 4 Will. IV. c. 42, s. 39, to enlarge the time, the defendant refusing his consent to such enlargement. *Andrews v. Eaton*, viii. 561.

V. Reference back to Arbitrator.

1. *Agreement that award may be sent back to arbitrator.* The submission contained the usual clauses, that "if either party, by affected delay or otherwise, should wilfully delay or otherwise wilfully prevent the arbitrator from making the award, he should pay costs. And in case of either party disputing the validity of the award, and moving the court to set aside the same, the court should have power to remit the matter referred to the arbitrator." *Held*, that the award, if invalid, might be remitted back on the application of the defendant, and that the clause in question was not confined to cases in which the court might exercise the power adversely to the party seeking to impeach the award. *Bradley v. Phelps*, xi. 595.

2. *Specific finding on several claims.* To a declaration containing a single count for work and labor, board and lodging, &c., the defendant pleaded never indebted and a set-off. The cause was referred. The arbitrator certified that a verdict should be entered on the first issue for the plaintiff, and on the second for the defendant. He afterwards stated that he considered that the plaintiff had made out no claim against the defendant, except for board and lodging. The court, under a power to that effect, remitted the matters to the arbitrator to certify specifically upon each of the claims in the declaration; and as to what sum (if any) he found to be due from the defendant to the plaintiff in respect of either of such claims. *Gore v. Baker*, xxix. 108.

VI. Award; Requisites, and Validity of.

1. *Awarding contrary to arbitrators' convictions.* Where it was agreed in a colliery lease, that certain persons should act as arbitrators to decide upon the "value of the mines and minerals," and what amount should be paid by the lessees, and one of the arbitrators stated the value of the mines contrary to his own convictions, and the lessees objected to the award as invalid, and deserted the mines, three years after which desertion the lessors filed a bill for specific performance, it was *held*, 1. That the award was invalid by reason of one of the arbitrators awarding contrary to his

convictions. 2. That the delay in filing the bill was fatal. But *semble*, that the fact that the arbitrators did not examine witnesses as to the value, or that they had asked the opinion of a person whom they had previously named as umpire would not have rendered the award invalid. *Eads v. Williams*, xxxi. 203.

2. *Joint and several differences.* Where all differences between A on the one side, and B and C on the other, are referred, the arbitrator may award as to differences which A has with B or C severally as well as those which he has with them jointly. *Adcock v. Wood*, vi. 570.

3. *Mutual claims of parties arising out of same contract.* It is no excess of jurisdiction if an arbitrator disposes of the mutual claims of parties, those claims all arising out of the same contract with respect to which the order of reference was made. *Hancock v. Reede*, vi. 368.

4. *Invalid direction in.* Where an arbitrator having power, but not being bound by the terms of the submission, to direct as to a particular matter, gives a direction which is invalid, the whole award is not thereby vitiated, but such invalid direction may be treated as surplusage. *Nicholls v. Jones*, v. 458.

5. *Recital of illegal provision in the submission.* It is no objection to an award that it recites a clause in the submission which provides that documents shall be admitted in evidence without a stamp, it not appearing that the arbitrator admitted in evidence any unstamped documents. *Phillips v. Higgins*, v. 295.

6. *Bad for excess—Deed of indemnity.* General words in a release are limited by the recitals. Therefore, where an arbitrator, having power to settle deeds of indemnity, with respect to the purchase of a rectory and tithes, settled a deed reciting that A was to indemnify B in respect of that purchase, and the release in the deed contained general words of indemnity with respect to all acts to be done in respect of the premises, it was *held*, that the award was not bad for excess, on account of the largeness of the indemnity; but that the indemnity must be taken to be in respect of lawful acts done in carrying out the recited provisions. *Bluck v. Boyes*, xxii. 503.

7. *Valid direction in—Construction of.* Where an arbitrator directed A to sign, seal, and deliver a deed "forthwith" to B, though it appeared on the face of the award that the execution of that deed was to depend upon the prior execution of another, it was *held*, that the award was not bad; the word "forthwith," meaning as soon as B should be in a condition to call upon A to execute. *Ib.*

8. *Construction of.* An action of ejectment being referred by the order of a judge to an arbitrator, the latter, after reading the order of reference, awarded as follows: "I award and determine that the verdict in the said cause be entered for the lessors of the plaintiff." *Held*, in an action by the lessors of the plaintiff, against the defendant, to recover the costs, that the arbitrator must be understood to have finally determined the cause in favor of the plaintiffs. *Law v. Blackburn*, xxiv. 312.

9. *Setting aside award for mistake of party.* Where parties agree that an arbitrator may award a money compensation for damage, or instead thereof actual repairs of the damage done, the court will not set aside the award, because one of the parties supposing that the arbitrator is to award only what repairs shall be made, fails to give evidence as to the actual money value of the repairs, the arbitrator having awarded a money compensation. *Newbold v. The East Lancashire Railway Co.* xiv. 508.

10. *Plan incorporated with.* On a plan annexed to an award and referred to therein, there were figures which referred to written descriptions at the foot of the plan, delineating certain places. Without these descriptions the plan was unintelligible. *Held*, that these written descriptions were part of the plan and incorporated with the award. *Johnson v. Latham*, iv. 203.

11. *Setting out of pleadings in.* An action on the case for obstructing the plaintiff's right to the water of a river was one of several matters referred to arbitration. *Held*, that it was not necessary to set out the pleadings in the award. *Ib.*

12. *Alternative award.* The direction in an award that the defendant pay a certain

sum to the plaintiff, or his attorney, does not vitiate the award; and upon a rule of court in that form under the statute, the plaintiff only, and not the attorney, can issue execution. *Hare v. Fleay*, vi. 433.

13. *Direction to pay money to a stranger.* A direction in an award that one party shall pay money to a stranger is good, if it does not appear impossible that such payment can be for the benefit of a party to the award. *Adcock v. Wood*, vi. 570. See, also, *In re Laing*, xxi. 349.

14. *Direction to pay to one of the arbitrators.* In a case of arbitration, an award, directing A to pay to one of the arbitrators the sum awarded, the same to be immediately paid by said arbitrator to B, is a good award, it sufficiently appearing that the payment to the arbitrator is for the benefit of B. *Wood v. Adcock*, ix. 524.

15. *Presumption in favor of award.* *Prima facie* an award is good, and if a state of facts can be conceived by the court which will fairly and reasonably make the award certain, it will be supported unless the opposite party shows that he has been misled. *Per Jervis, C. J. Wood v. Adcock*, xxviii. 328.

16. *Certainty of direction as to payment of costs by parties.* Where an agreement of reference provided that the arbitrator should by his award direct by whom, to whom, and in what proportions and manner the costs of the award should be paid, and the award directed the same to be paid by A, B, and C, in equal proportions, the award was held good, as it sufficiently indicated that each of the three parties was to pay one third of them to the arbitrator. *Young v. Bulman*, xx. 256.

17. *Conclusiveness of award.* Where arbitrators appointed under a friendly societies act, have jurisdiction of a matter submitted to them, their award will not be set aside, though the court might have come to a different conclusion upon the facts, unless they are proved to have acted corruptly. *Ex parte Long*, xxix. 194.

18. *Award on separate issues.* Where a cause, all matters in difference, and all the costs are referred to an arbitrator, it is not necessary for him to state in his award what proportion is referable to the action, what to other matters in difference, and what to costs. *Bradley v. Phelps*, xi. 595. See, also, *Humphreys v. Pearce*, xiv. 495.

19. *Certainty of award as to several issues—Specific directions.* A cause containing several counts, raising several issues, was referred to an arbitrator, with power to order for whom verdict should be entered—he being exempted from finding special issues, unless required so to do. He ordered defendant to pay plaintiff 50*l.* and all the costs. *Semble*, that the award was good, as disposing of the action, even without calling in aid the exemption clause, which clearly sustained it. But, the award ordering defendant to pull down certain encroachments on a yard, and to restore its area to the form and dimensions which it appeared by the evidence to have had when defendant's tenancy began, it was held, bad for uncertainty. *Kendal v. Symons*, xxx. 552.

20. *Certainty of award—Separate claims.* The plaintiffs entered into several separate written and several separate verbal contracts. In the plaintiffs' bill the several portions were kept distinct. The case was referred to arbitrators, before whom the several portions were still kept distinct. They awarded one sum for all the causes of action combined, and the award was held to be sufficient. *Crawshaw v. The York and North Midland Railway Co.* xi. 397.

21. *Certainty of—Reference to the declaration.* An action of *assumpsit* was referred, the costs to abide the event of the award. The award was that "the plaintiff had a good cause of action against the defendant, as stated in the declaration," and then assessed damages to the plaintiff. *Held*, that the award sufficiently decided all the issues in favor of the plaintiff. *Phillips v. Higgins*, v. 295.

22. *Certainty of—Reference to plan.* An arbitrator having to decide upon the depth at which the defendant was entitled to keep a weir which penned back the water of a river so as to interfere with the plaintiff's mill higher up the stream, and to determine all manner of rights of water between the parties, awarded that the

defendant was entitled to maintain his weir to the depth of fourteen inches and no more, and added that he had caused marks to be placed, which pointed out the depth the defendant was to keep his weir, and that a plan annexed to the award correctly defined and described the depth of the weir and the marks; it was held that the award sufficiently pointed out the depth of the weir, and was sufficiently precise, although it made no provision for the case of floods, or for regulating the depth of the paddle in the defendant's weir, by which the water could be let off. *Johnson v. Latham*, iv. 203.

23. *All appointed must act.* Two arbitrators, A and B, who, by the order of reference, were to name a third, appointed C as umpire, by the desire and with the knowledge of the plaintiff; and (1) enlarged the time for making their award, without consulting C. A asked the plaintiff for more documents, who said no more were necessary. The two then proceeded without C, informing the plaintiff of the fact (2.) They did not ask him if he had any more evidence to offer, (3.) nor state that they were going to make their award (4.); but made it without giving any notice of their meetings to C, or to the plaintiff's attorney. (5.) Held, that although the facts numbered (1.) and (2.) would not alone justify disturbing the award, yet, in view of the facts, (3.), (4.), and (5.), the case must be referred back to the arbitrators with directions to C to act as such. *In re Peterson v. Ayre*, xxv. 323.

24. *Certainty of—Costs.* An award that the defendant shall pay the costs of the reference and award is sufficiently certain, as it cannot be construed to mean that the defendant shall pay such costs to any one but the plaintiff. *Baily v. Curling*, iv. 201.

25. *Certainty and finality of.* After writ issued, and before any pleadings, the cause and all matters in difference were referred; the costs of the cause to abide the event, the costs of the reference and award to be in the discretion of the arbitrator. The award directed that all further proceedings in the cause should cease, that the defendant should pay to the plaintiffs 190*l.* in satisfaction and discharge of all claims and demands in the cause and matters in difference, and then disposed of the costs of the reference and award. Held, that the award was sufficiently final and certain; for that it was to be inferred that something was due to the plaintiffs in the cause, and the amount was immaterial, as the rule as to costs upon the lower scale does not apply to awards. *Nicholson v. Sykes*, xxv. 490.

26. *Finality of—Partnership.* Where one of the matters in difference between A and B at the time of a submission to arbitration by them was whether the two parties had been in partnership together upon a day named, and whether, if there had been a partnership between them the same had been put an end to, and where the arbitrator found by his award that no deed of partnership ever existed between the parties, and also, that if any partnership ever existed the same was dissolved on a day subsequent to that mentioned, and that nothing was due from A to B in respect of the profits or otherwise, it was held, that the award was bad, because it did not decide the question as to a partnership having once existed. *Bhear v. Harradine*, ix. 490.

27. *Finality of.* If an action and all matters in difference between the plaintiff and the defendant be referred to arbitration, and the award made *de præmissis* be silent respecting any further claim beyond the action put forward by the plaintiff or any cross demand urged by the defendant, the award is nevertheless final, as it will be intended that the arbitrator has by his silence negatived the right of the party to maintain such claim or cross demand. *Harrison v. Creswick*, ix. 452.

28. A cause and all matters in difference between the parties were, by a judge's order after issue joined, referred to an arbitrator, who recited the order of reference, and made his award "of and concerning the premises so referred as aforesaid." Held, that the award was final, although the arbitrator had not, in express terms, adjudicated upon a matter submitted to him. *Creswick v. Harrison*, i. 384.

29. *Finality of—Discontinuance of action.* An award is not bad for want of finality

in awarding a discontinuance of an action without determining the cause of action, if it appears that the discontinuance has been entered before or at the time of making the order of reference, and that it was left to the arbitrator to decide whether the discontinuance should remain, and it was intended that he should not proceed further in the action. *Hancock v. Reede*, vi. 368.

30. *Finality of—Practice.* *Semble*, where an objection is made to an award for want of finality, the affidavits should clearly point out what matters have been brought before the arbitrator, and left by him undetermined. *Ib.*

31. *Construction of.* An award defined the boundary of a colliery thus: "commencing where the level struck the coal, and extending in an eastward direction as deep as the said level will drain." There was an old excavation, (termed by miners a level,) not horizontal, but running upward into the coal, eastwardly. This excavation was described on the plan annexed to the award as the line of boundary. *Held*, that this old level was the boundary meant by the award, and not an imaginary line drawn horizontally eastward from the point where the old excavation struck the coal. *Brain v. Harris*, xxix. 431.

32. *Duty of arbitrator to hear new evidence on a reference back.* Where an award was objected to on the ground that the arbitrator had not determined the amount of the costs which he had rightly awarded, and the award was referred back on that ground, it will not be set aside because the arbitrator on the reference back refuses to hear new evidence on the merits. *Huntley v. Binbrooke*, xviii. 372.

33. *Where the appointment was invalid.* A friendly society appointed a set of nine arbitrators, under stat. 10 Geo. IV. c. 56, s. 27, and afterwards under the erroneous belief that these arbitrators had become incapable of acting, appointed, in good faith, a second set. The defendant agreed to refer a matter in dispute to five of these arbitrators, and their award was held binding, notwithstanding that the first set of arbitrators were capable of acting, and that the defendant was ignorant at the time of entering into the agreement that the appointment of the second set was invalid. *Regina v. Evans*, xxv. 147.

34. *Time within which award must be made.* A local inclosure act, after providing for the appointment of commissioners and the allotment of certain lands, enacted "that two awards should be made by J. C. (one of the commissioners,) within six years from the passing of the act;" and it was held that this clause was directory only, and that, where the award was made after the six years, the allotment was not, therefore, nugatory. *Doe d. Roberts v. Mostyn*, xi. 504.

35. *Finality of—Enforcing payment.* An action, and all matters in dispute between the parties, were referred by an order, which was made a rule of court. The arbitrator was to raise questions of law for the court, and assess damages contingently. Before the award was made, a second rule was obtained, by which the arbitrator was to make two several awards, and by the first to raise points of law for the opinion of the court, and to assess damages contingently, and, after the judgment of the court, he was to make his award concerning the other matters, reference being had to the judgment of the court; and neither party was to enforce payment of any thing the arbitrator might find due by the first award, till the publication of the final award between the parties. The arbitrator made an instrument, which was called an award, stating points of law for the court, and assessing the plaintiff's damages contingently. The court gave judgment in favor of the plaintiff. No other award was ever made, and the time for making it expired. The plaintiff accepted mining company's shares in satisfaction of his damages, under an act of parliament for the winding up of the defendant's affairs, and he afterwards signed judgment for the damages and the costs, in order to get the costs of the first action, and issued execution. *Held*, that the instrument made by the arbitrator was not a final award, even though no other was ever made, and the time for making one had expired; that, therefore, the plaintiff had no right to enforce payment of what the arbitrator found to be due by the first

instrument, and that the judgment, having been signed for the purpose of enforcing payment, should be set aside. *Wood v. The Governors and Company of the Copper Miners in England*, xxviii. 369.

36. *Certainty and finality of.* An action of ejectment, before the Common-law Procedure Act, 1852, upon the several demises of A and B, was referred by a judge's order after issue joined. There was a clause in the order, "that the arbitrator should, in the event of his finding in favor of the lessors of the plaintiff, have power to order immediate possession to be given of the land and premises in question in the action to the lessor of the plaintiff T. M., and also how and in what manner such possession should be given; and if not given, how it should be taken." The arbitrator awarded thus: "I do award in favor of the lessors of the plaintiff, and do order that immediate possession be given of the land and premises in question in this action to the lessor of the plaintiff A, and that the defendant pull or take down the wall forming the gable end of a room, and which said wall he has erected upon the land of the lessors, or so much of the wall as now stands four inches and a half, or thereabouts, upon the land of the lessors, and upon a certain wall which divides the property of the lessors from that of the defendant." *Held*, that the award "in favor of the lessors of the plaintiff" generally was sufficiently final; and that, in the absence of proof to the contrary, it must be taken that there was a state of facts in the *locus in quo* to which the direction as to the wall would reasonably apply, and that the award was therefore sufficiently certain. *Mays v. Cannell*, xxviii. 328.

37. *That an award not final is void*—see *Goode v. Waters*, i. 181.

38. *For the difference between an award of an arbitrator and an adjudication of a mere appraiser*, see *The Northampton Gas Light Co. v. Parnell*, xxix. 229.

VII. Setting aside Award.

1. *Setting aside award for non-execution by all the arbitrators.* Matters in difference were referred to arbitrators nominated by the plaintiff and the defendant respectively, and a third to be nominated by the two persons thus appointed, with power to the court to refer the matter back to the arbitrators. The arbitrator nominated by the defendant and the third arbitrator having made an award without the sanction of the other arbitrator, the court set aside the award, and refused to refer the matter back to the arbitrators. *Hinton v. Mead*, xxix. 505.

2. In such a case it is not necessary that the rule to set aside the award be drawn up on reading the award or a copy of it. *Ib.*

3. *Motion to set aside.* The original agreement of reference may be looked at on a motion to set aside an award, though the rule *nisi* be not drawn up on reading it, for the rule *nisi* is drawn up on reading the rule making the agreement of reference a rule of court, and the agreement of reference is in law part of the rule embodying it. *Oswald v. Grey*, xxix. 85.

VIII. Enforcing Award.

1. *Order for payment of money.* The court will not make an order under the 1 & 2 Vict. c. 110, for payment of money directed to be paid by an award, except in a case where an attachment would have been granted. *In re Laing and Todd*, xxiv. 849.

2. *Rule to pay money—Demand.* Demand of performance of an award for the payment of money, made by one of two plaintiffs, in whose favor the award was made, is a sufficient demand to warrant a rule calling on the defendant to pay the money pursuant to the award. *Drew v. Woolcock*, xxviii. 223.

3. It seems that if the award had been for the delivery of a bond, the demand by one would not have been sufficient. *Ib.*

4. *Rule to pay money.* A rule *nisi* to pay money pursuant to an award may be

moved for on the last day of term, although an attachment to enforce the award cannot. *Leble v. Canell*, xxix. 110.

5. When a rule is granted to pay money pursuant to an award, the original award must be produced, and deposited with the Master at the time of drawing up the rule. *Davis v. Potter*, ix. 401.

6. *Production of award on drawing up the rule.* The fact that the award has been deposited as a security with a person who has advanced money on it, and who declines to produce it on the drawing up of the rule, and to allow it to be deposited with the Master for fear of losing his lien on it, is no sufficient reason for allowing the rule to be drawn up on production of a verified copy; for if the lender is willing to assist in the application and produces the award, and gives the Master notice that he is entitled to it, the Master will draw up the rule and will hold the award for the lender until the judgment of the court has been executed, and then return it to him. *Id.*

7. *Rule to pay money.* The plaintiff having obtained a rule calling on the defendant to show cause why he should not pay a sum of money pursuant to an award, the court, being of opinion that it was not a case in which they would have granted an attachment, discharged the rule. *Creswick v. Harrison*, i. 384.

8. *Attachment for non-payment.* Where an award has been made under an agreement to refer which is a rule of court, the court, on non-payment of the amount and costs awarded, will grant an attachment for non-payment against the party in default. *In re Pike v. Newman*, xxvi. 296.

9. *Attachment for non-payment—Delay.* An award in an action, in which A and B were plaintiffs, and C defendant, ordered that the defendant should pay the plaintiffs a certain sum of money, and that the defendant should pay the costs of the reference and award, (not saying to whom the costs were to be paid.) After more than two years from the making of the award, one of the plaintiffs demanded payment of the amount awarded from the defendant. The defendant did not pay. *Held*, that the plaintiffs were entitled to an attachment to compel payment, although they had given no explanation of the delay, and further, that the demand made by one only of the two plaintiffs was sufficient to bring the defendant into contempt. *Baily v. Curling*, iv. 201.

10. *Attachment for non-payment.* An award ordered H. to pay, on a day and at a place named, to the attorney of C. for C.'s use, one sum for debt, and another for C.'s costs of the reference, and then directed that C. should pay to the arbitrator's attorney, at or before the delivery of the award, 62*l.* 10*s.* for the costs of the arbitrator and of the award; and that H. should, on a day and at a place named, repay the said sum of 62*l.* 10*s.* to the attorney of C. for C.'s use. H. not complying with the award, a demand was duly made on him on C.'s behalf for payment of the three specific sums, but H. did not pay any of them. On an application by C. against H. for an attachment for not paying the three sums, it was *held*, that, assuming the direction to pay the 62*l.* 10*s.* to be valid, no attachment could issue in respect of that sum, as it was not shown that C. had paid it in the first instance for the arbitrator's use; but that the court could mould the rule, and that the attachment might issue in respect of the other two sums. *The Earl of Cardigan, in re*, xvi. 105.

11. *Practice as to signing judgment on award.* Where the cause and all matters in difference were referred by order of *Nisi Prius*, and the costs of the cause were to abide the event, and the arbitrator found that there was no other matter in difference than the subject-matter of the action, and ordered a verdict to be entered for the plaintiff, and that the costs should be paid by the defendant, the Court refused to allow the plaintiff to sign judgment and tax the costs before the expiration of the term after the award was made, and within which the defendant might move to set the award aside. *Jones v. Ives*, i. 382.

12. *Provable in bankruptcy.* An award is more than a verdict, as the latter may be set aside on grounds on which the former cannot; therefore, an award without judg-

ment entered before an act of bankruptcy is provable as a debt; interest and cost go with the rest of the award. *Ex parte Harding*, xxvii. 267.

13. *Substituted agreement.* Action upon an award. Plea, a substituted agreement alleged to have been performed. *Held*, that inasmuch as the declaration was upon the award, and not upon the submission, the plea might be proved without showing that the substituted agreement was under seal. *Smith v. Trowsdale*, xxii. 360.

IX. Costs.

1. *Costs.* Upon a reference by the judge's order with the usual clause that the submission may be made a rule of court, the arbitrator under a power to award the costs of the reference and award may direct such costs to be taxed by the officer of the court, although no case was pending at the time of the reference. *Bhear v. Harradine*, ix. 490.

2. *Costs of amended award.* An order of reference gave the arbitrator a discretion as to the costs of the reference and award, and contained a clause giving the court power to refer the cause back to the arbitrator, in case of an application to set aside the award. The arbitrator made his award, directing each party to bear his own costs. On the application of the defendant, it was referred back to the arbitrator to find as to a specific matter not disposed of by the award. The arbitrator directed the defendant to pay the costs of the amended award. *Held*, that, by virtue of the order of reference, the arbitrator had power to award as to the costs of the amended award. *M'Rea v. M'Lean*, xxii. 294.

3. *In the cause.* Where a verdict is taken subject to a reference of the action to an arbitrator, who is to certify for whom and for what amount the verdict shall be entered, and the costs of the cause and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the verdict. *Deere v. Kirkhouse*, iii. 449.

4. *Application for.* Agreeing to such a reference at *Nisi Prius* does not preclude a defendant from applying for costs under the 12 & 13 Vict. c. 106, s. 86. If such an application be successful, the defendant's costs are to be deducted from the amount, exclusive of costs recovered by the plaintiff. The recital of the date of the writ in the issue appended to an affidavit shows that the action was commenced after the statute was passed. *Ib.*

5. *Of Umpirage.* Matters were referred to two arbitrators, and if they failed to make an award within a limited time, to an umpire. The arbitrators did not conclude the reference within the time limited. The parties then further agreed, that the arbitrators should sit with the umpire, and assist him in taking the evidence, which they did. The award ordered the losing party to pay to the other the costs of "the said umpirage and of this my award," and that each party should "pay their own costs of the reference other than the costs of my said umpirage and of this my award." The umpire included the charges of the two arbitrators in his costs of umpirage and award, and the same were paid by the successful party on taking up the award. *Held*, that the charges of the arbitrators were costs of the umpirage, and not costs of the reference; and that the successful party was entitled to have such amount allowed on taxation. *Ellison v. Ackroyd*, iii. 445.

6. *Reference back.* Where an award, being defective, is referred back by the court to the arbitrator, who hears fresh evidence and makes a second award, the arbitrator's charges for the first award are to be borne equally by each party. *Blair v. Jones*, v. 511.

7. *When award is sent back.* Where a submission to arbitration places the costs of the reference and award in the discretion of the arbitrator, and contains a clause giving the court power to remit the matters or any of them back to the arbitrator, and the award is sent back to him on any point, without any new direction as to costs, the arbitrator has a discretionary power over the costs of the second reference and award. *Johnson v. Latham*, iv. 203.

8. *When award is sent back.* The costs of a reference to arbitration had been taxed before the original award was sent back to the referee for reconsideration. After the second award was made, the defendant demanded the same costs without any new taxation. *Held*, that by the reference back the *allocatur* became null, and that there ought to have been a fresh taxation of costs after the making of the new award, before any demand for costs could be enforced. *Ib.*

9. *Who entitled to.* To a declaration on a special contract, the defendant pleaded several pleas going to the whole cause of action, one of which raised an immaterial issue. The cause was referred, on the terms of the costs abiding the event, and of the parties being bound not to sue out a writ of error. The arbitrator found the immaterial issue for the defendant, and the others for the plaintiff, with 5*l.* damages. *Held*, that the final event of the record was in favor of the defendant, and that he was entitled to the costs, as the arbitrator had no power to award judgment *non obstante veredicto*, and no writ of error could be brought. *Linegar v. Pearce*, xxv. 547.

10. *Costs of.* If a submission to reference by agreement containing a clause for making it a rule of court provide that the costs of the reference and award shall be in the discretion of the arbitrator, who may award and direct by and to whom the same shall be paid, the arbitrator cannot by his award conclusively fix the amount of the costs of the award. *Fernley v. Branson*, iii. 426.

11. *Action against arbitrator.* If, in the award, he name an exorbitant sum as costs of the award, and a party to the reference is obliged to pay such sum to obtain possession of the award, such party may recover the excess beyond what a jury may deem a reasonable compensation to the arbitrator in an action against the arbitrator for money had and received to his use. *Ib.*

12. *As to costs of making submission rule of court*, see *Williams v. Wilson*, xxii. 566.

ARREST.

1. *Affidavits of collateral facts—Intention to leave country.* On a motion to set aside an order to hold a defendant to bail, affidavits cannot be received as to collateral facts, such as to show that there was no cause of action, or that the defendant had no intention of leaving the country, though proof of these facts may be received on a motion to discharge the defendant out of custody. *Bullock v. Jenkins*, ii. 195.

2. *Service of capias—Second arrest.* After a warrant for arresting a debtor under the Absconding Debtors Arrest Act, 14 & 15 Vict. c. 52, has been issued, the *capias* required to be issued under sect. 1, must be served on the defendant, if in custody, within seven days of the date of the warrant; otherwise it ceases to have any operation, nor can it be treated as a valid *capias* under the 1 & 2 Vict. c. 110. But a second *capias* may be issued after the seven days upon fresh materials, under the general powers given by the latter statute. *Masters v. Johnson*, xii. 572.

3. *Discharge from, on death of plaintiff.* The plaintiff in an action, having obtained judgment, proceeded to outlawry against the defendant, who was arrested upon a *capias ullagatum*. The plaintiff then died, leaving two infant children, but no personal representative. An application for the discharge of the defendant, upon the ground of the plaintiff's death, was opposed by the late plaintiff's attorney, who had advanced money in the action upon the security of the judgment, and who intended to take out administration to the plaintiff. *Held*, that the defendant was not entitled to be discharged. *Cox v. Prichard*, iii. 493.

4. *On certificate in bankruptcy.* Defendant had gone into insolvency; plaintiff had discharged him from detainer on execution. The insolvent court had discharged him under 1 & 2 Vict. c. 110. He was subsequently arrested on a certificate in bankruptcy, under 12 & 13 Vict. c. 106, s. 257. The court refused to discharge the defendant out of custody. *Walker v. Edmundson*, iii. 437.

5. *On Sunday—Of town officers.* The summary remedy provided for by the 5 & 6 Will IV. c. 26, s. 60, of committing to jail town clerks or other officers appointed by

a town council, who wilfully refuse to account or deliver up books, &c., to the council, is in the nature of civil process, and an arrest under such a warrant of commitment upon a Sunday, is illegal. *Ex parte Eggington*, xxiv. 146.

6. *Second warrant.* Nor can a prisoner so arrested be legally detained under a second warrant, subsequently lodged against him, which has been issued at the instance of the same parties, though not in their capacity of town council, but as commissioners under a local act. *Ib.*

7. *Ca. sa.* But a detainer under a *ca. sa.* subsequently issued by a third party, and without collusion, is a valid ground for refusing to discharge the prisoner. *Ib.*

8. *Absconding Debtors Arrest Act—Second arrest.* After a warrant for arresting a debtor under the 14 & 15 Vict. c. 52, the Absconding Debtors Arrest Act, has been issued, the *capias* required to be issued under sect. 1, must be served on the defendant, if in custody, within seven days of the date of the warrant, and if not so served, it ceases to have any operation, nor can it be treated as a valid *capias* under the 1 & 2 Vict. c. 110. A second *capias* may, however, be issued after the seven days upon fresh materials, under the general powers given by the 1 & 2 Vict. c. 110. *Masters v. Johnson*, xii. 572.

9. *Malicious arrest under legal process.* A malicious arrest of a party on execution for a larger amount than is due, renders the creditor causing the arrest to be made liable to an action for damages, for any prejudice to the debtor occasioned thereby. *Churchill v. Siggers*, xxvi. 200.

10. *Without warrant.* A police officer was assaulted by the prisoner, and returning two hours after with assistance, attempted to arrest him without a warrant, and was again violently assaulted and wounded by the prisoner. *Held*, that the apprehension was not lawful. *Regina v. Walker*, xxv. 589. See *Broughton v. Jackson*, xi. 386, Editors' note.

11. Where a defendant is arrested under the 14 & 15 Vict. c. 52, s. 1, and is discharged upon making a deposit in lieu of bail, it is not necessary to serve him with a writ of *capias*, although he may be in custody upon another warrant. *Eld v. Vero*, xx. 514.

12. *Privilege of attorney's clerk.* The managing clerk of an attorney is not privileged from arrest while going to attend before a judge at chambers, on business of his master. *Phillips v. Pound*, xiv. 523.

13. *Privilege morando et redeundo.* A person acquitted on a criminal charge is not entitled to privilege from arrest under civil process, *morando aut redeundo*. Where, therefore, the defendant in a civil action, immediately after his acquittal and discharge on a trial for a charge of embezzlement at the Quarter Sessions, and whilst he remained in the court, was arrested under a writ of *capias* in the action, this court refused to discharge him out of custody. *Hare v. Hyde*, iii. 435.

14. *Discharge from, by reason of privilege.* A judgment for debt was obtained in the county court against the defendant, who was privileged from arrest on civil process. A judgment summons issued against him, under sect. 99 of the 9 & 10 Vict. c. 95, to which he did not appear, whereupon the judge committed him. *Held*, that the commitment was in the nature of a qualified execution, and not of a punishment for contempt; and therefore, that the defendant was entitled to be discharged by reason of his privilege; and that such privilege was not taken away by the 12 & 13 Vict. c. 101, s. 18. *Ex parte Dakins*, xxix. 331.

ARSON.

Description of the building. A building, about twenty-four feet square, with slated roof, wooden sides, and glass windows, used as a storehouse for seasoned timber, as a place of deposit for tools, and as a workshop, where timber was worked up into its proper form for building and prepared for use—*Held*, to be correctly described as a "shed," in an indictment for arson. And *semble*, per Patteson, J., that the building might properly be described as a building for carrying on the trade of a builder. *Regina v. Amos*, i. 592.

ASSAULT.

1. *What is.* The defendant ordered the plaintiff to leave his shop, and on his refusal, sent for some men, who mustered round the plaintiff, tucked up their sleeves and aprons, and threatened to break his neck if he did not go out, and would have put him out if he had not gone out. *Held*, an assault upon the plaintiff. *Read v. Coker*, xxiv. 213.

2. *By medical practitioner—Rape.* Where a medical practitioner had sexual connection with a female patient of the age of fourteen years, who had for some time been receiving medical treatment from him, it was *held*, that he was guilty of an assault, the jury having found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bonâ fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure. *Seemle*, that the prisoner might have been indicted for rape. *Regina v. Case*, i. 544.

3. *Of which one indicted for felony may be convicted.* By stat. 7 Will. IV. and 1 Vict. c. 85, s. 11, it is enacted: "That on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." Prisoners were indicted for the murder of their servant girl by, *inter alia*, a series of beatings, and the evidence proved a series of beatings, but it was proved by the surgeon, that these beatings did not conduce to her death. The cause of death was proved to be two blows upon the head, but there was no evidence to show how or by whom they were inflicted. *Held*, by eight judges, (six dissenting,) that the prisoners could not have been lawfully convicted of assault, inasmuch as the assault contemplated by the statute must be such as was a part of the very act and transaction prosecuted, and also conduced to the death. *Regina v. Bird*, ii. 428, 448.

ASSIGNMENT.

I. WHAT MAY BE ASSIGNED.

II. CONSTRUCTION OF ASSIGNMENT.

III. EQUITABLE ASSIGNMENT.

IV. MISCELLANEOUS.

I. *What may be assigned.*

1. *To insurance company of rights of action.* An insurance company, on payment of a loss occasioned by the negligence of a third party, may take an assignment of any rights of action which the assured may have, growing out of such negligence. *The Quebec Fire Assurance Co. v. St. Louis*, xxii. 73.

2. *Of reversion—Right of entry.* An assignee of the reversion of leased property cannot take advantage of a condition of forfeiture, where the breach of covenant occurs before the assignment, as a right of entry cannot be assigned. *Crane v. Satten*, xxviii. 137.

3. *Of reversionary interest in personal estate.* The assignment of a reversionary interest in a sum of stock, expectant on the death of another person, is valid, if made in due form and for a good consideration. *Voyle v. Hughes*, xxiii. 271.

4. *By deed.* The law does not admit of any thing being assigned by deed, except that which actually exists. Per Pollock, C. B. *Platt v. Bromage*, xxviii. 521.

5. *Of an officer's half pay.* The assignment of half pay is prohibited, in order that an officer may be able to maintain himself in a position to return to the army whenever his services are required; this principle does not apply to a gross sum received

by an officer by way of difference upon his going on half pay; such sum may be assigned for the benefit of his creditors. *Price v. Lovett*, iv. 110.

6. *By convicted felon.* Where a convicted felon made a *bonâ fide* assignment of goods after the commission day of the assizes, but before the day on which he was actually convicted, it was held that the assignee could prove the actual day of the conviction, and that the assignment was valid. *Whitaker v. Wisbey*, ix. 457.

7. *Of office of warden of forest.* Where an office of warden of a forest was long since assigned to one, his heirs and assigns, and many subsequent assignments took place without objection on the part of the crown, it was held that the office passed to the last assignee, and that he was entitled to the compensation, upon the forest being disafforested. *Wellesley v. Mornington*, xxiii. 612.

II. Construction of Assignment.

1. *To trustees for benefit of creditors.* Where a debtor conveys property to a party to be applied in the payment of the debts of the grantor, if the creditors are not parties to the conveyance, the grantee is a mere agent or trustee of the debtor, and the agency or trust may be at any time revoked by the debtor; but where there is a conveyance to trustees for the benefit of creditors who are parties to the conveyance, the trust is irrevocable. *Mackinnon v. Stewart*, i. 158.

2. *By debtor—What passes.* Under an assignment by a debtor of all his stock in trade, debts, goods, &c., and effects whatsoever, except his wearing apparel, a contingent interest in the residuary estate of a testator, to which the debtor is entitled in a certain event, passes. The exception of the "apparel" indicates that every thing else was intended to pass. *Ivison v. Gassiot*, xxvii. 483.

3. *Priority of.* A subsequent assignee for value of a reversionary interest in a trust fund, who gives notice of the assignment to the trustees of the fund, is entitled to priority over a prior assignee in insolvency who gave no notice other than by *The Gazette* of insolvents. *In re Atkinson's Trust*, xiii. 459.

III. Equitable Assignment.

1. *Equitable, of chose in action.* A debt or other chose in action may be assigned in equity, without any concurrence on the part of the debtor. *Bell v. The London and Northwestern Railway Co.* xxi. 566.

2. *Equitable, what is.* A railway contractor gave his bankers a letter directing the railway company to pass the check which might become due to him "to his account with the bank." Held, that this was not an equitable assignment, but that it would have been if it had directed the check to be passed to the bank. *Ib.*

3. *What amounts to.* A company in Calcutta directed their agents and consignees in London, to hold 10,625*l.* at the disposal of M., a creditor, and informed M. of the direction. The London agents advised M. of the receipt of the letter, and informed him that they were in advance to the Calcutta firm beyond all expected remittances, but saying that "if remittances should come forward to enable us to meet their wishes we shall lose no time in advising you." The Calcutta firm afterwards revoked their order. Held, that the transaction did not amount to an equitable assignment. *Malcolm v. Scott*, i. 72.

4. L'E., an officer, retiring from the army, his commission became salable. Being indebted to the plaintiff 500*l.*, he gave him a letter to Messrs. Cox, army agents, requesting them to pay the balance of the price of his commission to the plaintiff, who sent the letter, with another of his own, to Messrs. Cox, requesting payment, but they had not then received any money. The plaintiff again applied for payment, and received a letter informing him that, after the 14th of June, he might draw on Messrs. Cox for 408*l.* 10*s.* 11*d.*, the balance arising from the sale of the commission. In the

mean time S. obtained a foreign attachment against L'E. for 500*l.*, due on a bill of exchange, and attached the moneys, &c., of L'E. in the hands of Messrs. Cox. Upon an application for an injunction to restrain Messrs. Cox from parting with the money, it was *held*, that Messrs. Cox had recognized the plaintiff's demand, and that it amounted to an appropriation of the money to arise from the sale of the commission; and an injunction was granted. *L'Estrange v. L'Estrange*, i. 153.

5. *Order on creditor.* An agreement between a debtor and a creditor, that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds, belonging to the giver of the order, directing such person to pay such funds to the creditor, will operate as an equitable assignment of such debt or funds. *Rodick v. Gandell*, xv. 22.

6. A railway company was indebted to A, who was indebted to his banker; A, by letter to the solicitors of the company, authorized them to receive the money due to him from the company, and pay the same to the banker; the solicitors, by letter, promised to do so on receiving it. *Held*, that this did not amount to an equitable assignment. *Ib.*

IV. Miscellaneous.

1. A purchaser of a *chose in action* takes it subject to all equities. *Cockell v. Taylor*, xv. 101.

2. *Voluntary, of chose in action.* A, a creditor of B, by a voluntary deed, assigned the debt to C. C. filed a claim against A and B, but it was *held* that it could not be maintained. *Sewell v. Moxsy*, xii. 304.

3. *Of chose in action.* The assignee of a *chose in action*, or security of any kind, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it. He must be taken to be cognizant of them. It is his duty to make inquiries, and as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make the inquiries and who has not made them. *Mangles v. Dixon*, xviii. 82.

4. But if the notice given by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances, and if he should not do so, he will be bound to perform the stipulations of the security, and cannot be allowed to take advantage of the equities existing as between the assignor and himself. *Ib.*

5. The performance, by the creator of a security, of any intermediate stipulations in it, after he has received notice of its assignment, being an act done under both a legal and an equitable liability, can never, in itself, be considered as a ground for fixing him with a liability to something beyond that by which he is equitably bound. *Ib.*

6. *Of charter-party.* A was the owner of a vessel. B was to charter it for a particular voyage to seek a particular cargo. Its tonnage was larger than B required. A was willing to undertake half the risk, and was to have half the profits. A charter-party was executed, on the 24th of April, 1845, by which the vessel was declared to be let to freight, at 16*s.* a ton per month, to B, and bills were to be given, and payments from time to time made, by B, which, taken together, would cover one half of the amount stipulated for the freight. On the arrival of the ship at home, B was to give a bill at ninety days' date for the remainder of the freight. Two other instruments were executed on the same day; by the first of which D was to join in the adventure, and, "after payment or deduction of the freight, and all incidental expenses, the profit or loss" was to be borne by the parties in equal moieties; and, by the other, A

gave to B a guaranty for the due performance, by D, of the stipulations he had entered into. On the 1st of December, 1845, while the ship was on the voyage, A assigned to C the charter-party, and wrote on the margin thereof a note addressed to B, requesting him to pay "what is due." C gave B notice of this assignment and note. The notice was in the ordinary form, and C made no inquiries of B. B continued the payments which, by the stipulations in the charter-party, he was bound to make. The vessel returned in August, 1846, and the adventure turned out a loss. B claimed, as against C, to balance the accounts of profit and loss, as he would have been entitled to do with A had the charter-party not been assigned. *Held*, that in equity he was entitled to do so. *Ib.*

7. *Of judgment debt.* The assignee of a judgment debt must give the judgment debtor notice of the assignment. *Stocks v. Dobson*, xv. 314.

8. The equitable assign by deed of a judgment debt assigned it over, together with the deed. Notice of this assignment was not given to the judgment debtor. The original assign afterwards gave a release to the debtor, who accepted the same without requiring the original deed of assignment to be given up or produced. *Held*, that such release was good as against the assign, who had neglected to give notice of the assignment to him. *Stocks v. Dobson*, xix. 96.

ASSUMPSIT.

1. *Against commissioners under local act.* Where commissioners under a local act have power to appoint officers at a salary to be paid out of the rates raised, the appointment does not create a contract on the part of the commissioners to pay the salary. Therefore, an *indebitatus* action will not lie against them for salary; but a *mandamus*, or an action on the case, is the proper remedy. *Bogg v. Pearce*, iii. 508.

2. *Against director—Evidence.* In an action for services against a director of a joint-stock company, the fact that the defendant had paid the demands of another person against the company for work done on the order of the secretary, is admissible to show that he had acted as a director. *Elmes v. Ogle*, ii. 379.

3. *By treasurer against a qui tam informer, for half a penalty.* An action for money had and received lies at the suit of a treasurer of a borough fund for half a penalty recovered by a *qui tam* informer, under 5 & 6 Will. IV. c. 76, s. 48. It is for defendant to show, if he can, that deductions are to be made for costs and expenses. *The Mayor of Hurwich v. Gaunt*, xxx. 354.

4. *By a mortgagee against a landlord for overplus, on sale of the tenant's goods.* A landlord, who has sold his tenant's goods, under a distress for rent, is not liable in an action for money had and received at the suit of the mortgagee of the goods, to recover the overplus money in the landlord's hands; the proper remedy being by an action on the case against him for not paying over the overplus to the sheriff, pursuant to 2 W. & M. sess. 1, c. 5, s. 2. *Yates v. Eastwood*, v. 519.

5. *Trustee and cestui que trust.* Where parties stand to each other in the relation of trustee and *cestui que trust*, and the trustee is under no other legal liability than that which arises from that relation, no action at law for money had and received can be maintained against him, though he has money in his hands, which, under the terms of the trust, he ought to pay over to the *cestui que trust*, but which he still holds in the character of trustee only. *Edwards v. Lowndes*, xvi. 204.

6. *By carrier against railway company for sum paid in excess.* The B. and E. Railway is a continuation of the G. W. Railway, but worked by a distinct company, and the act of incorporation requires that the charges for carriage of goods, &c., shall be the same to all persons under similar circumstances. By the scale-bill for both lines, a certain price was stated for the carriage of goods per ton from P., the London terminus of the G. W. Railway, to T., a station on the B. and E. line, which charge included the cost of collection and delivery of the goods at the respective places; and

a notice was appended to the scale-bill, that a certain allowance would be made to persons collecting and delivering their own goods. The plaintiff, who so collected and delivered goods, which he sent by the railway, demanded a larger allowance; on several occasions, however, he paid at the specified rates, but always under protest, although without ever tendering a smaller amount. He then brought an action for money had and received, to recover the excess which he had paid above what would have been payable at an increased allowance for collection and delivery. The jury found that the allowance was too little, and returned a verdict for the amount so paid in excess. *Held*, first, that the action for money had and received was maintainable. Secondly, that the whole sum so paid in excess was recoverable from the Bristol and Exeter Railway Company, although they received a portion of it as agents only for the Great Western Railway Company. *Parker v. The Bristol, &c. Railway Co.* vii. 528.

7. *Against parish clerk to recover illegal charges.* The plaintiff applied to the defendant, a parish clerk, for liberty to search the register-book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same whether he made extracts or had certificates. The plaintiff searched through four years, and made twenty-five extracts, for which the defendant charged him 3s. 6d. each; and he accordingly paid the defendant 4l. 7s. 6d. *Held*, first, that the charge for extracts was illegal, since the 6 & 7 Will. IV. c. 86, s. 85, only authorizes a charge for a search, and for a certified copy; secondly, that the payment was not voluntary, so as to preclude the plaintiff from recovering back the excess; and, thirdly, that the defendant was the proper person to be sued. *Steele v. Williams*, xx. 319.

8. *Waiver of trespass.* A and B (the defendants) went together to the house of the plaintiff's mother, and A seized there a sum of money belonging to the plaintiff. There was some evidence of A and B having gone with intent to get the money, but no evidence that B went into the house. They subsequently paid the money into a bank to their joint account. *Held*, that the plaintiff might waive the trespass, and maintain an action for money had and received against the two defendants. *Neat v. Hardigg*, iv. 494.

9. *Money received as agent of plaintiffs.* Where a defendant retained money he had received as the agent of the plaintiffs, though he had a claim against their principals, and had made an arrangement with them to refund it, if the plaintiffs were not covered in their advances, or were called on to repay it, it was *held*, upon the principals calling for the money, that the defendant was liable to plaintiffs in money had and received; and, also, that the assent of the plaintiffs' principals to his appropriation of it in payment of his claim against them, would be no defence without an agreement between them and the plaintiffs, discharging the latter. *Enthoven v. Hammond*, xxii. 476.

10. *Money deposited to be repaid.* *Assumpsit* for money had and received will lie to recover a sum of money deposited with the defendant upon the undertaking that in a given event the same sum of money, although not the same identical coins or notes, shall be repaid to the plaintiff, and this, although part of the money, has, in the mean time, been expended by the defendant. *Londesborough v. Mowatt*, xxviii. 119.

11. *Deposit paid on shares in abortive railway company.* The plaintiff received a letter of allotment, allotting him shares in a projected railway, upon which he paid a certain deposit per share. With the letter of allotment, the board of directors (one of whom was the defendant) caused to be sent to the plaintiff a circular containing, amongst others, the following provision: "In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction." There was no evidence of any application by the plaintiff for shares, or that his allotted shares had been exchanged for scrip; and it appeared that he had never signed the parliamentary contract or subscribers' agreement. The project proving abortive, it

was held, that money had and received lay to recover back the deposit paid. *Ward v. Londesborough*, xxii. 402. See, also, *Londesborough v. Mowatt*, xxviii. 119.

12. *Cross-acceptances.* A, being in want of money, applied to B and C who were in partnership, for an advance. They sent him an acceptance by B alone, and A agreed that if he discounted that acceptance he would give to B and C his own acceptance. He discounted B's acceptance, but failed to give his cross-acceptance. B was afterwards sued on his acceptance by the holder of it, and paid it out of the money of B and C. B then sued A for money paid. Held, that the action could be maintained by B alone upon the implied contract to indemnify him, which arose when he paid the acceptance upon which he alone was liable to be sued. *Driver v. Burton*, ix. 404.

13. *Annuity paid after death of annuitant.* After the decease of an annuitant, the plaintiff, in ignorance of the fact of the decease, purchased the annuity. Held, that the annuity ceased to exist with the death of the annuitant, and that the plaintiff might recover back the money paid, for want of consideration. *Strickland v. Turner*, xiv. 471.

14. *Deposit of bank-notes—Failure of bank.* Where A deposited certain bank-notes with his banker, and received a certificate therefor, and it afterwards proved that the bank which issued the notes failed on the day the deposit was made, of which fact neither party was cognizant, it was held that A could not recover the amount of the notes, either in an action for money lent, or for money had and received. *Timmis v. Gibbins*, xiv. 64.

15. *Against executors—Testamentary dispositions.* A, at his death, left two sealed letters, containing promissory notes, directed to the plaintiff. The defendants, executors of A, made a payment, on account of these notes, to the plaintiff, and promised in writing to pay the residue, but subsequently refused to do so. On *assumpsit* by the plaintiff, it was held, that the defendants were not liable upon the count for an account stated, because the payments and promise had been made under a mistake as to the liability of the testator's estate, and without consideration. *Gough v. Tindon*, viii. 507.

16. *Account stated—Acknowledgment of debt.* The plaintiff executed a written contract of absolute sale of some goods to the defendant; he afterwards sued the defendant for a sum which he contended was due to him out of the proceeds of the goods as a balance after repaying the amount advanced by the defendant on their security. The plaintiff gave evidence, that on the sum being demanded by the plaintiff's agent, as the balance out of the proceeds, the defendant admitted the correctness of the amount, and said he would pay it over. Held, that though the sale was absolute in law, there was evidence that it was accompanied by a trust that the defendant should account for the proceeds, and that the facts showed a sufficient consideration for the account stated by the defendant to entitle the plaintiff to recover the balance on the count for money due upon an account stated. *Howard v. Brownhill*, xxii. 181.

ATTAINDER.

Effect of pardon on. A conditional free pardon of a convict, granted in the penal colony, will not do away with the attainder by which the convict's property has been vested in the crown. *Re Church's Will*, xi. 240.

ATTORNEY AND COUNSELLOR.

- I. CERTIFICATE OF; STRIKING OFF THE ROLL.
- II. RIGHTS, DUTIES, AND LIABILITIES OF.
- III. LIEN OF.
- IV. TRANSACTIONS WITH CLIENTS.
- V. NEGLIGENCE OF.
- VI. COSTS.
- VII. MISCELLANEOUS.

I. *Certificate of; Striking off the Roll.*

1. *Renewal of certificate.* It is not necessary for an attorney who has ceased to take out his certificate for a year previous to the passing of the stat. 6 & 7 Vict. c. 73, to apply to be readmitted as an attorney, on his desiring to practice again. It is sufficient for him to obtain a rule to renew his certificate. *Ex parte Howard*, i. 264.

2. *Altering name on roll.* By rule of court, an alteration of the name of an attorney was allowed to be made on the roll by inserting a middle name, which he had assumed. *Dearden, in re*, ii. 355.

3. *Change of name of.* If a solicitor gives good reasons for having changed his name, the corresponding change may be made on the roll of solicitors. *Ex parte Matthews*, xv. 339.

4. *Renewal of certificate.* T., who whilst uncertified had placed his name as an attorney upon briefs for counsel at Quarter Sessions, upon his showing by affidavit that he had on those occasions acted gratuitously, and from motives of kindness, was allowed to renew his certificate upon payment of three years' back duty, and a fine of 6l. *In re Taylor*, xi. 454.

5. *Articled clerk.* An articled clerk, having taken a B.A. degree, was articled for three years, two of which he served with his master, eight months with the London agent, and four months with a special pleader; he then passed his examination. *Held*, that he might be admitted after serving four months with an attorney, and receiving a certificate of his examination, the examiners to be at liberty to sign the certificate at once, but such certificate to be stayed until the service was completed. *Earle, ex parte*, xvi. 374

6. *Articled clerk, transfer of.* An articled clerk was transferred, under an agreement for an assignment, from one attorney to another; the assignment was not executed till six months after. *Held*, that the service under the agreement was a service within the 6 & 7 Vict. c. 73, s. 3. *Ex parte Brutton*, xxv. 232.

7. *Uncertificated, validity of acts of.* Under the stat. 6 & 7 Vict. c. 73, if an uncertificated attorney acts as an attorney, his acts are valid as regards other persons, though he cannot maintain any action or suit for the costs of business done while he is without a certificate. So *held* in the case of an attestation to a warrant of attorney by an uncertificated attorney. *Holdgate v. Slight*, ix. 331.

8. *Striking from roll.* The mere non-payment of money by an attorney, pursuant to an order and rule of court, is no ground for striking him off the roll. *Guilford v. Sims*, xxiv. 392.

9. *Stricken off roll of solicitors.* Where a rule had been obtained to strike an attorney off the roll of this court, founded solely on an order of the Lord Chancellor, striking him off the roll of solicitors for alleged misconduct in the Court of Chancery, but which order was subsequently reversed and the party restored to the roll of solicitors, on payment of costs, but he was ordered to be suspended for six months from practising in the Court of Chancery, this court discharged the rule on payment of costs. *In the matter of John Smith*, xvi. 231.

II. Rights, Duties, and Liabilities of.

1. *Cannot act for both parties—Warrant of attorney.* By stat. 1 & 2 Vict. c. 110, s. 9, an attorney can in no case act for both plaintiff and defendant, in the execution of a warrant of attorney to confess judgment. *Hirst v. Hannah*, xxiv. 186.

2. *As to client's papers.* An attorney or solicitor, who on payment of his bill delivers up papers that have been intrusted to him, is bound to deliver them up in a reasonable state of arrangement, so that the party to whom they are delivered may not be put to unreasonable trouble in sorting them. *The Northwestern Railway Co. v. Sharp*, xxviii. 555.

3. *Fraud of clients.* If an attorney, suspecting that his client is engaged in a systematic course of fraud and forgery, continues to act for him as if he were assisting to enforce just rights and give effect to genuine documents, he is guilty of gross misconduct, although not originally privy to the frauds, and although never informed of the manner in which the forged documents were obtained. *In re Barber*, vi. 338.

4. *Authority to file bill.* Where a solicitor files a bill, the *onus* lies upon him to show that he had the plaintiff's authority for doing so; and if he fails to show such authority, or a subsequent acquiescence on the part of the plaintiff, the plaintiff is entitled to have his name removed from the record, with costs to be paid by the solicitor. *Maries v. Maries*, xxiii. 221.

5. *Authority to institute suit.* A solicitor cannot be allowed to institute suit on the authority of the *cestui que trust*, against the trustee, without consent. And the affidavit of the solicitor is not good evidence of consent against the affidavit of the trustee. Solicitor to pay costs. *Crossley v. Crowther*, xii. 245.

6. *Misapplication of money by.* Where an attorney has fraudulently misapplied money received from his client for a specific purpose, this court will exercise its summary jurisdiction by ordering him to pay the money, although he has obtained a certificate of protection from the Bankruptcy Court under 7 & 8 Vict. c. 70. *Re ———* xxx. 390.

7. *Liability for interest on balances.* A solicitor cannot be charged with interest on balances in hand; but if he debits himself with interest in a cash account rendered, he ought to be charged. *In re Savery*, xv. 81.

8. *Liability for sheriff's fees.* The attorney who lodges a *fiery facias* with a sheriff, is liable to the bailiff by whom it is executed for the fees due to him although no directions were given by him as to the person by whom the writ should be executed. *Brewer v. Jones*, xxix. 502.

9. *Obligation to carry on suit.* An attorney is bound to carry on a suit to its termination, unless he gives notice that he shall discontinue if he be not paid, or supplied with funds, or the client dies; and the statute of limitations does not run against his bill, until the happening of one of these events. *Whitehead v. Lord*, xi. 587.

10. *Liability for fraud of clerk.* Where an attorney's clerk had fraudulently simulated the court seal upon a writ of summons, the court set aside the writ and all proceedings thereon, and ordered the attorney (though blameless) personally to pay the costs. *Dunkley v. Farris*, xx. 285.

III. Lien of.

1. *On amount payable to bankrupt client.* A cause and all matters in difference had been referred to an arbitrator, the costs of the cause to abide the event. The arbitrator found for the defendant, as to the cause, and as to the matters in difference awarded 303*l.* 15*s.* to the plaintiff, to be paid at the same time and place at which the plaintiff was to pay the costs of the action; and the defendant did, at the appointed time and place, pay the sum awarded to the plaintiff's attorneys, minus 180*l.*, the amount of the costs of the action, but refused to pay the residue unless the plaintiff

paid the costs of the action. The plaintiff having become bankrupt after the making of the award, the court discharged a rule calling upon the defendant to pay the balance of the sum awarded to the plaintiff's attorneys, who had a lien against the plaintiff for more than the amount awarded, for costs incurred by them in the prosecution of the reference. *Dunn v. West*, i. 325. See, also, *Lloyd v. Mansell*, xvi. 211.

2. *No ground of objection to order to produce deeds.* A claim of lien by a solicitor for professional charges, is no ground of objection to an order upon him to produce deeds in his possession, to be used as evidence between third parties. *Quære*, whether the solicitor can object to production, under such an order, on the ground of want of service upon, or of notice to, the person or persons to whom, subject to his lien, the deeds required to be produced belong? *Hope v. Liddell*, xxxi. 388.

3. *On bill of exchange—To what amount.* If a lessee deposits with the lessor's solicitor (acting for all parties) a bill of exchange and the lease to secure the payment of a particular debt, and the lessee's solicitors subsequently pay this debt, and receive the bill and lease, the solicitors acquire no lien on the bill beyond the amount which they have paid, unless there is an express contract. *Gibson v. May*, xxxi. 110.

4. *Evidence of.* Evidence of express contract will not support such a lien, without proof that the solicitors explained to their client his rights independent of such contract. *Ib.*

5. *Order to deliver up deeds.* In an administration suit instituted by an infant *cestui que trust* under a will, against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage, formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property which had been entered into by the executor. Under this order the purchase-moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances, and deliver the title-deeds to the petitioners; but the executor's solicitors refused to give up the deeds, claiming a lien upon them for costs due from the executor and advances made for the maintenance of the plaintiff. *Held*, that the court had jurisdiction on petition, to order the solicitors to deliver up the deeds. *Francis v. Francis*, xv. 47.

6. *Lien as against third parties.* A client cannot give a lien to his solicitor of a higher nature than the interest which he himself has in title-deeds, and therefore if such deeds are subject, in the hands of the client, to any legal or equitable rights of third parties, such rights will follow them into the hands of a solicitor. *Pelly v. Wathen*, ix. 61.

7. *Order to deliver up deeds—Attachment.* An order having been made, directing an attorney to deliver up certain deeds to a client, the court granted an attachment against him, for refusing to deliver them up unless the client would pay him for a schedule thereof, to be kept by the attorney. *Ex parte Willand*, xx. 293.

IV. Transactions with Clients.

1. *Buying land of infant client—Specific performance.* An attorney had sold land for his client while he was yet a minor, and bought in a portion of the premises himself. *Held*, that, although the client had acquiesced in the sale for a long time after he came of age, the attorney was not entitled to have specific performance of the sale ordered by a court of equity. *Cutts v. Salmon*, v. 93.

2. *Purchase by, from client.* An attorney cannot sustain his purchase from a client unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. But he may deal with a client as a stranger where the circumstances are not such as to put him under the duty of advising the client. *Holman v. Loynes*, xxvii. 168.

3. *The relation of attorney and client was in this case held to continue, although*

the attorney had not acted as such for the vendor for more than a year previous to the purchase, (but prepared the purchase agreement, and charged accordingly,) he having previously been employed as attorney about an attempted sale of the same property: and the sale was set aside, on the ground that the consideration, an annuity, ought to have been considerably greater, by reason of the intemperate habits of the vendor, although the vendor, acting under the advice of an auctioneer, named the price and pressed the attorney to purchase. *Ib.*

4. *Gift to, by client.* No valid gift can be made by a client to his attorney, without the intervention of a third party, or some other means of counteracting the influence of the relationship. *Hindson v. Weatherill*, xxiii. 132.

5. *Agreement of, with client.* *Semble*, that, in case of an agreement between a solicitor and client, the burden rests on the solicitor to prove that it was a fair agreement, and was not obtained by undue influence. *Moss v. Bainbrigge*, xxxi. 565.

6. *Provision in will in favor of solicitor who makes it.* Where a testator makes a disposition by his will in favor of the solicitor employed by him to make the will, in such language and under such circumstances as that upon the trial at law of an issue *devisavit vel non*, brought by the heir at law of the testator, or upon the hearing by the Ecclesiastical Court of a suit touching the validity of the will, the disposition in question would be upheld, this court will not, on the mere ground that the relation of solicitor and client existed between the solicitor and the testator, interfere, at the instance of the heir at law or next of kin, to fix a trust for the benefit of either of them upon the property devised or bequeathed to the solicitor. *Hindson v. Wetherill*, xxvii. 149.

7. *Purchase by, from client.* If a solicitor purchases of his client, the burden rests on him to show the fairness of the purchase, if he seeks to have the contract enforced. *Cutts v. Salmon*, xii. 316.

8. *As to money of feme covert client.* A married woman, to whom a sum of money was payable for her separate use, received a check, and handed it over to her solicitor, who accompanied her. *Held*, that the *onus* being on the solicitor to show cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt out of it. *Mawhood v. Milbanke*, xv. 73.

9. *For observations respecting conveyances by client to attorney, see Stump v. Gaby*, xvii. 357.

V. Negligence of.

1. *Failure to make proper inquiries.* An action will lie against an attorney for negligence in not inquiring whether the vendor had been insolvent, when he suspects such to have been the case. *Cooper v. Stephenson*, xii. 403.

2. *In drafting agreement.* An attorney undertook to draft a security for the payment of an annuity to a woman, to be made in consideration of past cohabitation. It was drawn in haste, the signer being unwilling to stop to execute it. It was worthless, because not under seal. In an action against the attorney for negligence, the judge charged the jury: "That every attorney is bound to bring a fair and reasonable amount of care and skill to the performance of his duty; that he is not to be expected to know difficult points of law; may not be bound to know all the authorities, but is bound to ask for time for examination if the case is difficult; that the question was whether plaintiff did not desire a valid agreement." The jury assessed damages for the plaintiff at 70*l.* After long arguments by counsel, the court took time to consider the case, and at a subsequent day proposed to the parties that the verdict should be reduced to 35*l.*, and this was agreed to, each party paying his own costs. *Parker v. Rolls*, xxviii. 424.

3. *Summary jurisdiction over solicitors.* Where the same solicitor was employed by the vendor and purchaser, and the purchaser paid his purchase-money to the solicitor,

and was afterwards deprived of the benefit of his purchase by parties having a prior equitable mortgage, which was known to the solicitor at the time of the purchase, it was *held*, that the court had no jurisdiction, on petition of the purchaser, to order the solicitor to pay, out of the purchase-money, the amount of the equitable mortgage, as the money was not paid to him as the solicitor of the petitioner, but of the vendor; and that it had no jurisdiction, on petition, to order the solicitor to make compensation to the purchaser for the loss sustained through his negligence. *Tylee v. Webb*, vii. 284.

4. *Investing client's money on insufficient security.* Where a solicitor invests his client's money on such insufficient security that the negligence amounts almost to fraud, the client can claim the amount in a suit for the administration of the solicitor's estate without a suit at law. *Smüh v. Pocock*, xxiii. 470.

5. *Allowing client's shares to be forfeited.* Where a solicitor allowed shares belonging to a client to be forfeited by neglect, and afterwards replaced such shares, giving less than would have originally been paid, it was *held*, that the client could only claim to be placed in the same position as if the shares had never been forfeited. *Ib.*

VI. Costs.

1. *Delivery of bill.* An attorney, being consulted by a client who was under a criminal charge, obtained from him a sum, to do the best he could for him, with an understanding that no account should be kept or rendered. Having succeeded in procuring the prisoner's discharge, the attorney was called upon after the lapse of nearly six years to deliver a bill. The court refused to order him to do so; but referred the whole matter to the Master, who in the result discharged the rule, but without costs. *In the matter of Edward Vann*, xxix. 318.

2. *Order for taxation and payment.* An order for the taxation and payment of an attorney's bill, (after a previous order to change the attorney,) cannot be made upon an *ex parte* application. *Gillow v. Rider*, xxx. 538.

3. *Delivery of bill.* If an attorney deliver his bill of costs to the person intended by him to be charged, inclosed in an envelope addressed to the person on the outside, it is a sufficient delivery of the bill within the meaning of the stat. 6 & 7 Vict. c. 73, s. 37, though there be no heading to the bill, and the name of the party does not appear anywhere on it as the debtor. *Lucas v. Roberts*, xxx. 592.

4. *When entitled to.* An attorney, having notice of the bankruptcy of a trader, upon an assurance from the defendant, a creditor, that all the creditors of the bankrupt would concur, and being instructed by him, drew a deed of settlement. *Held*, that as such deed might have been operative if all the creditors had concurred, the attorney was right in drawing the deed, and was entitled to his costs. *Lewis v. Colard*, xxiv. 367.

5. *Attorney's bill, statute respecting.* The plaintiff, an attorney, employed by the company, delivered his bill of charges, headed "Northampton, Lincoln, and Hull Railway to R. H. Daubney, debtor:" to the defendant who was a member of the provisional committee. *Held*, that it sufficiently charged the defendant within the meaning of the stat. 6 & 7 Vict. c. 73, s. 33. *Phipps v. Daubney*, iv. 240.

6. *Taxation of bill—Liability of client.* A judge's order, referring an attorney's bill to taxation, reserved to the client the right of disputing his liability to the whole or any part of it, on certain specified grounds. The order did not direct the Master to tax the costs of the reference, as required by statute. The Master taxed off less than a sixth of the whole bill, and taxed the attorney the costs of the reference. *Held*, that the client was liable, under the statute, to pay the costs of the taxation, whatever might be the event of the questions reserved. *In re George Shaw*, iv. 247.

7. *Agreement to pay, construction of.* A, an attorney, on obtaining from B, another attorney, the papers belonging to a former client of B, wrote to B as follows: "Out

of any moneys which I may receive on this or any other proceeding on her account, I will hand you such balance as may remain due of your bill of costs." *Held*, that A was bound upon this undertaking to pay over to B the amount of the costs due to him from the first moneys he should receive on account of the client, without deducting therefrom any costs that might be due to himself for recovering such moneys. *Tharrett v. Trevor*, viii. 508.

8. *Under winding-up acts.* The solicitor's bill, both for expenses incurred preliminary to the registration of the company and those incurred subsequently, ought to be allowed as a debt in the winding-up acts, but subject to taxation. *In re The Independent Assurance Co.* xxvii. 7.

9. *Payment, what is.* If a solicitor deliver his bill to a client, leaving it optional with him whether the bill shall be taxed, or not, and the client gives security for the bill, but pays no money, that is payment within the meaning of the statute. *Ex parte Turner*, xxvii. 555.

10. *Payment of costs under protest.* A protest upon payment of a bill of costs has no effect. A pressure from a third party, which cannot be removed without previous payment of a bill of costs to a solicitor, is no good ground for a taxation of costs after payment. *In re Browne*, xv. 83.

11. *New order for taxation—Lapse of time.* The court may make a new order for the taxation of a solicitor's costs (against the estate of a lunatic,) when the demand founded upon the first order has become barred by the statute of limitations. *In re Hart*, xiii. 186.

12. *Establishing right to, at law.* Where there is doubt as to the legal right of a solicitor to recover a bill of costs, the court of chancery will not undertake to decide the question, but will leave the party to establish his right at law. *In re Burchell*, ix. 178.

13. *Disobeying judge's order.* An action does not lie against an attorney for disobedience of the order of a judge for delivery of a bill of costs. *Dent v. Basham*, xxv. 463.

14. *Petition to disallow part of—Agreement between solicitors.* A, in Edinburgh, employed B, a solicitor, as his agent in London, and introduced to him business of some importance, which a client of his had in England. B, by a letter, promised to allow A one half of the profits of all such business, so long as he should retain the same, directly or indirectly. Upon the discovery of this by the client, who had obtained an order for the taxation of B's bills of costs, he presented a petition, asking that the taxing master might disallow all such share of the charges as B had promised to pay to A. *Held*, that if the agreement was illegal, it could not be enforced by A; that the 22 Geo. II. c. 46, s. 11, being a penal act, must be construed strictly; that the business having been done, the solicitor was entitled to payment, and that the client could not avail himself of the letters to refuse payment, or insist upon deducting from the bills of costs what B had promised to allow to A; and that the production of the documents, relating to the bills of costs, ought to be left to the discretion of the taxing master; and the petition was dismissed with costs. *Gordon v. Dalzell*, ix. 154.

15. *Of solicitor who acts for himself and co-trustees.* The rule, that a solicitor who is a trustee, and is made a party to a suit respecting the trust property, will be allowed his usual professional costs, where he acts as solicitor in such suit for himself and his co-trustees, and the costs are not increased by his so acting, is confined to the case of a suit, and does not extend to the case of a solicitor acting for himself and co-trustees in the administration of the trust property without the intervention of the court. *Lincoln v. Windsor*, v. 230. *Broughton v. Broughton*, xxxi. 587.

16. *Denial of agency.* A solicitor, who sold his business, but who continued to conduct a suit in chancery in the office as the agent of one of the plaintiffs, independently of the solicitor who had purchased the business, will not be allowed to deny his agency, or to strike from the bills of costs of such solicitor the costs of proceedings which had

been incurred by a mistake made in conducting the cause; and a petition for the taxation of the bills of costs under special circumstances was dismissed, with costs. *In re Gedge*, vi. 53.

17. *As to taxation after payment*, see *Re Winterbottom*, xv. 94; *Re Mash*, xv. 96; *In re Dearden*, xxiv. 488; *Ex parte Turner*, xxvii. 555.

VII. Miscellaneous.

1. *Mortgagor solicitor of mortgagee*. Where a mortgagor, a solicitor, prepares the mortgage-deed, the mortgagee not employing another solicitor, the mortgagor will be considered to be the solicitor of the mortgagee in the transaction of mortgage; but the latter will not therefore be deemed to have notice of a prior deposit of the title-deeds by the mortgagor, or of any uncommunicated fact which it was the interest of the mortgagor to conceal from the mortgagee. *Hewitt v. Loosemore*, ix. 35.

2. *Articled clerk—Premium*. A clerk was articled to a solicitor for a premium, for which he gave the solicitor an I O U, and afterwards left his master, who brought an action on the I O U; plea, never indebted, payment and release, upon which the master abandoned the action. In the course of subsequent proceedings, the clerk agreed to pay proportionally for the time which he remained with the solicitor; still later he sought to be relieved from this agreement, without success, and was also ordered to pay a certain sum, it appearing from his affidavits that there was impertinent matter between the parties. *Dufaur v. Sigel*, xxi. 313.

AUCTION.

1. *Auctioneer's lien, and right to sue*. Declaration for price of a horse. Plea, that plaintiff in selling it by auction acted as agent of K., to whom defendant paid the price. *Held*, that the plea was bad, as plaintiff must be assumed to have had a lien for his commission, &c., which the plea did not state to have been satisfied, nor that he had notice of the payment, or had in any way lost his right to sue. *Robinson v. Rutter*, xxx. 401.

2. *Abortive sale—Recovery of deposit*. The purchaser at a sale, which turns out abortive, from vendor's inability to make a good title, cannot recover the deposit from the vendor as money had and received, though paid over to him, but must sue the auctioneer, he being the agent of both parties, to appropriate the deposit to the party entitled to it. *Johnson v. Roberts*, xxx. 234.

3. *Misdescription of property*. Auctioneers are responsible to the vendors of property for loss occasioned by careless misdescription. *Parker v. Farebrother*, xxiv. 237.

4. *Puffer*. A puffer who bids by degrees up to his limit, instead of making his utmost bid at once, is not acting in fraud of the *bonâ fide* bidders. *Flint v. Woodin*, xiii. 278.

5. There is nothing fraudulent in the mere fact of an owner of property acting as auctioneer at a sale. *Ib.*

6. *Sale by, without warranty*. *Quære*, whether a sale by auction without warranty is valid, where the owner of the property sold has previously given a private warranty to one who buys or bids for the property. *Hopkins v. Tanqueray*, xxvi. 254.

7. Sale by auction on behalf of an infant, without a reserved bidding, strongly condemned. *Cutts v. Salmon*, xii. 316.

8. *In public market*. A sale by auction in a public market was not unlawful at common law, and is not prohibited by sec. 5 of stat. 50 Geo. III. c. 41. *Regina v. Henry*, xxix. 197.

BAIL.

1. *Capital offenses*. Where a person has been committed upon a charge of wilful murder, found by a coroner's jury, upon evidence sufficient to support the finding,

this court will not admit him to bail, especially where the accused has made a statement admitting his participation in the affair out of which the charge of murder arises. *Ex parte Baronnet*, xvi. 361. *Ex parte Barthélemy*, xvi. 366. And see note to same case for the American law on the subject of bailing capital offenders.

2. *Discretion of court respecting.* On an application to bail a prisoner charged with a criminal offence, the test to govern the discretion of the court is the probability of the prisoner's appearing to take his trial; but, in applying that test, the court will not look to the character or behavior of the prisoner at any particular time, but will be guided by the nature of the crime charged, the severity of the punishment that may be imposed, and the probability of a conviction. *In re Robinson*, xxv. 215.

3. *Point reserved on conviction for felonious assault.* Where a case has been reserved for the court of appeal upon a conviction for an assault with intent to commit a felony, the court will not deem itself bound to admit the prisoner to bail until the decision of the point reserved, even although the offence is only a misdemeanor, and the prisoner was admitted to bail of right previously to the trial. *Regina v. Bird*, ii. 439.

4. *Special bail by executors.* The general rule that, where an action against an executor is removed from an inferior court, the defendant is not bound to put in special bail, does not extend to the case of an inferior court, where a custom of foreign attachment exists, which can only be dissolved on putting in special bail. *Bastow v. Gant*, xiv. 32.

5. *Motion to rescind judge's order—Affidavits of collateral facts not received.* On a motion to rescind a judge's order to hold a defendant to bail in an action, the Court of Queen's Bench will not receive affidavits of collateral facts not submitted to the notice of the judge. *Bullock v. Jenkins*, ii. 195.

6. *Affidavit to hold to bail, sufficiency of—Stat. 1 & 2 Vict. c. 110, s. 3.* An affidavit on which an order was made to hold a party to bail under 1 & 2 Vict. c. 110, s. 3, spoke of a debt for "shares sold." On application to set it aside on various grounds, it was held, that it was no objection that it was intitled "A, plaintiff and B, defendant," though there was no cause in court at the time of swearing; that the section applies to actions for damages, and therefore it is unnecessary to state the delivery as well as sale of the shares; that it need not state the plaintiff's belief that defendant was about to quit England, "unless he was forthwith arrested," it being therein alleged that defendant had told plaintiff that such was his intention. *Hargreaves v. Hayes*, xxx. 272.

7. *Affidavit in criminal conversation.* As to what the plaintiff's affidavit, in support of an application to hold the defendant to bail in an action for criminal conversation, must set forth, see *Bullock v. Jenkins*, ii. 195.

8. *Money paid into court in lieu of—Delay in perfecting.* The defendant who had been arrested on mesne process, in an action for a debt, deposited with the sheriff the amount claimed together with £10 for costs, in lieu of bail, and the sheriff paid the amount into court. The defendant afterwards put in and perfected bail, but not in due time. Held, on an application to the court by the defendant, supported by an affidavit of merits, that the defendant was entitled to have the money paid out to him, and that the plaintiff was not entitled to elect whether he would take the security of the bail or of the money. *Brook v. Brook*, xvi. 177.

9. *Taking out of court money paid in in lieu of.* Where a plaintiff replies, taking issue on a plea and also demurring to it, pursuant to the Common-law Procedure Act, the defendant, on putting in bail before issue is joined on the demurrer, is in time to apply to take out of court money paid in in lieu of bail which, by the stat. 7 & 8 Geo. IV. c. 71, s. 3, he may take out "at any time during the progress of the cause before issue joined in law or fact." When the money has been paid in by a third party, on the bail being put in and perfected, the court will pay it out to him, if the attorney who gives instructions for the application swears that he is the attorney of

the defendant and acts for him, though the defendant himself is abroad. *Alcenius v. Nygren*, xxv. 222.

BAILMENTS.

See INNKEEPER; COMMON CARRIERS; PLEDGE, &c.

BANKRUPTCY.

- I. ACTS OF BANKRUPTCY.
- II. TRADER, WHO IS.
- III. JOINT AND SEPARATE ESTATE.
- IV. ADJUDICATION.
- V. JURISDICTION OF COMMISSIONER.
- VI. MESSENGER.
- VII. TITLE OF ASSIGNEES; ASSETS OF BANKRUPT.
- VIII. LIABILITIES, AND RIGHTS OF ASSIGNEES.
- IX. RIGHTS OF TRUE OWNER OF GOODS IN POSSESSION OF BANKRUPT.
- X. DEBTS PROVABLE.
- XI. PRIVILEGED CLAIMS, AND RANK OF CREDITORS.
- XII. CERTIFICATE.
- XIII. DEED OF ASSIGNMENT.
- XIV. WHAT ACTIONS BARRED.
- XV. PREFERENCES, AND FRAUDULENT TRANSFERS.
- XVI. PRACTICE.
- XVII. MISCELLANEOUS.

I. *Acts of Bankruptcy.*

1. *Personal service of summons—Neglect to comply.* Where the signature of the commissioner to the original summons shown to a trader on serving him with the summons, under the 78th section of the Bankrupt-law Consolidation Act, was omitted in the copy of such summons left with him, it was held that this was not a personal service of the summons upon the trader within the meaning of the 80th section of the act, and that his not appearing before the commissioner after such service did not constitute an act of bankruptcy upon which an adjudication against him could be founded. *Ex parte Tindall*, xxxi. 545.

2. *Assignment of part of trader's property.* Where a trader assigns part of his property, by way of mortgage, the question under the bankrupt laws is not whether putting the deed in force will put an end to his business, but whether it will make him insolvent. *Young v. Ward*, xiv. 462.

3. *Admission of demand—Failure to pay.* Where a creditor has filed an affidavit of a sufficient debt, and given his debtor, a trader, notice to pay, and summoned him before the Court of Bankruptcy, and the debtor files an admission that he owes part of the demand, and makes a deposition that he believes that he has a good defence as to the residue, and is excused by the commissioner of bankrupts from entering into a bond to secure it, though the debtor fail for more than seven days after the filing of the admission to pay the admitted portion of the demand, he does not thereby commit an act of bankruptcy within the meaning of the Bankruptcy Consolidation Act. *Oldfield v. Dodd*, xx. 380.

4. *Judgment on trader's bond.* A debt for which a trader gave a bond, and forfeited it before he ceased trading, is not merged in a judgment recovered on the bond after he ceased trading, so as to preclude the obligee from petitioning for adjudication against the obligor. Such judgment is a good foundation for an act of bankruptcy, having for this purpose relation to the trading of the obligor; and notice requiring payment of

the judgment, and not of the bond, is a good notice. A member of parliament may become bankrupt in such case. *Ex parte Griffiths*; *In re Mostyn*, xxi. 227.

5. *Sale of goods seized on execution.* A trader's goods had been seized on execution; he executed a bill of sale to the defendant, who paid out the sheriff; the jury found the object to be to protect the goods from other creditors, and not merely to relieve the trader from a forced sale. *Held*, a void sale, and an act of bankruptcy. It seems, it was void as to subsequent creditors, thereby delayed or defrauded. *Graham v. Furber*, xxv. 273.

6. *Assignment on eve of bankruptcy.* Where, on the eve of his bankruptcy, the bankrupt, upon being pressed for payment by a creditor, executed to him an assignment of so much of his estate and effects, as to render it impossible for him to continue carrying on his trade, this was *held* to constitute an act of bankruptcy, and to be void as against the general body of the creditors of the bankrupt. *Bailey, ex parte*, xix. 51.

7. *Fraudulent assignment of trader's stock.* *Semble*, that an assignment, though made *bonâ fide*, of the whole of a trader's stock for the price of a part, not because the trader is obliged, under pressure, to sell his stock for less than its value, but because an old debt is taken as part of the price, though the moving cause of the transfer may be a new advance, is a fraudulent transfer, constituting an act of bankruptcy within the 12 & 13 Vict. c. 106, s. 67. At all events, such assignment is an act of bankruptcy, even without fraud in fact, if it conveys all the trader's property including the sum advanced, and professes to give the assignee a right to take the trader's future acquired property upon non-payment of his debt within a certain time. *Graham v. Chapman*, xi. 498.

8. *Fraudulent grant as to creditors.* G., a farmer, who became liable to the bankrupt laws as a trader, by possessing two shares in a joint-stock bank, worth less than 20*l.* each, conveyed all his other property, worth about 3,000*l.*, to a creditor to secure his debt of 900*l.* *Held*, that the conveyance might be an act of bankruptcy, as a fraudulent grant with intent to defeat or delay creditors, although the two shares, which were G.'s only trading property, were not conveyed, and although the conveyance did not stop G.'s trade as a banker. *Held*, further, that the conveyance being of property worth three times the amount of the debt which it was given to secure, did not prevent the deed being an act of bankruptcy; for, though the grantee would be a trustee for G. as to the amount beyond his own debt, the property could not be taken in execution; and as the common-law remedies of the other creditors against their debtor's property would thus be barred, they might consequently be defeated or delayed. *Smith v. Cannan*, xviii. 390.

9. *Deed of assignment.* A trader being indebted to L., agreed with the defendant, upon his paying 200*l.* to L. in liquidation of the debt, to assign all her goods and effects to him as security for the repayment of the 200*l.* The deed of assignment contained a power for defendant to take all the goods of Y. which then were, or at any time during the continuance of the security might be, upon the premises, and to sell the same, and repay himself the 200*l.* and interest. There were covenants to pay the 200*l.* by instalments, and that Y. should remain in possession until default in payment. Y., who had remained in possession, sold the goods, and paid 207*l.* to defendant for principal and interest. Afterwards Y. became bankrupt. In an action by her assignees against defendant to recover the 207*l.*, the jury having found that the deed was not fraudulent, nor executed in contemplation of bankruptcy, it was *held*, that the deed was not an act of bankruptcy, inasmuch as the payment of the 207*l.* by defendant to L. was an advance to Y., to enable her to carry on her business, and she derived the full benefit of the whole sum advanced. *Hutton v. Crittwell*, xvi. 121.

II. *Trader, who is.*

1. *Cowkeeper.* A man farming 271 acres kept six cows, and sold milk, and sometimes butter. His intention in keeping the cows was to sell milk, and if he had not done so, the keeping of so many would have been unprofitable. It would not have been bad farming if he had kept no cows, but cows, to the extent he kept them, were the most profitable stock. *Held*, that he was not a trader liable to be made a bankrupt as a "cowkeeper" within the bankrupt laws. *Bell v. Young*, xxix. 237.

2. *Conduct as a trader.* Where all the material acts under consideration took place while a bankrupt carried on that trade in respect of which he was declared a bankrupt, those acts are to be regarded as "conduct as a trader," within the meaning of the statute. *Ex parte Dornford*, v. 242.

3. *Carrying on trade when under difficulties.* A man may fairly carry on his trade even where, if his assets were realized, they would have been less than his debts. Such a course may be likely to be beneficial to existing creditors, and may be pursued without dishonesty, if he have a well-grounded expectation and reasonable hope of surmounting his difficulties. *Ib.*

4. *Soliciting agent.* *Quære*, whether a person who is employed by merchants to solicit orders for their goods, being paid a commission on such orders, is a trader within the bankrupt law? *Hernemann v. Barber*, xxv. 357.

III. *Joint and separate Estate.*

1. *Partnership property.* A carried on business as a grocer, and was entitled to some stock in trade and furniture on the premises. He took B and C into partnership. Afterwards the firm became bankrupt. B and C did not pay any thing to A, or bring any money into the concern, and no deed of transfer of the property of A and no articles of partnership had been executed. After the partnership A ordered goods in the name of the firm. *Held*, that the stock in trade on the premises at the time of the bankruptcy was partnership property, and that the furniture was the separate property of A. *Owen, ex parte*, vii. 305.

2. *Transfer of proof from separate to joint.* A judgment having been obtained against one of three joint debtors, the other two being out of the jurisdiction, a fiat of bankruptcy was issued against him by the creditor. Afterward the creditor wishing to transfer his proof from the separate to the joint estate, the court decided that, on his agreeing to abandon the proof made against the separate estate, he was entitled to make such proof as he would have been entitled to make if the separate action had never been brought. *Ex parte Jones*, v. 240.

3. *Payment of dividends.* Where there was joint estate to the amount of 13*l.* it was *held*, that the joint creditors could not receive dividends from the separate estate, until all the separate creditors were paid in full, although it did not appear that after payment of costs any part of the 13*l.* would remain for distribution. *Ex parte Kennedy*, xix. 150.

4. *Member of banking company.* A member of a banking company, established under 7 Geo. IV. c. 46, cannot be proceeded against in bankruptcy for a debt due from the company, although the company may have ceased to carry on business, and an order have been obtained for winding it up under 11 & 12 Vict. c. 45, prior to such proceedings in bankruptcy. *Davison v. Farmer*, iv. 391.

IV. *Adjudication.*

1. *Annulling adjudication—Infancy.* Where a person, who has been adjudicated bankrupt, does not show cause against the validity of the adjudication within the period prescribed by sect. 104 of the stat. 12 & 13 Vict. c. 106, or commence "an action, suit, or other proceeding to dispute or annul the fiat," &c., within the period prescribed

by sect. 233, the court will not annul the adjudication, on the ground of infancy. *Ex parte John West*; *In re William and John West*, xix. 483.

2. *Obtained by fraud.* Where an adjudication in bankruptcy is obtained by false and fraudulent representations, the party making them is liable in an action against him by the alleged bankrupt, though the matters alleged, if true, would not be ground for the adjudication, and therefore the commissioner made a mistake in point of law. *Farlie v. Danks*, xxx. 115.

3. *Petition to annul.* A petition for annulling an adjudication of bankruptcy, presented by a creditor of the bankrupt at his instigation, must be treated as if presented by the bankrupt himself. *Ex parte Emery*, xxvii. 328.

4. *Petition against adjudication.* Where a creditor petitions against an adjudication within the proper time, and the petition is not heard within the twenty-one days from the adjudication, and when heard it is dismissed, and the creditor appeals within twenty-one days after the commissioner's decision on his petition, his appeal is in time under the 12th section of the statute. *Ex parte Bean*, xiii. 523.

5. A petition to the commissioner to annul the adjudication is not an appeal within the meaning of that section. *Ib.*

6. A doubt on the legal validity of an adjudication is not sufficient ground for annulling it. *Ex parte Bower*, xiii. 582.

7. *Declaration of insolvency.* A trader signed an act of insolvency, which was delivered to A, who, with his partners B and C, was a creditor. B and C, to whom the trader was also indebted in respect of another business carried on by them, at once distrained and took the trader's goods, and then, at the office of A's solicitor, agreed with the creditors upon a composition. After the execution of the composition deed, A filed the declaration of insolvency, and, on his affidavit of the joint debt due to him and B and C, the trader was adjudged bankrupt, which adjudication was, on appeal, set aside. *Ex parte Johnstone*, v. 234.

8. *Covenant to pay unliquidated sum.* P. and B. were engaged in partnership, and W. being about to join them in the business, stipulated that J. B., the father of B., should covenant with him that the debts due to P. and B. would realize a stated sum, and if not, he would, on demand of W., pay so much as it fell short of that sum to P., B., and W.; and also should covenant with W. that the debts owing by P. and B. did not exceed a stated sum, and if they did, J. B. would, on the demand of W., pay to P., B., and W., or the person or persons to whom the same might be due, the excess over that sum. The partnership of P., B., and W. was formed, and the covenants entered into accordingly. W. made a demand for payment of a sum which appeared to be due from the firm of P. and B., over the stated sum, and not being paid, an adjudication of bankruptcy was pronounced and affirmed against J. B., who appealed; and it was held, that the covenant was not to pay a stated or liquidated sum, but that the remedy of it lay in damages, and being so, the demand did not constitute a good petitioning creditor's debt, and the adjudication was, therefore, annulled. *Broadhurst, ex parte*, xix. 466.

9. *Isle of Man—Contesting validity of fiat.* The Isle of Man is not within the United Kingdom; and therefore a person residing there at the time of an adjudication of bankruptcy against him has three months within which he may contest the validity of the fiat or petition for adjudication, under 5 & 6 Vict. c. 122, s. 24, or 12 & 13 Vict. c. 106, s. 233. *Davison v. Farmer*, iv. 391.

10. *Non-appearance of petitioner.* A debtor presented a petition for arrangement with her creditors, but did not appear on the day appointed for the private sitting, and the petition was dismissed, and an adjudication of bankruptcy was made under the 223d section, and the same was held to be regular. *Ex parte Barnett*, v. 237.

11. *Summons—Particulars of demand.* A creditor, a wholesale dealer, issued a summons under the 78th section of the act, demanding payment of money due from a retail dealer in the same line of business, and described the items in the particulars of

demand as "goods." *Held*, that this described with sufficient certainty the wares supplied, so as to prevent the annulling of the adjudication on the ground of uncertainty. *Ex parte Bower*, xiii. 582.

12. *Certainty*. The situation of parties and nature of demand are to be considered in determining what is convenient certainty. *Ib*.

13. *Annulling adjudication—Commissioner's jurisdiction*. A commissioner has no jurisdiction to annul the adjudication after the time allowed by the 104th section of stat. 12 & 13 Vict. c. 106, for showing cause against the validity of the adjudication has expired, and a petition to the commissioner, praying that the adjudication may be annulled, is not a proper proceeding to dispute the adjudication, within the meaning of the 233d section of the act; and, although a petition of appeal to the Vice-Chancellor from the order on that petition be presented within twenty-one days from the date of that order, according to the 12th section, but more than twenty-one days after the advertisement of adjudication, the bankrupt is not entitled to have the adjudication annulled. *Ex parte Carter*, viii. 112, reversing case below, vii. 312.

V. Jurisdiction of Commissioner.

1. *Jurisdiction to annul adjudication*. A commissioner of bankrupts has no jurisdiction to annul his adjudication of bankruptcy, on the application of the bankrupt, except where the bankrupt shows cause against the adjudication under the 104th section of the act 12 & 13 Vict. c. 106. After the advertisement of the adjudication, the bankrupt must appeal to the superior court. *Ex parte Carter*, xx. 19.

2. *Power to remove assignees*. The commissioner, objecting to the solicitors employed by the creditor's assignees, as being connected by marriage with the bankrupts, requested the assignees to change them, and upon their refusal, made an order removing them from their office. *Held*, upon appeal, that the matter was one entirely in the discretion of the commissioner; and that, there being nothing to show a wrongful exercise of such discretion, the court ought not to interfere. *Ex parte Bates*, x. 310.

3. *Adjournment of meeting*. The discretion of a commissioner in adjourning a meeting for granting a certificate in bankruptcy, under 12 & 13 Vict. c. 106, s. 198, determined. *Woods*, *ex parte*, vii. 115.

4. *Authority to suspend advertisement*. Notice of an application to suspend the advertisement of bankruptcy was given within seven days of the adjudication, but no meeting was held till they had expired. On appeal from the commissioner's refusal to suspend, on the ground that the application was not within the seven days, as required by the statute, it was held that he had authority to suspend the advertisement. *In re Castelli*, viii. 280.

5. *Jurisdiction to accept surrender*. *Semble*, that the commissioner has jurisdiction to accept the bankrupt's surrender after the time fixed by the advertisement, and where the commissioner considered that he had no such jurisdiction without the leave of the Vice-Chancellor,—the Vice-Chancellor gave the leave, although not impressed with any favorable opinion towards the bankrupt, holding the surrender to be for the benefit of the creditors generally. *Ex parte Atkinson*; *In re Atkinson*, xvii. 513.

6. *Authority to appoint sitting*. The commissioner has authority under the 198th section of the Bankrupt Law Consolidation Act to appoint a sitting for the consideration of the grant of a certificate to a bankrupt, although the bankrupt does not make the application himself. *Ex parte Sherlock*, xiii. 548.

7. *Discretion of, as to sale of effects*. A commissioner, in the absence of one of the creditor's assignees, ordered a sale of part of the bankrupt's effects; that assignee appealed, but did not enter his petition until more than twenty-one days from the date of the commissioner's order. *Held*, that the discretion of the commissioner could not be interfered with, and also that the appeal was too late, the case falling within the 12th section of the act 12 & 13 Vict. c. 106. *Ex parte Flood*, xxxi. 259.

8. The condition of the existence of a single commissioner in the district does not apply to the 27th section. *Ex parte Barnett*, v. 237.

9. *Refusal of certificate.* Whether the court of appeal has jurisdiction to refer back the question of certificate after the commissioner has refused it, *quære*. *Ex parte Whitaker*, xiii. 522.

10. Whether the grant of the certificate by the commissioner after he has once refused it would be valid, *quære*. *Ib.*

11. *Commissioner, unavoidable absence of.* Where, upon an application being made to the Court of Bankruptcy in London, the senior commissioner, having transacted the business before him, had left the court for the day, this was held to be an unavoidable absence within the meaning of the 20th section of the Bankrupt Law Consolidation Act, so as to enable a junior commissioner, then present in court, to act for the senior commissioner in the matter of the application. *Ex parte Sewell*, xvii. 301.

12. *Expiration of time to show cause.* A commissioner has no jurisdiction to annul an adjudication, after the term allowed by 12 & 13 Vict. c. 106, s. 104, to show cause against the adjudication has expired. *Ex parte Carter*, viii. 112, reversing case below, vii. 312.

13. *Power to refuse protection or certificate.* Under the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, the commissioners have a discretionary power to refuse protection to a bankrupt, or to refuse or suspend the certificate of conformity, in any cases not within the penal enactment of sect. 256. *Ex parte Stanton*, viii. 283.

14. *Semble*, that wherever the commissioner thinks that the conduct of the bankrupt has been such that he ought to be amenable to the common-law rights of the creditors, it is in the power of the commissioner to withhold the protection, and so restore those common-law rights. *Ib.*

VI. Messenger.

1. *Taking goods of stranger.* A messenger of the Court of Bankruptcy, who takes the goods of a stranger, though in the *bonâ fide* belief that they are the goods of the bankrupt, which he is directed to take, is not entitled to the protection of the 12 & 13 Vict. c. 106, s. 107, but is liable to an action of trespass, without there being any demand of the perusal of such warrant. *Munday v. Stubbs*, i. 392.

2. *Balance due under old bankruptcy.* A commission of bankruptcy issued in 1817. A B acted as messenger from that time until 1821, and he was paid the greater part of his claim on account. Many years afterwards, moneys came to the hands of the official assignee, and the executors of the messenger petitioned for payment out of these moneys of the balance remaining due; but the court declined to make any order. *Ex parte Page*; xxvii. 332.

VII. Title of Assignees; Assets of Bankrupt.

1. *Sale by bankrupt after fiat.* Where a party receives property from a bankrupt, as his property, after the fiat, and sells it as the bankrupt's, the assignees may recover the value. *White v. Mullett*, v. 509.

2. *Trover by assignees.* A bankrupt, previously to his bankruptcy, deposited timber with the defendants, who were wharfingers, to be kept at their wharf, and delivered on payment of the wharfage. On the 7th of February, 1848, a fiat issued against him, and the plaintiff, Cannan, was appointed official assignee. The bankrupt, after the fiat, sold the timber, and between September, 1848, and January, 1849, it was delivered to the purchaser by the defendants, who had no notice of the bankruptcy.

In February, 1849, the other plaintiffs were appointed trade assignees. In trover by the official and other assignees, *held*, first, that the defendants were not liable for the value of the timber, being protected by the 6 Geo. IV. c. 16, s. 84. Secondly, that the issuing of the fiat was not notice to all the world of its issuing, the fiat not standing on the same footing as the old commission of bankruptcy. *Cannan v. The South-eastern Railway Co.* xiv. 334.

3. "*Goods belonging to any bankrupt.*" The words, in the 84th section, "goods belonging to any bankrupt," mean goods which belonged to the bankrupt at the time they were deposited in the possession or custody of the person delivering them, and which would have continued to be his property unless an act of bankruptcy had occurred. *Id.*

4. *Title to property in hands of third parties.* The plaintiff, having seized the goods of S., a trader, under a *fi. fa.* issued upon a judgment founded on a warrant of attorney previously given to him by S., took an assignment of the goods from the sheriff by bill of sale. The defendants, who were landlords to S., distrained for rent, and seized the goods under such distress whilst the plaintiff was in possession of them. Three days afterwards, S. filed a petition in bankruptcy, on which he was declared a bankrupt, and assignees were appointed. The assignees did not interfere with or demand the goods of the plaintiff, but they commenced an action of trover against the plaintiff for the conversion of goods. In an action for excessive distress, brought by the plaintiff against the defendants, the jury found that the warrant of attorney was given as a fraudulent preference of the plaintiff over the other creditors, in contemplation of bankruptcy. *Held*, that the property in the goods vested in the plaintiff by the bill of sale, subject to be divested by the assignees; and that, as the assignees had not interfered, the plaintiff was the owner of the goods, and the defendants, being wrongdoers, could not set up the title of the assignees to defeat the plaintiff's action. *Neurnham v. Stevenson*, iii. 512.

5. *Title to shares, how acquired.* R., holding shares in an incorporated company, became bankrupt, and handed the certificates of the shares (worthless at that time) to his assignees. Nothing was done on either side till five years later, when they demanded to be registered as owners, the shares having risen in value. The company refused, contending that as 25*l.* only had been paid on each 100*l.* share, the assignees to acquire a title must have signified their acceptance within a reasonable time, to be judged of by the court—five years not being so. *Held*, that, assuming an acceptance of the shares was necessary to give the assignees title, and that the acceptance ought to be within a reasonable time, still that the facts proved were evidence of the plaintiff's title, and that the question of reasonable time was a question for the jury; but that the judge ought to direct the jury that the reasonable time for accepting did not begin to run until some party interested in the shares had taken some step respecting them. *Graham v. The Van Diemen's Land Co.* xxx. 574.

6. *Bankrupt's property, how divested.* Goods and chattels in the reputed ownership of a bankrupt do not pass to his assignees by the adjudication of bankruptcy under sect. 141 of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. To divest the bankrupt's property in such goods, the Court of Bankruptcy must make an order to sell and dispose of them under the 125th section: *per curiam*; *dubitante*, Platt, B. *Heslop v. Baker*, iv. 555.

7. *Vesting order—Relation back of assignees' title.* Under the section of the Bankrupt Act, which makes an order necessary for the vesting of property in goods in the order and disposition of the bankrupt, as reputed owner, in the assignees, or vendee of the goods, the title of the assignees relates back to the act of bankruptcy, in the same manner as the title of the assignees by the general assignment has relation back. *Heslop v. Baker*, xx. 536.

8. *Trover against assignees.* In trover, by the owner of the goods against the bankrupt's assignees, the defence was that the goods, at the time of the bankruptcy, were

in the order and disposition of the bankrupt with the consent of the owner, and that the title to the goods vested in the assignees by virtue of an order of the Court of Bankruptcy. *Held*, that such defence was admissible under the plea of not possessed, although the action was brought before the order was applied for. *Ib.*

9. *Surplus of bankrupt's estates—Trustee and cestui que trust.* A trader, who was in insolvent circumstances, was the owner of leasehold property, which was charged with an annuity. He committed an act of bankruptcy, and, after that, A B paid off the arrears of the annuity and another sum, making 900*l.*; and, with the concurrence of the trader, took an absolute assignment of the annuity and arrears. Then the trader was adjudicated bankrupt, and assignees of his estate were appointed, after which A B bought the leasehold property so charged, and the same was assigned to a trustee for him. Upon a bill being filed by the assignees, the sale of the annuity and of the leasehold was set aside as fraudulent and void, with costs to be paid by A B to the solicitor of the assignees. An order was made in the bankruptcy, by which it was declared that the order as to costs in the decree was to be without prejudice to any question between the trader and A B. The trader obtained his certificate, and the leaseholds having been sold and all the debts paid, there remained a surplus. The trader assigned all his effects for value, and the purchaser claimed the surplus, but A B insisted that he was entitled to be repaid out of it such costs of the proceedings in chancery and bankruptcy as he had paid to the assignees; but the court *held*, that he was not entitled to them as against the trader or his assignee for value, because, if he and the trader were trustee and *cestui que trust*, in the purchase, he had set up an adverse title to the trader; and because, if he and the trader had in the purchase combined to defeat the creditors, it would be against public policy to give him the costs; and *held*, therefore, that the purchaser from the trader was entitled to the surplus. *James, ex parte*, xix. 460.

10. *Right to a legacy.* A son was indebted to his father. The father bequeathed to his son a leasehold estate, and declared it to be "entirely free from any claim, charge, demand, or lien of my son's creditors, or any or either of them, or of any person claiming under him, (the son,) either at law or in equity." Soon after the father's death the son became bankrupt. *Held*, that the assignees were entitled to the estate. *Harvey v. Palmer*, vii. 248.

11. *Relation back of title.* A trader, indebted to several creditors in a sum sufficient to form a petitioning creditor's debt, caused his goods to be taken in execution by the plaintiff, another creditor, with intent to defeat or delay his creditors, and by way of fraudulent preference; after which the defendants distrained them for rent while on the trader's premises. The trader subsequently filed a declaration of insolvency, and on this a fiat was awarded before the Bankrupt Law Consolidation Act, 1849, came into operation, and he was adjudged bankrupt on his own petition, under the 7 & 8 Vict. c. 96, s. 41. The plaintiff then sued the defendants for maliciously distraining for more rent than was due, and for taking an excessive distress, &c. After the commencement of the action, the assignees gave notice to the plaintiff that they elected to treat the execution as void; and they also gave notice to the defendants claiming the goods taken under the distress. *Held*, that as the fiat and adjudication proceeded on the bankrupt's own petition, the title of the assignees could not relate further back than to the act of bankruptcy on which the fiat proceeded, namely, the declaration of insolvency, and therefore that it did not relate back to the fraudulent execution; but that the case would have been otherwise had the fiat been obtained on the petition of creditors, and possibly so if the adjudication had proceeded on their petition, though the fiat had issued on the petition of the trader. *Held*, also, that the assignees had a right to disaffirm the fraudulent execution and claim the goods, as the transaction was voidable but not void; but, (*dissentiente* Erle, J.,) that such disaffirmance had no relation back, and that the goods, at the time of the seizure by the defendants, and until the assignees assumed their rights, were the plaintiff's property, and

consequently that he was entitled to maintain an action for illegal taking. *Held*, further, as in *Tancred v. Leyland*, iii. 482, that the first count was bad, and that the insertion of the word "maliciously" could not make that actionable which was not legally so without it; and that as damages had been assessed generally upon all the counts, there must be a *venire de novo*. *Stevenson v. Newnham*, xvi. 401.

12. *Action to recover back money paid by bankrupt on execution.* After issue joined in a hostile action against the bankrupt at the suit of the defendant, the bankrupt took out a summons for stay of proceedings on payment of debt and costs, and an order was made for stay of proceedings on payment within a given time. Default being made in payment, judgment was signed and execution levied, and the debt and costs paid to discharge the execution. The judge's order was not, nor was any copy thereof, filed within twenty-one days after the order, pursuant to sect. 137 of stat. 12 & 13 Vict. c. 106. *Held*, that the judge's order was obtained by consent of the defendant, and that the judgment and execution thereof were rendered void by sect. 137 of stat. 12 & 13 Vict. c. 106; and that the assignees of the bankrupt were entitled to recover the money paid by the bankrupt upon the execution, as money had and received to their use. *Farrow v. Mayes*, xvi. 95. •

13. *Action by assignees—Principal and agent—Stoppage in transitu.* A, as correspondent of B, purchased of C a cargo of Indian corn. The documents showed that C regarded A as his purchaser, and charged him with the price of the corn. A drew a bill of exchange for the amount on B, which was accepted. A, having become bankrupt before the bill was due, C stopped the cargo *in transitu*; and B agreed to take up his acceptance on the cargo being allowed to proceed. B having paid the amount of the cargo as invoiced by C to A, on being indemnified by C, and the cargo being allowed to proceed; it was *held*, in an action by the assignees of A, to recover the amount of B's acceptance, that A was the purchaser of the corn from C, and the seller of it to B, and not merely an agent, that therefore C had not, at the time, the right of stoppage *in transitu*, and that the assignees were entitled to recover. *Pennell v. Alexander*, xxiv. 132.

14. *Assignees of bankrupt joint tenant.* One of four joint tenants of a sum of 2,000*l.*, subject to a life-estate in M. B., married J. L. Afterwards J. L. became bankrupt; then the wife died; then M. B. died. *Held*, that the surviving joint tenants were entitled, in preference to the assignees in bankruptcy of J. L. *In re Barton's Trust*, xii. 323.

15. *Judgment on bankrupt's warrant of attorney.* Where judgment was signed within twenty-one days upon a warrant of attorney given by a bankrupt, and on the same day a copy of it was filed with the clerk of the dockets of the Queen's Bench, but no affidavit of the time of its execution was ever filed, it was *held*, that the judgment and execution issued upon it were void as against the assignees. *Acraman v. Herniman*, v. 292.

VIII. Liabilities, and Rights of Assignees.

1. *Official assignee—Contracts for sale of bankrupt's property.* Under the Bankrupt Act, prescribing the duties of official assignees, the official assignee is bound by contracts entered into by the creditors' assignees for the sale of the bankrupt's property, such contract not being in breach of their trust. *Hughes v. Morris*, xv. 175.

2. The provision in a contract for the sale of the property of a bankrupt, entered into by the creditors' assignees, that the purchase-money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the court to refuse specific performance of the contract. *Ib.*

3. *Solicitor of assignees.* The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy, but he is not, by such appointment, *per se* constituted the agent of the official assignee. *Ib.*

4. *Assignee of lessee—Liability for rent.* The mortgagor and mortgagee of one undivided moiety, and the owner of the other joined in a demise of the whole premises to G., for twenty-one years; G. covenanting with the three jointly and severally to pay (not saying to whom) the reserved rent. G. entered, and having become bankrupt, his assignee accepted the lease. *Held*, on the authority of *Wakefield v. Brown*, 9 Q. B. Rep. 209, that the assignees were liable in an action, at the suit of the three lessors, for rent due since their acceptance of the lease. *Magnay v. Edwards*, xx. 264.

5. What amount may be allowed to the official assignee under the 44th section, and what are the powers of the Lord Chancellor under the 54th section, see *Ex parte Glyn*, xiii. 566.

IX. Rights of true Owner of Goods in Possession of Bankrupt.

1. *Goods in possession, order, or disposition of bankrupt.* In order to render goods in the possession, order, or disposition of a bankrupt, &c., within the 12 & 13 Vict. c. 106, s. 125, two things are required—first, they must be in his possession under such circumstances as to render him reputed owner of the goods; secondly, they must have been left in his possession through some impropriety, or laches of the true owner, under circumstances calculated to enable the bankrupt to obtain a false credit by inducing the world to look on him as the true owner. *Hamilton v. Bell*, xxviii. 557.

2. The question whether goods are in the possession, order, and disposition of a bankrupt, may depend on the usage of some particular trade, which may vary at different times and places. *Ib.*

3. When property is left by the true owner in a shop where goods are notoriously left by parties for other purposes than for sale, the proprietor of the shop is not a reputed owner of them within that statute. *Ib.*

4. An order of the Court of Bankruptcy stated that the bankrupt had at the time he became bankrupt, by the consent of R. H., (the owner,) who then claimed and still claims to be true owner thereof, in the bankrupt's possession, divers goods, &c. *Held*, that the order was good, although it did not state in express terms that R. H. was the true owner of the goods. *Heslop v. Baker*, xx. 536.

5. An order of the Court of Bankruptcy, ordering the sale of goods of which the bankrupt was reputed owner, is not final and conclusive against the true owner. *Graham v. Furber*, xxiv. 333.

6. The true owner has a right, at any time before the fiat, to take back his goods which he has allowed the bankrupt to have the possession of as the reputed owner, provided he does so without notice of any prior act of bankruptcy, it being a "transaction" with the bankrupt, within the meaning of the 133d section of the 12 & 13 Vict. c. 106, and therefore protected. *Ib.*

7. *Retrospective order to sell goods in bankrupt's reputed ownership after actual sale.* A mortgagee of goods, under a power of sale, allowed the goods to remain in the order and disposition of the mortgagor, until the latter committed an act of bankruptcy, but took possession before any petition of adjudication was filed. On the mortgagor being found bankrupt, the messenger took the goods out of the mortgagee's possession and sold them. The mortgagee brought an action of trover and recovered, on the ground that, under the Bankrupt Law Consolidation Act, 1849, the assignees could not sell, without an express order of the commissioner, goods in the reputed ownership of a bankrupt. The assignees applied to the commissioner, who made an order retrospectively confirming the sale, and reciting as a fact, that the goods were in the order and disposition of the bankrupt at the time of the bankruptcy, with the permission of the true owner. *Held*, that the mortgagee was not entitled to have the order discharged on his appeal, as being invalid on the face of it; and on the appellant declining to enter into the question whether he had notice of the act of bankruptcy, when he took possession, his appeal was dismissed with costs. *Held*, also,

that the time of the commissioner signing and delivering out an order, and not the time of his pronouncing it, is its true date, with reference to an appeal. *Ex parte Heslop*, xv. 18.

X. *Debts provable.*

1. *Breach of bond for payment of annuity.* Where the defendant is surety on a bond for the payment of an annuity, the annuitant cannot prove under the bankruptcy of the defendant in respect of previous breaches of the bond, and consequently the bankruptcy and certificate of the defendant are no defence to the action. *Amott v. Holden*, xvi. 142.

2. *Against bankrupt drawers and acceptors of bills.* Two firms, K. and Company and B. and Company, had dealings together, during which K. and Company made payments for and accepted bills for the accommodation of B. and Company, and received from B. and Company cash and bills as payment of and security for the outlay and liabilities made and incurred. By the course of dealing adopted by the two firms, the amounts received by K. and Company on the bills deposited with them by B. and Company, were credited by K. and Company to B. and Company in a cash account. In July, 1812, K. and Company became bankrupt, and B. and Company became bankrupt in the following month, and at the period of the bankruptcies there was a large balance due to K. and Company. The bill-holders proved against both estates, having been paid 10s. in the pound out of the estate of B. and Company, the principal debtors, and then 10s. in the pound, out of K. and Company's estate, who were the sureties. *Held*, affirming a decision of the Vice-Chancellor in bankruptcy, first, that the assignees of the estate of K. and Company were entitled to prove against the estate of B. and Company the amount on the cash balance due at the date of the bankruptcies; secondly, were entitled to appropriate the amounts received on the deposited bills to the discharge of their liabilities to the bill-holders; and, thirdly, that they were entitled to the benefit of the proof made by the bill holders against the estate of B. and Company, until they should be recouped the excess paid by the estate of K. and Company, to the bill-holders, over and above the sums realized from the deposited bills. *Ex parte Johnson; In re Bulmer*, xix. 474.

3. *By trustee under a will.* One of the residuary legatees under a will was the surviving trustee of it. The other was subsequently appointed a new trustee under a power, the trust estate then consisting of 9,000*l.* due from the continuing trustee, and of shares in a company, valued at 6,000*l.*, which were transferred into the names of the two. After the death of certain *cestuis que trustent* who were entitled for life, and when the trust estate constituted a clear fund belonging in moieties to the two residuary legatees, subject only to the payment of legacies, which amounted to 4,000*l.*, the continuing trustee became bankrupt, still owing the 9,000*l.* to the trust estate. *Held*, that the new trustee was not entitled to prove for this amount, and retain the dividends till he should be paid his share in full, but could only prove to the extent of his beneficial interest immediately before the bankruptcy; and that, as the bankrupt could then have settled with him by paying 3,500*l.*, that was the amount provable. *Ex parte Turner*, xxi. 649.

4. *Forged bill discounted by bank.* A brought to a bank a bill of exchange, appearing to have been drawn by B, and accepted by C, and stated that he was agent for B. The manager agreed to discount the bill without an indorsement by A, and the money was paid to A. It appeared afterwards that the signature of C had been forged by B, but A was assumed to have had no knowledge of the forgery. A became a bankrupt. The bank tendered a proof against his estate in respect of the bill, which was allowed by the commissioner, but no inquiry was then made whether the money had passed from A to B. *Held*, that, upon the present state of the evidence, the proof was wrongly admitted, and the matter was referred back to the commissioner, with liberty to either party to add to the evidence. *Bird, ex parte*, vii. 308.

5. *By trustees of marriage settlement.* If an insolvent makes a marriage settlement, the intended wife knowing nothing of the insolvency, and enters into a covenant with trustees to pay them a certain sum of money, subject to the wife's appointment, and in process of time he becomes bankrupt, the trustees are entitled to prove against the assignees. *Ex parte Mac Birnie's Trustees*, xiii. 479.

6. *Marriage settlement—Covenant with trustees.* A trader, in his marriage settlement, covenanted with trustees to pay them 3,000*l.* "out of the first capital moneys or real or capital personal estate or capitalized income of or to which he should be or become possessed or in anywise entitled after the solemnization of the marriage," within six months after he should "have become" so possessed or entitled. The marriage took place, but the money was not paid. The trader was possessed of stock in trade and other effects far exceeding in value the 3,000*l.* down to the time when he became bankrupt, and for a long time, more than six months after the date of the settlement, more than enough to pay all his debts for the time being, including the 3,000*l.* The trustees tendered a proof, but the same was refused; but on appeal it was held, that as the bankrupt had property six months after a settlement, more than enough to satisfy the 3,000*l.*, and as there was a breach of the covenant by non-payment at the end of six months, the trustees were entitled to prove. *Evans, ex parte*, xix. 455.

7. *Damages received before, but determined after adjudication.* If, prior to the petition for adjudication of bankruptcy, a verdict for damages in an action for tort is recovered against the bankrupt, but the amount is not determined until after the adjudication, the party obtaining the verdict cannot prove its amount in the bankruptcy. *Ex parte Todd*, xxxi. 549.

8. *Surety—Subrogation.* Where a principal debtor, or his estate, pays part of a debt, and the creditor proves for the remainder, and the surety of the principal debtor pays the remainder of the debts, the latter has, by relieving the estate of the principal debtor from further demand in respect of the debt, placed himself within the meaning of the 8th section of stat. 49 Geo. III. c. 121, and is entitled to stand in the place of the creditor in respect of his proof against the estate of the principal debtor. *Ex parte Johnson; In re Bulmer*, xix. 474.

XI. *Privileged Claims, and Rank of Creditors.*

1. *Lien of purchaser.* A hotel keeper, who was also the owner, agreed, on the 24th of March, 1851, to sell his hotel, and to assist in carrying on the business for two years, receiving half the profits. The purchaser's wife (who was the hotel keeper's daughter) went on the premises and assisted in managing the concern. From the purchaser's letters, it appeared that he was not able to supply the funds necessary to carry on the business; and in a letter of the 24th of May, 1851, he wrote thus to the hotel keeper: "You must mortgage or sell the premises." He subsequently asked the hotel keeper to give him a mortgage on the hotel, for sums which he claimed to be due to him, and brought an action against the hotel keeper for, among other things, a remuneration in respect of the services of his (the purchaser's) wife above mentioned. The hotel keeper became bankrupt. Upon a claim filed by the purchaser against the assignees, claiming that they should elect specifically to perform the agreement, or that it should be declared that the purchaser was entitled to a lien for the sums he had advanced under the contract, it was held, that although the purchaser would have been entitled to a lien, if the contract had failed through the vendor's default; yet that, as the purchaser had himself abandoned the contract, the purchaser was not entitled to any lien, and his claim was dismissed. *Dinn v. Grant*, xvii. 526.

2. *Priority of judgment creditors.* A trader gave a warrant of attorney, on which, in April, 1848, judgment was entered up. In February, 1852, an arrangement was attempted with the general body of creditors to avoid a bankruptcy. The trader signed

a declaration of insolvency. At a meeting between the judgment creditors and an agent for the other creditors, the former were informed of this, and were asked and made a promise, the terms of which were in controversy, not to take any steps to gain priority; and the meeting was adjourned to a future day. In the mean time the judgment creditors registered their judgment; and on the trader being adjudicated bankrupt, they petitioned the commissioner that they might be declared equitable mortgagees of the real estate of the bankrupt; but, on the ground of breach of faith, the commissioner dismissed the petition, with costs. On appeal, the court decided that what took place at the meeting, even if a promise was generally made, was not enough, on the one hand, to support a bill to restrain the registration of the judgment, nor on the other to support a bill to restrain the filing of the declaration of insolvency, and that the decision of the commissioner must be reversed. *Boyle, in re*, xix. 493.

3. A judgment on a warrant of attorney, although not executed, may now constitute a lien upon real estate in case of bankruptcy. *Ib.*

4. *Priority of creditors subsequent to bankruptcy.* Where an attorney and solicitor became bankrupt, and, without having obtained his certificate, commenced practice and continued to do so with the knowledge of the creditors who had proved, it was held, that the subsequent creditors had priority over those who had proved, and that the estate was to be administered in equity and not in bankruptcy. The official assignee, who appealed from a decree of the court below, was ordered to pay the costs personally. *Tucker v. Hernaman*, xix. 541.

5. *Seizure of goods on execution as giving priority.* The seizure of a trader's goods under an execution in an action commenced adversely, gives the creditor no priority in case such trader is made bankrupt upon a petition for adjudication filed before the sale of the goods, whether the act of bankruptcy is before or after the seizure. *Hutton v. Cooper*, ii. 423.

6. *Drawers in mines not "laborers."* Drawers, employed in the excavation of mines held not entitled as laborers or workmen under the 169th section of the Bankrupt Law Consolidation Act, to payment of wages out of the estate of the bankrupt proprietors of the mines. *Eckersley v. Byrom*, xvii. 215.

7. *Bankrupt drawers and acceptors.* The principle of *Ex parte Waring*, 19 Ves. 345, applies to cases of actual as well as judicial insolvency. *Powles v. Hargreaves*, xix. 257.

XII. Certificate.

1. A bankrupt was refused his certificate by the commissioner, for an offence not enumerated in the 256th section of the stat. 12 & 13 Vict. c. 106, namely, for systematically buying goods at a small price and short credit, and immediately selling the same at still lower prices. He was also refused any protection except pending an appeal. On an appeal the court refused to grant any certificate, but made an order, by consent of the assignees, giving protection for the person of the bankrupt, but leaving his property liable. *In re Holthouse*, viii. 277.

2. *Certificate of conformity, suspension of—Taking in execution.* A bankrupt, whose certificate of conformity is suspended for a given time, cannot be taken in execution after the expiration of that time, on a writ of execution issued during its continuance, under the provisions of the 257th section of the 12 & 13 Vict. c. 106. *Quære*, whether execution under that section can be enforced against the property of the bankrupt. *Eserhard, in re*, ii. 382.

3. *As protection against commitment.* *Semble*, the production of a certificate in bankruptcy granted to a defendant, after the obtaining of a judgment against him in a county court, is a sufficient answer to a summons under the 98th section of stat. 9 & 10 Vict. c. 95. *Rackham v. Blowers*, v. 347.

4. *Right to, as affected by gaming or wagering.* *Semble*, railway shares, as distinguished from railway stock, are within the 201st section of the Bankrupt Law Con-

solidation Act, 1849, which provides that no bankrupt shall be entitled to a certificate who has, within the period mentioned in the act, lost 200*l.* by any contract for the purchase or sale of any government or other stock. *Copeland, in re*, xvii. 93.

5. And *semble*, per Lord Cranworth, L. J., that a contract for the purchase of railway stock, not performed by a transfer of the stock within one week after the contract, but carried over from time to time by means of continuation contracts with the broker, is within the provision of the 201st section of the Bankrupt Law Consolidation Act, 1849, that no bankrupt shall be entitled to a certificate who has, within the period mentioned in the act, lost 200*l.* by any sort of gaming or wagering. *Id.* See, also, *Ex parte Matheson*, xiii. 482.

6. *Delay to grant—Joint and separate fiat.* It is no sufficient reason for delaying the grant of a certificate under a separate fiat, that during the further proceedings under a joint fiat against the bankrupt and others, matters may be disclosed that may render it proper to refuse this certificate, or grant it with modifications. *Ex parte Braggiotti; In re Braggiotti*, xix. 491.

7. *Delay to grant—Action pending.* Nor is it a sufficient reason that an action is pending, to try whether two out of three other persons against whom and the bankrupt a joint fiat has been issued, are legally bankrupts. *Ex parte Castelli; In re Castelli*, xix. 492.

8. *As affected by prior bankruptcy.* A bankrupt, who has been made a bankrupt before, and paid on that occasion less than 15*s.* in the pound, will not, in the matter of his certificate, be placed in a more favorable position than he would have been in under the 6 Geo. IV. c. 16, and is merely entitled to protection for his person. *Hollingworth, ex parte*, vii. 303. See, also, *Ex parte Hodgson*, xxvii. 405.

9. *Refused on account of money fraudulently obtained.* A trader obtained money on pretence that it should be invested on mortgage, which was not done. He became bankrupt, and a certificate was refused him on the ground that the money was obtained by fraud and falsehood. *Ex parte Staner*, xiii. 576.

10. *Void, in case of fraudulent concealment of property.* The certificate of a bankrupt who has concealed any part of his property with intent to defraud his creditors is void by the 38th section of the 5 & 6 Vict. c. 122, even though he voluntarily gives it up before the granting of the certificate. *Courtivron v. Meunier*, ii. 393.

11. *Granted, with proviso.* A bankrupt having been guilty of breaches of trust, the court, on appeal, granted him his certificate, but added a proviso, by which he was not to be protected from all claims upon him as a trustee. *Wakefield, ex parte*, vii. 302.

12. *Right to, as affected by dealing in accommodation bills.* If a bankrupt has dealt in accommodation bills, that is a circumstance requiring a full and satisfactory explanation, but is not necessarily one affecting his title to a certificate; and although every such transaction must be judged of according to its particular circumstances, the main point for consideration is, how far the bankrupt had reason to believe that he could discharge his liability upon such bills, on their becoming due. *Ex parte Hammond*, xxxi. 260.

13. *Refused to bankers continuing in business after insolvency.* Bankers who, upon the evidence before the court, must be taken to have been, and to have known that they were, deeply insolvent, continued to receive deposits and to issue notes for a period of eighteen months; and it was held that they were not entitled to any certificate, or protection. *Ex parte Rufford*, xiii. 542.

14. A banker, who has pledged a short bill of a customer, is excluded from a certificate. *Sturt, ex parte*, xvii. 515.

15. *When not to be refused.* A certificate ought not to be refused to a bankrupt on the ground that he has withheld certain information from a creditor whom he had induced not to enforce payment of a certain sum, if that information was not withheld from an unfair motive. *Ex parte Gull*, xiii. 557.

16. *Refused on account of fraud.* A bankrupt, who had twice before compounded with his creditors, having made false and fraudulent entries in his books, consisting of

fictional accounts in particular names, was refused a certificate and all protection. *Ex parte Curties*, xiii. 571.

17. *What certificate should state.* A certificate of conformity to the bankrupt laws, issued by commissioners under the 6 Geo. IV. c. 16, ought to state that there does not appear to them any reason to doubt the "truth or fulness" of the discovery made by the bankrupt of his estate and effects—the merely saying that there does not appear any reason to doubt its "fulness" is insufficient. *Wagner v. Imbrie*, v. 503.

18. *Grant of certificate, a judicial act.* The grant of the certificate by the commissioner under the 225th section of the Bankrupt Law Consolidation Act, is a judicial act, and he may look at the nature of the deed of arrangement to see whether it is of the nature contemplated by the 224th section, and if it appears not to be so, he may refuse his certificate, although the deed be executed by the required number and value of the creditors. *Ex parte Wilkes*, xxxi. 265.

19. *Loss of bankrupt by gaming.* In estimating the loss upon a contract for the purchase or sale of government or other stock, with reference to the question whether a bankrupt, by such contract, has been brought within the penal provision of the 201st section of the Bankrupt Law Consolidation Act, 1849, the broker's commission must be included, and the gross amount of the loss arising from the variation in the price of the stock, added to the commission taken as the measure of the loss. Therefore, where a bankrupt had, within a year of the date of his petition for adjudication, lost, upon a contract for the purchase of railway stock, a sum, exclusive of the broker's commission, slightly less than 200*l.*, but which, when added to the broker's commission upon the purchase, made up a sum slightly exceeding 200*l.*, the bankrupt was held liable to the penalty. *Copeland, in re*, xvii. 93.

20. The word "contract," used in the section of the statute, includes "contracts;" and, therefore, the bankrupt is liable to the penalty of the statute where he has lost, within the period mentioned therein, 200*l.*, arising from the aggregate of losses upon several contracts. *Ib.*

XIII. Deed of Assignment.

1. *Vests in trustee what portion of debtor's estate.* The effect of the 8th section of stat. 7 & 8 Vict. c. 70, for facilitating arrangements between debtors and creditors, is to vest in the trustee appointed under the statute that portion only of the petitioning debtor's estate which he has proposed to give up, and the creditors have agreed to accept, in liquidation of his debts. *Robins v. Hobbs*, v. 86.

2. *Notice to creditors—Discharge of debt—Bill of exchange.* To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that, being a trader, he presented a petition to the Bankruptcy Court, under the 12 & 13 Vict. c. 106, which court appointed a private sitting, and that fourteen days before such sitting written notice was given to every person whom the defendant then knew to be his creditor, or whom he had any means of knowing to be his creditor, and amongst others to the drawer of the bill of exchange, and that he did not, at the time of giving such notices, nor did the Bankruptcy Court, or the official assignee, know that the drawer had indorsed the bill, or was not the holder, or who was the holder, or the address of such holder; that the defendant filed an account of his debts, wherein he set forth a proposal to pay his creditors 7*s.* 6*d.* in the pound; that at such private sitting of the Bankruptcy Court, the requisite number of creditors proved their debts and assented to the defendant's proposal; that the Bankruptcy Court proposed another sitting; of which the plaintiff had notice; that at such second meeting, the requisite number of creditors proved their debts, and agreed to accept the defendant's proposal; that the Court of Bankruptcy then confirmed the proposal and agreement, and afterwards gave the defendant a certificate in the form in schedule A. *Id.*, that the plea was bad in not averring that the resolution and agreement had

been carried fully into effect, and the creditors satisfied pursuant to the 221st section of the 12 & 13 Vict. c. 106. *Alcard v. Wesson*, xiv. 360.

3. *When not binding on creditors not parties.* A deed by which a trader assigned all his estate to trustees for the benefit of his creditors, contained a provision that the trustees might require the creditors to verify their debts by declaration or otherwise; and that, in the event of any creditor failing or refusing so to verify his debt, he should lose all dividends under the deed, and that such dividends might be paid by the trustees to the debtor. *Held*, that this was not such a deed of arrangement as could be binding on creditors not parties to it, under the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 224, as it did not necessarily provide for the distribution of the whole of the debtor's estate among his creditors. *Cooper v. Thornton*, xvi. 258. See, also, *Tetley v. Taylor*, xii. 469; *Drew v. Collins*, iv. 540; *Ex parte Wilkes*, xxxi. 265; *Fisher v. Bell*, xiv. 245.

XIV. *What Actions barred.*

1. *Defective description in schedule.* Defendant gave a renewal bill for 26*l.* to W., who, without his knowledge, indorsed it to plaintiff. W. died, and defendant, being insolvent, thus described the debt in his schedule: "The representatives of W. are Messrs. X., varnish-makers. 30*l.* admitted for varnish. They hold a bill for 30*l.* and upwards, drawn by self and partner, and renewed by self." Defendant pleaded an order for protection in insolvency, the debt being contracted previous to filing his petition. Replications, first, that the debt was due at the time of said filing, and plaintiff was not named in the schedule as a creditor, nor was the bill named; second, that the debt was due, and plaintiff was indorsee and holder, to defendant's knowledge, and yet was not named, &c. *Held*, first, that the plea was bad, and that the two replications constituted but one answer to the plea; secondly, that the description in the schedule was defective, and that the debt was not barred. *Kemp v. Hurry*, xxx. 583.

2. *Calls by joint-stock company.* A joint-stock company, completely registered, became bankrupt. One of the members of the company had previously been declared bankrupt, and had obtained his certificate. The Master placed the bankrupt's name on the list of contributors, and calls were made by the Master on him for contributions to discharge the liabilities of the company incurred before his bankruptcy. *Held*, on his appeal, that his certificate was a bar to the liabilities, to satisfy which the calls were made; and that the bankrupt's name ought to be removed from the list of contributors. *Chapple's Case*, xvii. 516.

3. *Notice of sitting of court not given to creditor.* The certificate granted to a petitioning trader by the commissioner of bankruptcy, under sect. 221 of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, will not prevent a creditor from suing the trader for a debt, if the creditor has not had notice of both sittings of the court to consider the trader's proposal of compromise; even if the creditor be the indorsee of a bill of exchange drawn by a third party and accepted by the trader, and the latter at the time of giving the first notice was ignorant that the bill had been parted with by the drawer, and had given the drawer due notice of the first sitting, and after the first sitting, learning to whom the bill had been indorsed, had given the indorsee due notice of the second sitting. *Wesson v. Alcard*, xvi. 481.

4. *Calls on railway-shares.* The defendant, being the holder of shares in a railway company, became bankrupt. No transfer of the shares to the assignees had taken place in the mode pointed out by the Companies Clauses Act, 8 Vict. c. 16; but before the fiat a correspondence took place between the official and the trade assignee, in which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares in question, and estimating the amount that would be necessary to work the fiat and pay dividends, and he subsequently wrote suggesting the propriety of selling the shares. *Held*, that the debt was not barred

by the certificate, as it was not provable under the fiat, as a debt due *in futuro*, within sect. 51 of the 6 Geo. IV. c. 16, or as a debt due on a contingency within sect. 56 *The South Staffordshire Railway Co. v. Burnside*, ii. 418.

5. *Shareholder's liability to call.* The bankruptcy of a shareholder dissolves his connection with the company, and he cannot be made contributory to any call made subsequent to the fiat. *Ex parte Greenshields*, xi. 240.

6. *Contingent liability.* The defendant executed a bond, whereby he became liable to pay to the plaintiff such costs as the plaintiff should be liable to, in case a verdict should pass for certain defendants in an action of *scire facias*; wherein the now plaintiff sued as a nominal party. The action on the *scire facias* was tried at the spring assizes in 1848, and a verdict was found for the then defendants; after which, in Easter term, a rule *nisi* for a new trial was obtained. In November following, the defendant in the present action became a bankrupt. In Hilary term, 1849, the rule for a new trial was discharged. In May, the defendant obtained his certificate, and in August, the costs in the action on the *scire facias* were taxed, and final judgment signed against the now plaintiff. *Held*, that the plaintiff's claim was not barred by the defendant's certificate, the debt not being a contingent debt within the 6 Geo. IV. c. 16, s. 56, but only a contingent liability. *Hankin v. Bennett*, xiv. 403.

7. *On promissory note.* In July, 1846, A received for value of defendant a blank promissory note stamp, signed by him. In May, 1851, defendant obtained a certificate in bankruptcy. In October, 1852, A filled up the note for 24*l.* at one month's date, and indorsed it to plaintiff for value. *Held*, that there was no claim provable under the fiat, and, consequently, the certificate was no bar to an action on the note. *Semble*, the case would not be altered by proof of a collusive attempt to create a debt to which the certificate would be no bar. *Temple v. Pullen*, xx. 306.

8. *Debts not proved.* Whether, after a refusal of a certificate, the grant of protection is of any avail against the common-law right of creditors who do not come in under the bankruptcy, *quære*. *Ex parte Rufford*, xiii. 542.

XV. Preferences, and fraudulent Transfers.

1. *Buying goods for purpose of pledging.* Where the usual course of dealing carried on by the bankrupt, who had traded without capital, had been to purchase goods, and immediately afterwards to raise money by pledging them, and it appeared that this was done, not for a purpose merely dishonest, but in accordance with the custom in his trade, and with the *bonâ fide* expectation of being able afterwards, on a rise in the market price of the goods, to redeem the goods and sell them at a profit, it was *held* that this was not equivalent to the offence of contracting debts "by any manner of fraud, or by means of false pretences," within the meaning of the 256th section of the Bankrupt Law Consolidation Act, 1849. *Ex parte Manico*, xvii. 594.

2. *Discretion of court.* The 256th section of the statute is to receive a strict, rather than a loose construction, as against the bankrupt; and, *semble*, that where one only of the offences enumerated in the 256th section has been committed, it is not imperative upon the court to inflict the full penalty specified in the statute; but that it has a discretion, upon the circumstances, to award a minor degree of punishment. *Ib.*

3. *Payment of wife's debt by husband.* If a *feme sole* gives her creditor a bill of sale of her stock in trade as security, and afterwards marries, it is no fraudulent preference of creditors within the 12 & 13 Vict. c. 106, if the husband pay, before his bankruptcy, a portion of his wife's debt for the sake of having her creditor withdraw the bill of sale. *Ex parte Hunt*, xiii. 538.

4. *What constitutes, within bankrupt act.* In August, 1853, and for some months following, a retail draper, who afterwards became bankrupt, bought large quantities of goods on credit, and in November, and for some months subsequently, sold them, from time to time, to the defendant, who was a job-dealer, at prices considerably below their real value. *Held*, that in the absence of proof of the bankrupt's intention to

decamp with the money, or otherwise defraud his creditors, and of the buyer's knowledge of such intention, such sales were not of themselves acts of bankruptcy as amounting to a "fraudulent transfer," within the Bankrupt Act. *Lee v. Hart*, xxviii. 531.

5. *Pledging goods—Not keeping proper books of account.* E. M. and H. M. purchased a business of their brothers, but it was not paid for. E. M. attended to the accounts, so far as they were attended to, and H. M. performed the duties of traveller to the business. E. M. and H. M. on various occasions raised money by deposits of goods, and paid 60*l.* per cent. for discount. H. M. ordered goods one day and pledged them on the next. The brothers, the vendors of the business, sued for the purchase-money and issued execution on a judgment in the action. Both E. M. and H. M. were adjudicated bankrupts, and the commissioner refused them their certificates or protection, on the ground of not keeping proper books of account (as to E. M., destruction of books,) obtaining goods for the purpose of pledging, and pledging them, and fraudulent preference to the brothers who sold the business. H. M. appealed, and swore that he pledged the goods to meet a sudden demand for payment of bills falling due; that he believed he was solvent when the goods were bought, and that he had nothing to do with the keeping of the books, and he produced a witness who swore that the goods were ordered because they were wanted in the stock. The lords justices were of opinion that there was no wrong intention as to the books or the pawning, and that there was pressure by the vendors, and, acquitting the appellant of fraud, granted him a second-class certificate, to be dated eight months after the adjudication. *Ex parte Martyn*, xiii. 562.

6. *Mortgage of all mortgagor's property.* A assigned all the wares, stock in trade, &c., in his store to B, as a mortgage to secure the repayment of money then advanced. The deed provided that on the non-payment of the principal and interest on or before certain days mentioned, then the mortgagee might enter, forcibly if necessary, and take possession. More than a year after the day for payment the mortgagee took possession; the next day A committed an act of bankruptcy, and was soon adjudicated a bankrupt. *Semble*, that the mortgagee was not entitled to retain the goods unless the mortgagor had, at the date of the mortgage, other property. *Ex parte Sparrow*, xxi. 646.

7. *What is not.* All but one of a bankrupt's creditors agreed to take 3*s.* 6*d.* in the pound, and signed a petition to have the bankruptcy annulled. The dissenting creditor refused to sign, unless the bankrupt would guarantee to him 16*l.* in part payment of his debt. This was done without the other creditors' knowledge. *Held*, in an action on the guarantee, that it was not fraudulent. *Smith v. Saltzman*, xxv. 476.

XVI. Practice.

1. *Refusal of certificate of conformity.* When the Court of Bankruptcy has refused a certificate of conformity on the ground that the bankrupt has committed any of the offences enumerated in sect. 256 of stat. 12 & 13 Vict. c. 106, the granting a certificate to the assignees, or a creditor, upon which execution may issue against the body of the bankrupt, in pursuance of sect. 257, is a ministerial act, and being for the purpose of enforcing payment of the bankrupt's debts, may be granted from time to time upon the application of the assignees or creditors. *In re Cowgill*, iv. 270.

2. The Court of Queen's Bench cannot inquire into the grounds upon which a certificate of conformity was refused by the Court of Bankruptcy. *Id.*

3. *Petition to stay certificate—Service—Costs.* Upon a petition to stay the bankrupt's certificate coming on to be heard, it appeared that the petitioners had not been able to serve the petition upon the bankrupt, he having gone out of the jurisdiction. The court dismissed the petition, with costs as against the assignees, but upon the petitioners undertaking not to file another petition, without costs as against the bankrupt. *Ex parte Eyre and Higgins; In re Belton*, xvii. 50.

4. *Notice before court of appeal.* Under the 198th section, three days notice of opposition is as necessary before the appeal court as before the commissioner. *In re Holthouse*, viii. 277.

5. *Balance-sheet.* It is not necessary that the balance-sheet in all cases of bankruptcy be made out by the official assignee; the commissioner has a discretion in each case whether to employ a person to assist the bankrupt or not. *Ex parte Russell*, xxvii. 146.

6. The official assignee of the bankrupt's estate is not a person to whom an allowance can be made, under the 160th section of the Bankrupt Law Consolidation Act, 1849, out of the estate and effects of the bankrupt, for assisting him to prepare his balance-sheet and accounts. *Ib.*

7. *Commitment of bankrupt for not answering.* In order to justify the commitment of a bankrupt, under sect. 260 of the Bankrupt Law Consolidation Act, for not fully answering questions to the satisfaction of the court, the examination should be full, fair, and searching, and not rambling or irrelevant, but limited to the matters mentioned in sect. 17, namely, "relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts." *Ex parte Legge*, xviii. 235.

8. Where a bankrupt, on a second or subsequent examination, states that he wishes to explain some of his former statements, but that he does not sufficiently recollect them, his memory should be refreshed by their being repeated to him. *Ib.*

9. *Examination of bankrupt.* A bankrupt, on examination, is bound to answer as to matters which must, more or less, be in his recollection, (e. g. why a check was drawn;) the answer that he does not recollect may be full and direct but is not sufficient. The warrant to commit for not answering should set out such questions and answers, that the court may judge of the reasonableness of the committal, from the whole case. *In re Bradbury*, xxv. 252.

10. *Summons under consolidation act.* A bankrupt cannot under 12 & 13 Vict. c. 106, s. 120, obtain summons without the concurrence of his assignees for the examination of a party suspected of having the bankrupt's property. *Ex parte Dimsdale*, xxvii. 333.

11. *Vote by letters of attorney—Superseding bankruptcy.* A creditor resident in England may vote by letters of attorney at meetings held, under the 230th section of the Bankrupt Law Consolidation Act, to take into consideration an offer made by a bankrupt to his creditors, with a view to superseding the bankruptcy. *Clegg, ex parte*, vii. 316.

12. *Summons by creditor—Tender.* Where a creditor has issued a summons to his debtor, and the debtor attends and admits part of the debt and tenders the part he admits, the creditor may by his conduct render it unnecessary for the debtor to actually produce and show the money, in order to comply with the requirements of the 82d section of the 12 & 13 Vict. c. 106. *Danks, ex parte*, xix. 486.

13. *Quære*, whether, under the same section, it is necessary that the same proof of tender should be given as would be necessary to support a plea of tender in an action, their lordships not agreeing upon the point. *Ib.*

14. *Bankruptcy of plaintiff.* Where sole plaintiff becomes bankrupt, the defendant may move that the assignees may elect within a certain time to file their supplemental bill, or in default that all further proceedings should be stayed; and is not compelled to file his bill of revivor and proceed with the cause. *Clark v. Tipping*, x. 292.

15. *Appeal to House of Lords as to sufficiency of debt.* Where the court, differing from the commissioner, and holding the petitioning creditor's debt to be sufficient, referred back to him the question of the validity of the adjudication, an application for leave to appeal to the House of Lords from the decision as to the sufficiency of the debt, was held premature, and was ordered to stand over till the commissioner should have given his decision. *Ex parte Griffiths*, xxi. 227.

16. *Order for sale of goods.* An order by a commissioner of bankruptcy, for the sale of goods in the possession, order, or disposition of a bankrupt, as reputed owner, under the 125th section of the 12 & 13 Vict. c. 106, must be specific as to the goods to which it is to apply (although it may be made on an *ex parte* application;) and therefore, an order to sell all goods which at the time, &c., of the bankrupt, was *held* bad. *Quartermaine v. Bittlestone*, xx. 204.

17. *Stay of proceedings where defendant has become bankrupt.* Where the defendant in an action brought for the recovery of a debt, has become bankrupt, and the plaintiff has tendered his claim for proof of the debt under the bankruptcy, and the claim is not allowed ~~but~~ adjourned, the defendant is not entitled to a stay of proceedings in the action under the 12 & 13 Vict. c. 106, s. 182, the Bankrupt Law Consolidation Act. To entitle him to such stay of proceedings, the debt must be proved under the bankruptcy, or the claim entered upon the proceedings. *Ball v. Bowden*, xx. 475.

18. *Stay of proceedings.* Where a trader had petitioned under the arrangement clauses of the stat. 12 & 13 Vict. c. 106, and had conformed to the requirements of the statute, the court, differing from the commissioner, permitted the petition to be taken off the file, and all proceedings stayed, although the case did not come within the 223d section of the act. *Phillips, ex parte*, xix. 496.

19. *Change of venue.* Where the petition of adjudication had been filed in the country district in which the bankrupt resided and had his property, but the great majority of the creditors resided in London and elsewhere, out of the district in which the petition had been filed, the court, upon the application of one of such creditors, made with the consent of the others, directed the removal of the petition, and of proceedings thereunder, from the country district to the Court of Bankruptcy in London. *Ex parte Sewell; In re Shaw*, xvii. 301.

20. *Creditor's bond.* The 79th section of the Bankruptcy Consolidation Act, 12 & 13 Vict. c. 106, s. 79, gives to the court a discretion as to whether a bond with sureties is to be required; in exercising which discretion, regard is to be had, not merely to the solvency of the alleged debtor; but to the origin and nature of the demand, and the probability of its being such as the claimant can succeed in enforcing. *Ex parte Wood*, xxiii. 524.

XVIII. Miscellaneous.

1. *Settlement on wife of bankrupt.* Where there had been no settlement, and the wife of a bankrupt was left in reduced circumstances, with eleven children, two thirds of a fund in court were directed to be settled on them. *Ex parte Pugh*, xii. 350.

2. *Costs of creditor.* The costs of a creditor, who, though not served with a petition of appeal against the adjudication presented by the bankrupt, appeared by counsel, were allowed out of the estate. *Ex parte Barnett*, v. 237.

3. *Bankrupt tenant—Distress.* A landlord levied a distress for rent, and before he sold the tenant was adjudicated bankrupt, and then the sale took place under the distress. *Held*, that the landlord was, under the 42d section of the 3 & 4 Will. IV. c. 27. (the Statute of Limitations,) entitled to six years' rent out of the proceeds of the sale. *Ex parte Bayly; In re Lougher*, xix. 472.

4. *Court of appeal.* Under 12 & 13 Vict. c. 106, s. 12, and 14 & 15 Vict. c. 83, the court of appeal has only appellate jurisdiction. *In re Cheetham*, viii. 279.

5. *Bankruptcy of plaintiff—Claim of assignees.* Debt for labor, as a surgeon, and for medicines administered. Plea, bankruptcy of plaintiff, and that the debt was claimed by the assignees. Replication, that the labor was personal labor bestowed after the bankruptcy, and the medicines were purchased out of the earnings of this labor. Rejoinder, traversing the replication. Plaintiff was an uncertificated bankrupt, and the evidence tended to show that he was still carrying on his business as a medical practitioner. *Held*, the replication was not proved. *Elliott v. Clayton*, iii. 396.

6. The distinction between bankruptcy and insolvency, as being voluntary and involuntary modes of alienation approved of. *Rochford v. Hackman*, x. 64.

7. *Policy of insurance, transfer of and sale of goods insured.* *Assumpsit* to recover an average loss on a policy of insurance on goods from the Havannah to a market in Europe, at 60s. per cent. premium, to return 23s. 9d. per cent. if the risk ended in the United Kingdom, and less if at other places in the north of Europe. Pleas, first set-off; secondly, bankruptcy of plaintiff before action. Replication, that before plaintiff became bankrupt he sold the goods and transferred the policy, and the right and interest of plaintiff to recover for the loss of the goods, to F., and delivered the policy to him. Rejoinder, that the cargo was delivered, and the risk thereon ended in England before the bankruptcy of plaintiff, and that the right to have a return of premium was not transferred from plaintiff before his bankruptcy. On demurrer, it was held, that the plea of set-off was inadmissible, as the claim in the declaration was for unliquidated damages; and that, the two causes of action being separate and totally distinct from each other, though arising upon the same instrument, the plaintiff was entitled to sue for average loss as trustee for his vendee, that being a cause of action in which he had no beneficial interest at the time of his bankruptcy. *Bodington v. Castelli*, xviii. 427.

8. *Petitioning creditor's debt.* A judgment debt is a good debt on which to found a petition in bankruptcy, although the debtor has been taken in execution under a *ca. sa.* and before the date of the petition discharged from custody under the Insolvent Debtors Act, 1 & 2 Vict. c. 110. *Watson v. Humphrey*, xxix. 446.

9. *Petitioning creditor's debt—Notice to dispute trading, &c.* In an action of trover and for money had and received by the assignees of a bankrupt, the defendant gave notice to dispute the trading and act of bankruptcy. Held, that a trading and act of bankruptcy having been proved, the defendant must be taken to have admitted that the petitioning creditor's debt existed at the time of the trading and act of bankruptcy, and was not to be allowed to show that the debt accrued due subsequent to the trading having ceased. *Hernemann v. Barber*, xxv. 357.

10. For evidence on which a solicitor was decided to be no scrivener within the meaning of the act—see *Ex parte Dufaur*, xiii. 550.

BANKS AND BANKING.

1. *Letter of credit by one bank on another—Payment of forged check—Liability of bank.* A, in Scotland, being indebted in 460*l.* to B, in England, paid 460*l.* into a Scotch bank, in return for a letter of credit on an English bank, in this form: "Please honor the drafts of B to the extent of 460*l.*, which charge to the bank." A inclosed this letter of credit in a letter to B, which arrived at B's office in B's absence. The only clerk in the office, but who had no authority to manage B's money transactions, opened the letter, took the letter of credit to the English bank, forged a check in B's name for the amount, received payment, and absconded. B, on his return, drew on the English bank for the 460*l.*; but his draft was dishonored, and the bank refused payment to him. B then, along with A, sued the Scotch bank, in Scotland, for repayment of the 460*l.* Held, reversing the judgment of the Court of Session, that the Scotch bank was liable, unless it could show, either that the English bank actually paid B's draft when called on to do so, or that the English bank did something which as between the English bank and B, the English bank was entitled to treat as equivalent to payment. A letter of credit, drawn by one bank on another, is no part of the law merchant, and payment cannot be resisted until the instrument is delivered up. Payment on a forged check or order is not of itself any payment at all, as between the party paying and the person whose name is forged. But in some cases such payment may be made valid by reason of collateral matters, as where a forgery has been successfully accomplished by reason of the want of due

caution on the part of the person whose name is forged. *Orr v. The Union Bank of Scotland*, xxix. 1.

2. *Manager, authority of—Liability of bank for fraud of.* The local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account, that higher interest might be obtained for her money if she purchased two houses for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a fresh deposit note for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss. *Held*, in an action against them, that they were liable, the jury having found that the manager intended and induced the lady to believe that he was acting as the agent of the bank, and also that as local manager he had authority from the bank to make an assignment of an equitable mortgage. *Thompson v. Bell*, xxvi. 536.

3. *Refusal to pay check.* In an action against bankers for refusing to pay a trader's check, they having at the time of refusal sufficient assets of the trader, the latter may recover substantial damages without proof of actual damage. *Rolin v. Steward*, xxv. 841.

4. *Payment of bill of exchange on forged indorsement—Liability.* If a bill of exchange, made payable to order, be accepted payable at the acceptor's bankers, and the indorsement of the payee be forged, and the bankers pay the bill to a party presenting it for payment, they are guilty of no breach of duty towards the acceptor in making the payment; but they are not at liberty to charge the amount of the bill in account against him, although the payee be a stranger to them, and they have no immediate means of ascertaining the genuineness of his handwriting, and have dealt with the bill in the ordinary course of business. *Robarts v. Tuckcr*, iv. 236.

5. *Semble*, the bankers have a reasonable time to inquire into the genuineness of the indorsements of strangers necessary to make out the title to the bill. *Ib.*

6. *Crossed check—Negligence.* The crossing of a check payable to bearer with the name of a banker, does not restrict its negotiability to such banker alone. Such crossing is, however, so far a protection to the owner of the check that the banker upon whom the check is drawn ought not to pay it except through a banker; for if he does so, and the person actually presenting it turns out not to be the lawful holder, the circumstance of his so paying would be strong evidence of negligence on the part of the banker, in the event of his seeking to claim credit against his customer for the amount. The banker's duty is the same where the crossing is by the customer or by an intermediate holder, or where the original crossing is erased, and the name of another banker written instead of it. *Bellamy v. Majoribanks*, viii. 513.

7. In an action against bankers for money lent, to which the defendants pleaded payment, it appeared that the plaintiffs had drawn a check on the defendants, crossed thus: "Bank of England, for account of the Accountant-General." The payee to whom this check was delivered, struck out the crossing by running a pen through it leaving it, however, perfectly legible, and crossed it a second time with the name of his own bankers, and paid it into their bank to the credit of his own account. The check being presented by them for payment, was paid by the defendants, who charged it to the debit of the plaintiffs' account. The payee appropriated the sum so received to his own purposes, and it never was paid to the accountant-general; and the plaintiffs who were trustees, were obliged to pay the amount themselves. *Held*, that the circumstance of this check being thus doubly crossed, afforded no additional evidence against the defendants. *Ib.*

8. *Liability of—Receiver's estate and private account.* A receiver of an estate, who had a private account at his bankers', opened another there, under the name of the estate, under such circumstances as to inform the bankers that the money which would

be paid in to that account would belong to the owner of the estate. The receiver drew a check on the estate account and paid it into his private account. *Held*, reversing the decision of the Vice-Chancellor in the court below, (xiii. 222,) that the bankers were liable to repay the amount to the owner of the estate. *Bodenham v. Hoskyns*, xxi. 643.

BARRATRY.

By master of vessel who is part-owner. A master who is a part-owner may commit barratry. A fraudulent sale of ship and cargo and an application of the proceeds to his own use, by a master who is part-owner, is a loss by barratry, within the policy of insurance. Per MARTIN, J. It is a loss within the general words of the policy. *Jones v. Nicholson*, xxvi. 542.

BASTARDY.

1. *Jurisdiction of single justice—Enforcing payment—Appeal.* The jurisdiction given to a single justice of the peace by 7 & 8 Vict. c. 101, s. 3, at any time after the expiration of one month from the making of an order for the maintenance of a bastard child, to grant a warrant against the putative father, for the purpose of enforcing payment under the order, is not suspended by an appeal to the Quarter Sessions by the putative father against the order, and the confirmation of the order by the sessions, subject to a special case. *Kendall v. Wilkinson*, xxx. 196.

2. *Liability of putative father.* Under the 7 & 8 Vict. c. 101, s. 3, justices have jurisdiction to make an order on the putative father of a bastard child, although the mother be a married woman living apart from her husband. The liability of the putative father under such an order, does not cease upon the return of the woman's husband and his cohabitation with her. *Ex parte Grimes*, xxii. 164.

3. *Order of affiliation enforced by distress.* Justices have a discretion as to enforcing an order of affiliation by distress; but where they declined to issue their warrant, on the ground that the putative father was discharged from the order, by reason of the husband of the mother having returned and cohabited with her, this court made absolute a rule, under the 11 & 12 Vict. c. 44, s. 5, ordering the justices to issue the distress warrant. *Ib.* Also, *Regina v. Pilkington*, xviii. 247.

4. *Order of maintenance.* An order of maintenance ordered a person, as putative father, to pay a weekly sum for the maintenance of a bastard child from the birth of the child. As the application for the order was not made until more than two months after the birth, the order was clearly bad as to the period between the date of the birth and the time of applying for the order. Notice of abandonment of all claim under the order for payment anterior to the date of the order had been served on the putative father. *Held*, that the order was valid, and might be enforced against the putative father in respect of the weekly payments which became due after the application to the magistrates. *Regina v. Green*, iv. 197.

5. *Order, time of making—Sufficiency of.* A bastard child was born May 10, 1850, and a summons, dated July 23, 1851, was served upon the putative father, which stated that the application had been made "within twelve calendar months from the date hereof." The hearing of this summons was adjourned from time to time, till September 11, 1851, when an order was made, which, after reciting that the mother "did, on the 28th October, 1850, having been delivered of a bastard child, within twelve calendar months prior thereto, make application," &c.; that the hearing was adjourned to September 11, 1851, and that it was proved that the child was, on the 10th of May, 1850, born a bastard; adjudged J. II. to be the putative father, and ordered him to pay 2s. 6d. per week, from the said 28th October, 1850, the day upon which such application was made as aforesaid. *Held*, that it sufficiently appeared on the face of the order, that the complaint had been made within twelve months from

the birth, and that the statement in the summons that the child was born within twelve months of its date was immaterial. *Held*, also, that the order was good, although the justices had directed payment from the time of the application, a period of more than thirteen weeks; and that the order was not vitiated by reason of its having been made more than forty days after the service of the summons, the delay being occasioned by the adjournment. *Ex parte Harrison*, xi. 451.

6. *Order—Evidence*. A case set out a bastardy order, under 8 & 9 Vict. c. 10, s. 1, which omitted the following words in form 8 of the schedule: "and having also heard all the evidence tendered by the defendant," and found that no evidence in fact was tendered by him. The case also set out the evidence given to corroborate that of the mother. *Held*, first, that the order was good, without alleging that no evidence was tendered by the defendant. And held, also, that whether the evidence corroborated that of the mother, was a question for the justices, under sect. 3 of stat. 7 & 8 Vict. c. 101. *Regina v. Percy*, viii. 365.

7. *Summons, service of on alleged putative father in his absence—Certiorari to quash order*. A summons was left at D.'s last place of abode, a few days after he had left it and sailed for America, calling upon him to answer the charge of being the putative father of a bastard. An order of affiliation which recited that the summons had been duly served on D., was made against him in his absence from the country. On an application for a *certiorari* to bring up and quash the order made by D., on his return from America, he swore that he did not leave home with any intention of avoiding service of the summons, but he did not deny that he was the father of the child. The court refused the *certiorari*. *Regina v. Davis*, xx. 201.

8. *Appeal, notice of—Costs*. By sect. 4 of 7 & 8 Vict. c. 101, an appeal is permitted against bastardy orders, if notice of appeal is given to the mother within twenty-four hours after the adjudication, and sufficient security for the payment of costs is offered, to the satisfaction of a justice of the peace, within seven days. The justice is not to decide upon the validity of the notice, but is bound to take the security for costs offered, if satisfactory. *Regina v. Ginner*, xxx. 396.

9. *Indictment for abandoning bastard child*. An indictment for abandoning and deserting a bastard child, was held bad because there was no averment that the prisoner had the means of supporting the child, or that the child had sustained any injury by the abandonment. *Regina v. Hogan*, v. 553.

10. *Concealment of birth of bastard child*. There need not be a final disposing of the dead body of the child to constitute an offence within the 9 Geo. IV. c. 31, s. 14, but it is sufficient if there is only a temporary disposition of the body with the intention of concealing the birth. *Regina v. Perry*, xxix. 550.

BENEFIT SOCIETY.

See FRIENDLY SOCIETY.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. WHAT IS A BILL OR NOTE.
- II. CONSIDERATION.
- III. ACCEPTANCE; LIABILITIES OF ACCEPTORS; PRESENTMENT, &C.
- IV. INDORSEMENT.
- V. DISHONOR, AND NOTICE OF; PROTEST.

VI. ALTERATION ; PAROL DISCHARGE ; USURY.

VII. LOST BILLS AND NOTES.

VIII. ACTIONS ON BILLS AND NOTES ; PLEADING, EVIDENCE, DAMAGES, &C.

IX. MISCELLANEOUS.

I. *What is a Bill or Note.*

1. *What is, as against the drawer.* An instrument was drawn in the following form : " Two months after date I promise to pay to A B, or order, 99l. 15s. H. Oliver." At the foot it was addressed to " J. E. Oliver," and across it was written, " Accepted, payable S. and A., bankers, London. E. Oliver." *Held*, that in an action by the payee against the drawer it might be treated and declared upon as a bill of exchange. *Lloyd v. Oliver*, xii. 424.

2. *Effect of phrase " or when realized."* An instrument directed to C. S., by which defendant requested C. S., " ninety days after sight, or when realized," to pay plaintiff, is not a bill of exchange. *Alexander v. Thomas*, ii. 286.

3. *Name of drawer necessary—Promise by acceptor in such case.* An instrument was as follows : " Exchange for 200l. at sight of this my third of exchange, first and second, &c., unpaid, please pay P. or order the sum of 200l. sterling, for value received, and place the same, as by letter of advice, to the account of A. B.," and across the face of it the drawer wrote, " Accepted. S. R., Esq., Shire Lane, Bedminster, Bristol." *Held*, not to be a bill of exchange, as it had no drawee; the words written across were, if any thing, an acceptance, not an address; but that if S. R. promised to pay after it was drawn, it might be treated as a promissory note. *Peto v. Reynolds*, xxv. 438.

4. *Separated warrant.* A warrant or coupon, for an instalment of interest upon a debenture or bond of a mining company, was detached from the debenture when the interest was demanded. *Held*, that the separated warrant was not a promissory note, and did not require any stamp. *Enthoven v. Hoyle*, ix. 434.

5. An instrument in the form of a promissory note was indorsed thus : " In the event of my (the payee's) death, this amount is not to be demanded of the maker, but to remain at interest, and ultimately be divided among my daughter's children." *Held*, that this made the payment conditional, and therefore it was not a promissory note. *Richardson v. Martyr*, xxx. 365.

6. *Contingent promise.* The following instrument was sued upon as a promissory note by the plaintiff, who, at the time of the making of it, and until the commencement of the action, was secretary of the Indian Laudable and Mutual Assurance Society : " Nine months after date I promise to pay to the secretary for the time being of the Indian Laudable and Mutual Assurance Society, or order, company's rupees 20,000 with interest, at 6 per cent. per annum, and I hereby deposit in his hands twenty-two Union Bank shares, as particularized at foot, by way of pledge or security for the due payment of the said sum of company's rupees 20,000, and in default thereof hereby authorize the said secretary for the time being forthwith, either by private or public sale, absolutely to dispose of the said bank shares so deposited with him, and out of the proceeds to reimburse himself the said loan of company's rupees 20,000, he rendering to me any surplus, and I hereby promise to make good whatever may be wanting over and above the proceeds of such sale to make up the full amount of such loan and interest." *Held*, that the promise to pay was a floating contingent promise, the performance of which was to be made to a person to be ascertained *ex post facto*, namely, the secretary when the instrument became due, and therefore that the instrument could not be sued upon as a promissory note. *Storm v. String*, xxviii. 108.

7. *Query*, whether the additional promise to pay the deficiency in the event of a sale of the bank shares deposited as a security proving insufficient, rendered the instrument invalid as a promissory note. *Ib.*

II. *Consideration.*

1. *Money advanced to pay illegal bets.* The advancement of money by the drawer of a bill of exchange, to pay bets made by him in behalf and at the request of the drawee, is a good consideration for the draft, although the bets were illegal and the money was advanced without the request of the drawee. *Oulds v. Harrison*, xxviii. 524.

2. *I. O. U.—Assignment of judgments.* A executed an indenture, assigning certain judgments to B, and reciting that the price had been paid. The price had not been paid, but soon after B gave A his I. O. U., for the amount. *Held*, that there was a sufficient consideration for the I. O. U., which might be treated as given at the moment of executing the indenture. *Berry v. Story*, xxv. 371.

3. *Note given after composition to induce payee to take up bills of exchange accepted prior thereto.* A compounded with his creditors, of whom B was one. B having received a preference, joined in the composition deed, releasing his whole debt. Prior to the composition, A had accepted bills of exchange, drawn by B, to amount of the debt, which were outstanding at the time of the release. B neglected to take them up, and to induce him to take them up, A gave him his promissory note. *Held*, that the note was without consideration. *Mallalieu v. Hodgson*, v. 279.

4. *Note given as collateral security for debt of a third person.* It is a good plea to an action by the payee against the maker of a promissory note, that the defendant made the note, at the request of the plaintiff, as a collateral security for a debt due from a third person to the plaintiff, and that the defendant was not liable to pay the debt or to give the note as security, and that there was no other consideration. *Crofts v. Beale*, v. 408.

5. *Bet—Pleading.* To an action by the drawer against the acceptor of a bill, defendant pleaded that the consideration of the acceptance was a bet lost by him to A B, and that the defendant had notice of the premises at the time. The evidence was that the bill sued upon was given in renewal of a prior bill accepted in consideration of the bet. The jury found that the bill declared upon was given in consideration of the bet, and that the plaintiff had notice of it. *Held*, that the plea was proved. *Held*, also, that the plea was a good answer to the action, under the 5 & 6 Will. IV. c. 41. *Hay v. Ayling*, iii. 416.

6. *Plea of want of consideration—False representation.* A plea to an action on a promissory note "that the note was given without consideration," and "that it was obtained from the defendant upon a representation by the plaintiff that a sum of money was owing from the defendant to the plaintiff by virtue of an indenture, whereas no such sum was owing," is a good plea of no consideration without alleging that the representation was made "fraudulently," or that it was a representation of a matter of fact, and the word "fraudulently," if used, might be rejected as surplusage. *Southall v. Rigg*, iv. 366.

III. *Acceptance; Liabilities of Acceptors; Presentment, &c.*

1. *On behalf of joint-stock company.* A bill of exchange drawn upon a joint-stock company by its corporate name, was accepted as follows: "Accepted, J. B. and E. N., directors of the C. Company, appointed to accept this bill." J. B. and E. N. were, in fact, directors of the company. The corporate seal, having the name of the company inscribed, was also affixed to the bill, and it was countersigned by the secretary. *Held*, that the bill of exchange was sufficiently expressed to be accepted by J. B. and E. N. on behalf of the company within 7 & 8 Vict. c. 110, s. 45. *Halford v. Cameron's, &c. Railway Co.* iii. 309. *Edwards v. Cameron's, &c. Railway Co.* xi. 565.

2. *Prima facie evidence of—Reasonable time.* The bare production of a bill of exchange, with formal proof of the writing to the acceptance, is *prima facie* evidence that the bill was accepted during its currency, and within a reasonable time of the date bears, such being the regular and usual course of business. What is a reasonable

time depends on the relative places of abode of the parties to the bill. *Roberts v. Bethell*, xiv. 218.

3. *Contract raised by—Where made.* Where a bill is sent from one country by the drawer to the drawee in another, who there accepts it, and returns it to the drawer, the contract raised by the acceptance was made in the country of the drawee. So, also, where the bill is thus sent from one place to another in the same country. *Wilde v. Sheridan*, xi. 380.

4. *Acceptance in blank.* If an indorsee of a bill, accepted in blank, is aware of that fact at the time of the indorsement, he must be taken to have as full knowledge of the circumstances of the origin of the bill as if he had made the proper inquiry. In this case a claim by the holder of such a bill against the estate of a deceased person was not allowed. *Hatch v. Searies*, xxxi. 219.

5. *Of bill payable at bank—Indorsement by bank.* A bill of exchange drawn by A, was accepted, payable at a bank. A, a customer of the bank, discounted the bill with them, and the bank re-discounted it, and indorsed it to a third party. On the day when the bill became due, it was presented at the bank for payment by the holder, and there being no funds of the acceptor then in their hands, the bank, having paid it, instead of debiting the acceptor's account with the amount, carried it to a separate account as an unpaid bill. The acceptor not having provided funds in the course of the day, the bank sent notice of its dishonor to the drawer on the next morning, and debited his account with it. In an action by A against the bank for money lent, in which the defendants set off the amount of the bill, the jury found that the bank paid the bill as indorsers of it, and not as agents of the acceptor. *Held*, that the jury were justified in so finding. *Pollard v. Ogden*, xxii. 152.

6. *Blank acceptance—Statute of limitations.* A person, by giving another a blank acceptance, makes him, as to third parties, his general agent to fill up the bill to the extent the stamp will cover, and he is bound by his acceptance in the hands of an innocent holder for value; therefore, to an action by an indorsee for value without notice against the acceptor, it is no defence that the acceptance was given in blank to the drawer, and that the bill was not filled up and issued until an unreasonable time (twelve years) after. In such case, the Statute of Limitations runs from the time the bill became due, as filled up, and not from the time it would have become due, if completed when it was accepted in blank. *Montague v. Perkins*, xxii. 516.

7. *Individual liability on bill accepted for company.* Where a bill was addressed to a mining company, and accepted for the company by the defendant as manager, and it was shown that he and three others had agreed to form the company, and that the mine had been worked on the footing of that agreement, it was *held*, that the defendant was individually liable on the bill as a member of the company. *Owen v. Van Uster*, i. 396.

8. *Unauthorized acceptance for company.* A man who accepts a bill for a company, without authority to do so, binds himself, but not the company, even though he states at the time that he will not be personally bound. *Nicholls v. Diamond*, xxiv. 403.

9. *Of bill given for bets made by drawer as acceptor's agent.* It is no defence to an action against the acceptor of a bill of exchange, that the bill was given for bets on horse-races made by the drawer as the acceptor's agent, but paid by him without the acceptor's request. *Oulds v. Harrison*, xxviii. 524.

10. *Drawn in blank abroad—Fraudulently filled up—Acceptance procured by fraud.* Where a bill of exchange drawn in blank in a foreign country, was sent by the drawer to his agent in London, to be accepted by a customer of the drawer as a mode of payment for goods; and the agent, without any authority from the drawer, filled it up and induced the defendant, who was not a customer of the drawer, to accept it, and afterwards, in fraud of the drawer, indorsed it to the plaintiffs for value, it was *held*, that the bill was a foreign bill, not requiring a stamp, and that the acceptor was liable. *Barker v. Sterne*, xxv. 502.

11. "*Retire*," meaning of. E. drew a bill on the plaintiff for 477*l.*, and to induce him to accept it gave him the defendant's acceptance of a (second) bill for the same sum. The defendant suspended payment. E. then induced the plaintiff to accept a (third) bill, agreeing in writing to find him funds to pay it and "*retire*" the second bill. E. accordingly afterwards paid the plaintiff 477*l.*, who paid the amount of the second bill to the holder and took it; promising to surrender it to E., but afterwards refusing to do so. The plaintiff paid the first and third bills, and sued on the second. The defendant pleaded that he had paid the plaintiff a sum of money on condition he should retire and deliver up the bill as discharged. *Held*, that the word "*retire*," in the written agreement, did not mean "to cancel and discharge" when used of an indorser. That the plaintiff had accepted the third bill on the faith of the agreement, and that his liability was unaffected by his subsequent promise to return the second bill. That the action was maintainable; and that there was no evidence to support the plea. *Elsom v. Denny*, xxv. 423.

12. *Presentment for, of bills payable on or after sight—Check.* In bills of exchange payable on or after sight, our law does not fix a time for presentment for acceptance; but the rule is that, where there is no usage of trade, the bill must be presented within a reasonable time, which is a mixed question of law and fact for the determination of a jury, with the assistance of a judge. In such questions the interests not only of the drawee, but of the holder also, must be taken into account; and, though the bill need not be sent for acceptance by the very earliest opportunity, there must be no improper delay. And it is no answer to the objection of laches, that the parties remained solvent from the date of the bill to the day of presentment, and that no actual loss was occasioned by the laches. But these rules do not apply to a banker's check, which is a peculiar sort of instrument. *Mullick v. Radakissen*, xxviii. 86.

13. *Agent of drawer and drawee—Failure of agent before maturity of bill.* A sent B an order for coffee, saying that for the costs of the coffee he had opened a credit in favor of B with C of London. C was the agent of both A and B. B drew on him at sixty days after sight, and C on receiving the bill marked it as accepted, and afterwards formally accepted it, and charged the amount to A and credited it to B, with interest from the date of the receipt of the bill. C failed before the bill was due, having never had assets of A's sufficient to meet the bill. B was a creditor of C's. The bill was protested for non-payment, and B sued A for the price of the coffee, and recovered on the ground that the circumstances did not import that B had accepted the credit on C as present payment, and taken the risk of C's insolvency; and that C had no right to enter it as present payment without B's consent. *Maxwell v. Deare*, xxvi. 56.

IV. *Indorsement.*

1. *Delivery to indorsee.* In order to constitute a legal and valid indorsement of a bill of exchange, the holder must not only write his name on the back thereof, but he must also manually deliver the bill to the indorsee. A delivery, after indorsement to the attorney retained by the indorsee to sue, is not sufficient to sustain the allegation of indorsement in a declaration on a plea traversing it. *Sainsbury v. Parkinson*, xx. 351, (note.)

2. *Delivery for special purpose.* A, being the payee and holder of a bill of exchange, wrote his name upon it, and gave it to B for the purpose of getting it discounted. B never paid A any money in respect of the bill, but kept it until it was overdue, when he delivered it to C without receiving any value for it. *Held*, that there was no indorsement by A to B. *Lloyd v. Howard*, i. 227.

3. *Indorsement for discount.* The drawer of an accepted bill of exchange wrote his name across the back of the bill, and delivered it to A to get discounted; who, instead thereof, while the bill was running, deposited it with B as security for money advanced to himself, without fraud on the part of B. *Held*, that there was a valid indorsement of the bill by the drawer to B. *Palmer v. Richards*, 4. 529.

4. *Indorsement of overdue bill—Equities—Set-off.* The statutory right of set-off is not one of the equities subject to which an overdue bill of exchange is taken by an indorsee, and notice given by the drawee to the drawer, of election to set off a cross claim, makes no difference, unless there is an agreement to allow the set-off assented to by both of the parties to the bill. *Oulds v. Harrison*, xxviii. 524.

5. *Transfer of bill indorsed in blank.* Where a bill of exchange is indorsed in blank, and is transferred by the indorsee by delivery only, without any fresh indorsement, the transferee takes as against the acceptor any title which the intermediate indorsee possessed. *Fairclough v. Pavia*, xxv. 533.



V. Dishonor and Notice of; Protest.

1. *Knowledge of party giving notice.* If a party to a bill gives a positive notice of its dishonor, which afterwards turns out to be true, it is immaterial whether he had absolute knowledge of the fact at the time when he gave the notice. *Jennings v. Roberts*, xxix. 118.

2. The defendant indorsed a bill, accepted and payable in London, to the plaintiff, who indorsed it to a country bank. On the day when it fell due, the plaintiff told the defendant that the manager of the bank said the bill would be back from London in the morning, and he asked the defendant for the money for it. Another witness added that the plaintiff said the bill had been dishonored. The manager of the bank did not, in fact, know that the bill had been dishonored until the next morning. The judge told the jury that if they believed the evidence, this was a good notice of dishonor, if the defendant so understood it. The jury found for the plaintiff. *Held*, that the evidence was sufficient to make out a notice of dishonor, and that there was no misdirection, what was said about the defendant understanding the words as a notice of dishonor being by way of caution to the jury against giving to the words the meaning which they would ordinarily bear. *Ib.*

3. *Diligence of holder.* Notice of the dishonor of a bill of exchange for non-payment by the acceptor, was sent by the holder to the drawer through the post, addressed "London," the bill itself being dated London simply. The drawer resided at Chelsea, and the notice never reached him, and it was stated in evidence that had inquiry been made of the acceptor, whose address was given in the bill, the drawer's address might have been ascertained. *Held*, in an action against the drawer, that due diligence on the part of the holder sufficiently appeared, and therefore that he was entitled to succeed upon the issue of whether or not due notice of dishonor had been given. *Burmester v. Barron*, ix. 402.

4. *Erroneous description of bill.* A notice of dishonor sent by the indorsee of a bill of exchange to the drawer, stated the amount of the bill correctly, but erroneously described it as drawn by the acceptor and accepted by the drawer. *Held*, a sufficient notice of dishonor. *Mellersh v. Rippen*, xi. 599.

5. *Form of good notice.* The following is a good notice of dishonor of a bill of exchange: "We beg to acquaint you with the non-payment of Mr. Miles's acceptance to James Wright's draft of the 29th of December last, at four months, 50*l.* amounting, with expenses to 5*l.* 5*s.* 1*d.*, which remit us in the course of post without fail, or pay to Messrs. Everards and Co., of Lyme." *Everard v. Watson*, xviii. 194.

6. *Question for jury.* On the day after a bill became due, the holder's clerk called upon the drawer, and told him that the bill had been duly presented, and that the acceptor "could not pay it;" to which the drawer replied that "he would see the holder about it." *Held*, that it was properly left to the jury to infer from this conversation that the drawer had due notice of dishonor. *Metcalfe v. Richardson*, xx. 301.

7. *Notice too late.* The drawer of a bill indorsed it to defendant, who indorsed it to A, and A to plaintiff. The bill fell due on Saturday, the 15th, and was dishonored. The plaintiff, the holder, on Monday, the 17th, gave notice of dishonor to A. A gave

no notice to the defendant, but on the 18th, the plaintiff gave the defendant notice. *Held*, that the notice to the defendant was too late. (*See cases in the note.*) *Rowe v. Tipper*, xx. 220.

8. At the trial of an action against the drawer of a bill of exchange, in which the defendant traversed the notice of dishonor, it appeared that when the bill came into the plaintiff's hands in due course, he wrote to an indorsee for the defendant's address, and on the day he received it, sent a notice of dishonor to him. *Held*, sufficient evidence to warrant the jury in finding for the plaintiff. *Dixon v. Johnson*, xxix. 504.

9. *Evidence of.* In an action by indorsee against indorser or drawer, any declaration by him, amounting to an acknowledgment of liability or to a promise to pay, made to any party applying on behalf of the plaintiff, is good evidence of notice of dishonor. And although the defendant himself is called to disprove notice, yet, if the question be left to the jury on his credibility, and they find for the plaintiff, the court will not disturb the verdict. *Jones v. O'Brien*, xxvi. 283.

10. *Protest—Foreign bill taken up for honor of party.* Although, to make a party to a foreign bill liable to a person who takes up such bill for his honor, it is necessary that a formal protest should, previously to so taking up the bill, have been made before a notary, that the payment was made for the honor of such party, yet it is not necessary that such protest should be formally drawn up at the time of such payment, even in the case of payment for the honor of a drawer or indorser. The instrument may be drawn up at any time afterwards, if before trial. *Geralopulo v. Wieler*, iii. 515.

VI. Alteration; Parol Discharge; Usury.

1. *Alteration without consent of maker.* A note was made payable five months after date with lawful interest, and afterwards, and before the note became due, the words "interest to be paid at 6l. per cent. per annum," were written in the corner of it, without the consent of the maker. *Held*, in an action by the payee against the maker, that there was a material alteration of the note, and that the plaintiff was not entitled to recover in the action. *Warrington v. Early*, xxii. 208.

2. *Insertion of words without acceptor's knowledge.* Where a bill of exchange was, without the privity of the acceptor, altered by inserting the words "payable at A," and afterwards indorsed to the plaintiff for value, who took it *bonâ fide* and without knowledge of the alteration, it was *held*, that this was a material alteration which discharged the acceptor. *Burchfield v. Moore*, xxv. 123.

3. *Remedy.* The plaintiff's remedy in such a case is confined to a right to recover the consideration for the bill as between himself and his immediate indorser; and a similar remedy may be resorted to between all prior parties to the bill until the party is reached through whose fraud or laches the alteration was made. *Ib.*

4. *Discharge by parol.* Liability on a bill of exchange, or a promissory note, may be discharged by parol. *Foster v. Dawber*, vi. 496.

5. *Security of land—Usury.* A bill of exchange at three months, made to secure the repayment of money lent by the plaintiff at interest exceeding 5l. per cent. is not invalidated by reason of the plaintiff holding the security of land also for the repayment, within the 3 & 4 Will. IV. c. 98, s. 7, and the 2 & 3 Vict. c. 37, s. 1. *Nixon v. Phillips*, viii. 531.

VII. Lost Bills and Notes.

1. *Action for goods sold—Plea of bill delivered and lost.* To an action for goods sold, there was a plea that the defendant had accepted and delivered to the plaintiff a bill of exchange drawn on him by the plaintiff on account of the sum due for the goods, and payable to the order of the latter five months after date; that afterwards the plaintiff lost the bill, and that it from thence hitherto remained lost. *Held*, on general demurrer, that the plea disclosed a good defence to the action, although it did

not allege that the bill was overdue or that the plaintiff had indorsed it. *Crowe v. Clay*, xxv. 451.

2. *Loss of negotiable bill a defence—Bill of exchange.* Where a negotiable bill of exchange is lost at the time a party is called on to pay it, the loss constitutes a defence, *aliter* if it is not a negotiable bill. *Clay v. Crowe*, xviii. 514. But see note.

3. *Loss of non-negotiable note.* If the loss of a non-negotiable note be a good defence in an action on it, that defence does not arise on a plea of *non fecit*. It seems that even if specially pleaded it would be no defence. A plea that the note was destroyed in consequence of an agreement between the payee and the maker, cannot be treated as a plea stating the loss of the note, by rejecting the other allegation. *Charnley v. Grundy*, xxv. 318.

VIII. *Actions on Bills and Notes; Pleading, Evidence, Damages, &c.*

1. *Action by bonâ fide holder for benefit of another party.* C., a merchant in London, having in his hands funds of W., a merchant in America, by W.'s request, bought of defendant, through a broker, a bill of exchange drawn by defendant on a Paris banker. C. agreed to pay for the bill on the next post-day, according to the custom of London merchants, and forwarded it to plaintiff on account of amount due him by W. Plaintiff acknowledged its receipt, and stated he had placed it to credit of W. C. failed to pay the price of the bill, and, by defendant's order, payment of the bill was refused by drawee. W. reimbursed plaintiff. *Held*, that the plaintiff was a *bonâ fide* holder for value, and entitled to maintain the action, though W. was really the party for whose benefit the action was prosecuted; C. not acting as agent for W. in the purchase of the bill, so as to pledge his credit for the price. *Poirier v. Morris*, xx. 103.

2. *Bets—Security for winnings.* Where A and B jointly made bets with third persons on a horserace, and B received the money, giving A a bill accepted by C (no party to the betting,) for his share, it was *held*, that A might sue C on the bill. *Johnson v. Lansley*, xxii. 468.

3. *Interest and possession requisite to sustain suit.* A party cannot sue on a bill of exchange in which he has no interest, and of which he has no possession. An accepted bill was indorsed by the drawer to A who gave it to B for value, but without indorsement, saying that he would guarantee the payment. The executor of B, unwilling to sue on the bill himself, applied to A to see it paid, whereupon it was agreed between them and the plaintiff that the latter should sue on it in his own name; and A accordingly took a copy of the bill from the executor, and delivered it to the plaintiff for that purpose. An action was then commenced, and the bill given to him. *Held*, that defendant's pleas that plaintiff was not an indorsee nor the holder at the commencement of the suit, were both proved. *Emmet v. Tottenham*, xx. 348.

4. *Action by indorsee against acceptor—Plea of payment to drawer.* To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that J. H. the drawer, indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held it without value or consideration, and that after the bill became due, J. H. accepted certain scrip certificates from the defendant in full satisfaction and discharge of the bill. The plaintiff replied that the bill was indorsed for value and consideration, and upon this issue the defendant had a verdict. *Held*, that the plaintiff was entitled to judgment *non obstante veredicto*. *Milnes v. Dawson*, iii. 530.

5. *Plea of payment of principal and interest, whether an answer.* Where an indorsee sues the acceptor of a bill of exchange, a plea that after the bill fell due the defendant paid the plaintiff principal and interest in full satisfaction and discharge of the bill is no answer to the action. It should show satisfaction of damages and costs. *Goodwin v. Cremer*, xvi. 90. (For American cases on this point, which differ from each other, see note.)

6. *Shares in money-club—Note given for—Weekly payments no evidence under plea*

of payment. By the rules of a 50*l.* money-club, each member was to pay a weekly sum for each of his shares, and to take his share by sale as the sum of 50*l.* was paid in by the members, upon giving security to be approved of by the committee. Interest was to be paid from immediately after the sale. B. being a member of such club, became a purchaser of a share, and, together with the defendant and another person, gave a joint promissory note to the treasurer of the club for 50*l.*, payable on demand, with interest. The weekly payments were duly made for some time by A. and his sureties, but on their being discontinued, an action was brought upon the note for the full amount. *Held*, that the weekly payments were not evidence under a plea of payment. *Jones v. Gretton*, xx. 472.

7. *Plea of payment by drawer in action against acceptor.* In an action by an indorsee against the accommodation acceptor of a bill, it is not a good defence to the further maintenance that, after action brought, the drawer paid the amount of the bill and interest to the indorsee, under a judge's order in another action brought by the indorsee against the drawer. *Randall v. Moon*, xiv. 243.

8. *Indorsement to avoid set-off.* The indorsee of a bill of exchange took it from the drawer overdue, and without consideration, with knowledge that the acceptor had given the drawer notice of his election to set off a cross claim, for the express purpose of avoiding this set-off, and brought suit on it for the benefit of the drawer. *Held*, that he had a legal right to do this, and that a plea setting up the above statement of facts as a defence was bad. *Oulds v. Harrison*, xxviii. 524.

9. *Cancelling of acceptances—Fresh acceptance, new assignment of.* A. S. (a foreign merchant) drew upon D. and Co. several bills, in two parts, which were accepted, and, according to instructions, were sent to G. and Co. to be held by them at the disposition of the holders of the seconds. A. S., failing to get the seconds discounted, destroyed them, and sent word to G. and Co. to return the firsts to D. and Co., to have the acceptances cancelled, and instructed D. and Co. to receive and so cancel them. Afterwards, A. S. made new seconds, wrote to D. and Co. that he had annulled the previous instructions to G. and Co., and requested them to replace the firsts in the hands of G. and Co. Whereupon, D. and Co. wrote to A. S. as follows in substance: "We have cancelled the acceptances on your firsts, and, therefore, it would hardly do to reissue them in their present state; but we have written to G. and Co., explaining this, and requesting them to refer the holders of the seconds to us." *Held*, in an action by the holders of the seconds against D. and Co. that the acceptances had been duly cancelled; and, even if the last letter of D. and Co. to A. S. amounted to a fresh acceptance, that, the defendants having pleaded the above facts, such fresh acceptance should have been newly assigned. *Ralli v. Dennistoun*, v. 461.

10. *Evidence—Onus of proof of consideration.* Defendant accepted a bill of exchange drawn for his accommodation. It was then indorsed by the drawer, in blank, and delivered to defendant, who delivered it to A, who delivered it to B, for the purpose of getting it discounted for defendant. B, against good faith, and without the authority of defendant or of A, indorsed the bill to plaintiff. *Held*, that defendant was entitled to a verdict, unless plaintiff proved that he had given consideration for the bill. Where the immediate indorser of a bill of exchange to the plaintiff has parted with the bill in violation of good faith, want of consideration as between him and the plaintiff is presumed, so as to throw upon the plaintiff the *onus* of proving consideration. *Smith v. Braine*, iii. 379.

11. *Evidence of negotiation and payment.* A bill, on being produced at the trial, had the name of the drawer on the back, and a memorandum of the date when it was due on the face of it; and it appeared that the drawer delivered it to the plaintiff, the indorsee, after that date. *Held*, that this was no evidence to go to the jury in support of the allegations in the plea, that the bill was negotiated by the drawer, and paid at maturity, when it was delivered by the holder to the drawer, who indorsed it to another party, without the consent of the defendant the acceptor, and without having it restamped. *Jewell v. Parr*, xxiv. 281.

12. *Admission of acceptance—Effect of.* Where, in an action against the acceptor of a bill of exchange, plea, *non acceptavit*, the defendant's attorney signed an admission that the acceptance was in the handwriting of the defendant, without adding the usual clause, "saving all just exceptions to the admissibility of evidence," it was held, that the jury were warranted in finding for the plaintiff, notwithstanding the non-production of the bill. *Chaplin v. Levy*, xxiv. 519.

13. *Fraud as affecting onus.* In an action by the indorsee against the acceptor of a bill of exchange, to which the defendant pleads that the bill was obtained from him by fraud, and indorsed to the plaintiff without consideration, proof of the fraud throws on the plaintiff the *onus* of proving that he gave consideration for the bill. *Harvey v. Touters*, iv. 531. *Berry v. Alderman*, xxiv. 318.

14. *Fraud—Indorser a convicted felon—Evidence.* Action against acceptor of a bill of exchange, indorsed to plaintiff by H.; plea, that defendant was defrauded of his acceptance, and that it was fraudulently indorsed by drawer to a person unknown; that H. took it with notice of the fraud, and that the plaintiff took it with notice of the premises. It having been proved that the plaintiff had said in 1852, he had known H. for a long time, a witness was asked whether he had not seen H. in the dock at the Old Bailey, and seen him removed to prison; and it was held, that this evidence was inadmissible. *Berry v. Alderman*, xxii. 484.

15. *Questions for jury—Acceptance—Admission of liability—Presentment—Indorsement.* In an action on a bill by an indorsee against an indorser there was no covenant of acceptance in the declaration, and no plea putting it directly in issue, but there was an averment of presentment, and a plea traversing it, and also a traverse of notice of the dishonor. The evidence showed a presentment, not personally, to the supposed acceptor, but at the banking house where, by the supposed acceptance, the bill was payable. Held, 1. That the question of the acceptance was open on the pleadings, and that it was a question of fact for the jury. 2. That the defendant's admission of his handwriting and promising to pay, though it might be evidence of notice of the dishonor, was not an admission of liability which precluded his objecting to the presentment, but that this was also a question for the jury. 3. That it was a question for the jury whether the indorsement was made before the supposed acceptance, but that as the plaintiff admitted this, there must be a verdict for the defendant on the issue as to the presentment, though not on that as to the notice, as no point was made on it at the trial. *Weeton v. Hodul*, xxvi. 278.

16. *Measure of damages.* In an action against the drawer of a bill of exchange not bearing interest, which has been dishonored by non-acceptance, if the jury find the plaintiff entitled to interest by way of damages, the measure of damages is the rate of interest at the place where the bill was drawn. *Gibbs v. Fremont*, xx. 555.

IX. Miscellaneous.

1. *As to the negotiability of a check, see Bellamy v. Majoribanks*, viii. 513; and as to admissibility of a post-dated check to show fraud, see *Watson v. Poulson*, vii. 585.

2. *Alteration by parol.* The terms of a bill of exchange cannot be altered by a parol contract. *Besant v. Cross*, v. 389.

3. *Vendor of warrants what.* The vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports on the face of it to be. *Gompertz v. Bartlett*, xxiv. 156.

4. *Implied warranty against forgery.* The vendor of a bill of exchange, though no party to the bill, impliedly warrants its genuineness, and if it turns out that the name of one of the parties is forged and the bill becomes valueless, he is liable to the vendor, as upon a failure of consideration. *Gurney v. Womersley*, xxviii. 256.

5. *Forged acceptance—Discount—Failure of consideration.* The defendants, bill

brokers, having received from A a bill of exchange drawn and indorsed by A, for the purposes of being discounted, took it to the plaintiffs, who were money lenders, with whom the defendants had previously had similar dealings, and acting as principals, the defendants procured the bill to be discounted by the plaintiffs, without, however, indorsing or guaranteeing it, though asked by the plaintiffs to do so. The rate of discount charged by the defendants to A, exceeded that charged by the plaintiffs to the defendants. The acceptance to the bill turned out to have been forged by A, and the bill proved valueless. *Held*, that the plaintiffs were entitled to recover the sum paid to the defendants upon the discount of the bill as upon a failure of consideration. *Ib.*

6. *Conditional liability of maker.* If B is induced to sign a note with A, on the representation that C will also join, and he signs it with the understanding that he shall not be responsible unless C does thus join, and C refuses to do it, whereupon A, without the knowledge of B, passes the note to D for value, then B is not liable on the note. *Awde v. Dixon*, v. 512.

7. *One note taken in satisfaction of another.* An agreement between the payee and one of several makers of a joint and several promissory note, that the payee shall take another promissory note in satisfaction of the first, with payment of the note taken by the payee on such understanding, amounts to payment by the other makers of the joint and several note, though the second note be made by a third person, and paid by a fourth. *Thorne v. Smith*, ii. 301.

BILLS OF LADING.

See SHIPS AND SHIPPING.

BOND.

1. *Release of.* A being indebted to B, C, and D, three sisters, who were his near relations, partly on his own account, and partly as executor of his father, executed to them a bond for 500*l.* At the time of giving the bond, A objected to give it, and agreed to do so, only on a verbal representation that it was not intended to be enforced unless B, C, and D should come to want,—an event which did not happen. The bond remained in the hands of the three, till the death of B, and, after her death, in the hands of the survivors, and, after the death of C, in the hands of D, whose property, (by mutual arrangements,) it was at the time of her death. On the bond was found the following indorsement: "This bond is never to appear against A. Witness, C. C." This was dated eleven years after the date of the bond. It was not made clear that C's name was written by herself; it was said that D had written it. It was, however, proved that if D had written it, she did so with the authority of C. *Held*, that without saying whether the indorsement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that, if put in suit, the action would be restrained, and that there was nothing due on the bond to the estate of D. *Major v. Major*, xix. 106.

2. *Discharge of in equity.* The appointment of the obligor in a bond as the obligee's executor, does not in equity change or discharge the debt. *Turner v. Cox*, xxvi. 72.

3. *Validity of—Replevin.* The plaintiff, being judge of a county court, upon the removal of a plaint in replevin from his court into a superior court, under the 9 & 10 Vict. c. 95, ss. 121, 127, took a bond in the usual form, except that he himself was the obligee, instead of the other parties in the suit, as directed by the 127th section. The bond having been forfeited by reason of the suit in the superior court not being prosecuted with effect, the judge of the county court brought an action on the bond.

Held, that the bond, though irregular, was not void, and that the plaintiff might sue upon it as a voluntary bond. *Stansfeld v. Hellawell*, xi. 559.

4. *Debenture or bond of corporation—Void because of blank for payee's name.* A debenture, or bond, issued by a private incorporated company under their common seal, and signed by their secretary, in which is left a blank for the name of the payee, is void because of such blank. *Enthoven v. Hoyle*, ix. 434.

5. *Bond to the crown, under 33 Hen. VIII. c. 39.* A bond to the crown, under the 33 Hen. VIII. c. 39, binds all lands of the obligor over which he has a disposing power at the time he entered into the bond. *Ellis v. Regina*, vi. 438.

6. The giving such a bond is a voluntary act upon the part of the obligor, and he cannot, by afterwards exercising the power, defeat the right of the crown. *Id.*

7. *Such bond a record.* Such bond is within the 33 Hen. VIII. c. 39, though made payable to "the king, his heirs and successors," and, being a record, can be looked at by the court, although it be not set out in the pleadings. *Id.*

8. *Condition, construction of.* The condition of a bond executed by the defendant as surety for A, recited (*inter alia*) that it had been agreed between the directors of a company and A, that A should proceed to such place in the East Indies, at such time and by such conveyance as the directors should direct, and there serve the company as engineer, at a certain monthly salary, to commence from the day of his embarkation at Southampton. The defeasance provided (*inter alia*) that if A should forthwith proceed to such place in the East Indies, at such time and by such conveyance as the directors should direct, the bond should be void. A was paid part of his salary in advance in London by a clerk of the company, who, at the same time, gave him a ticket for the steamer from Marseilles, and money for the journey to that place, but he remained at Boulogne for some time, and then returned to London. *Held*, in an action against the defendant on the bond, that the embarkation of A at Southampton was not a condition to the operation of the bond; and that there was evidence of A having been directed by the directors to proceed to the East Indies by Marseilles, and that by his neglect the bond was forfeited. *Erans v. Erle*, xxvi. 475.

9. *Action on—Warrant of attorney—Suspension of remedy.* To an action on a joint and several bond in the penal sum of 2,800*l.*, given by the defendant, J. O., and M. N., conditioned for the payment of 1,400*l.*, the defendant pleaded: First, that the sum mentioned in the bond was secured by a warrant of attorney of even date therewith, upon which judgment was to be forthwith entered up, given by J. O. to the plaintiff; and that J. O., after the day conditioned for payment of the principal sum, paid the same, with interest, to the plaintiff. Secondly, that plaintiff sued J. O. for the detention of the moneys in the declaration mentioned in respect of the bond; that he obtained judgment, and took in execution goods of J. O. to the amount of 1,417*l.* Thirdly, that by the warrant of attorney execution was to issue only on default of payment of the 1,400*l.*; that plaintiff afterwards sued J. O. for the said debt of 2,800*l.*; that J. O. became bankrupt; that plaintiff omitted to file the warrant of attorney as required by 3 Geo. IV. c. 39; that certain goods of J. O. were taken in execution under the judgment so obtained; and that thereby the plaintiff suspended his remedy against the principal, and discharged the defendant, the surety. Replication to second plea—that, by reason of the omission to file the warrant of attorney, the plaintiff was compelled to refund to the assignees of J. O. the proceeds of the execution. Similar replications to the first and third pleas. *Held*, that the facts disclosed by the pleadings, afforded no defence at law to the action. *Farker v. Watson*, xx. 314.

BOTTOMRY BOND.

1. *Notice of, to owner of cargo and charterer of ship.* A bottomry bond on ship, freight, and cargo was granted by the master at the port where A, the owner of the cargo and charterer of the ship, resided. Advertisements for the loan on bottomry

were published, and A was aware of these advertisements, of the unseaworthy condition of the ship, and of the fact that his cargo had been laden and unladen while the ship was in the port, but no more direct communication was made to him, nor any application for advances. *Held*, that the advertisements were not sufficient notice; and the bond pronounced against, so far as A's interest was affected. *The Nuova Lanese*, xxii. 623.

2. *Duty of lender to give immediate notice of intention to take bond.* A British ship, being damaged, was repaired at Elsinore, where she arrived on the 18th of October. S. and Co. undertook the management of and ordered the repairs, and corresponded with the owner of the ship and part-owners of the cargo, but gave no intimation to them or the master of their intention to take a bottomry bond as a security, for many weeks, and only just before the ship sailed. The bond was pronounced against, with costs, on the ground that the repairs were ordered; in the first instance, on personal credit, and that S. and Co. should have given the master and owners immediate notice of their intention to take a bond. *The Wave*, iv. 589.

3. *Notice of damage to owners.* A letter from the British consul in a foreign port, written on behalf of the master of a small British vessel and his agent, informing the consignees in England of the damage sustained by the ship, but making no application for money, nor referring to the necessity for repairs, is sufficient notice for the purpose of raising money on bottomry. *The Bonaparte*, xx. 649.

4. *Pleading.* The defence intended to be relied on as against a bottomry bond, should be stated in the pleadings. *Ib.*

5. *Payment of wages.* In a cause of bottomry, where no appearance is given for the owners, and actions for wages, &c., are entered against the ship, the court may allow the bondholders to pay the claims which were the subject of those actions, on giving security for the protection of the owners' interests. *The John Fehrman*, xx. 648.

6. *Advance of freight.* The master of a ship, having given a bond on ship and freight to A, subsequently chartered the ship to B, who, by the terms of the charter-party, was to advance part of the freight to defray necessary expenses already incurred; the charter-party then provided for payment of the balance of freight to A, in discharge of the bond. *Held*, that the bondholder had no claim upon the freight advanced as against the consignee of the cargo and assignee of the freight. *The Cynthia*, xx. 625.

7. *May be taken by agent.* In certain cases an agent may take a bottomry bond. A ship, damaged on leaving New York, returned to that port. M., who had acted as agent for her owner, gave the owner notice of the accident, and of his intention to get the ship ready for sea again as soon as possible. The owner communicated with M. and with the ship's master, but provided no funds for the expenses; there was no evidence that the owner or master had credit at New York. When the ship was ready for sea, the master not being able to pay for the expenses, advertised for a loan on bottomry; and, M.'s offer being the lowest, the bond was given. *Held*, that the bond was valid. *The Oriental*, ii. 546.

8. *Given by British consul.* A British ship, whose master and officers had been murdered in a mutiny, came into a foreign port, where the British consul took possession of her, appointed a master, and gave a bottomry bond on the ship. Bond pronounced for. *The Cynthia*, xx. 623.

9. *Abandonment—Sale of cargo—Transshipment.* Bond on ship, freight, and cargo; the money to be paid within twenty-one days of the ship's arrival in the port of London, and not to be demanded or recovered in case the ship and her cargo be lost, miscarry, or be cast away on the voyage. The ship never reached the port of London, but was abandoned as for a total loss at Algoa Bay, where part of the cargo was sold, and the proceeds brought to England, and part put into another ship, and also brought to England. The fact that the ship could not be repaired was not proved. *Held*, that

the bond must be pronounced for, and enforced against the proceeds of the cargo, and the cargo transhipped. *The Elephanta*, ix. 553.

10. *Owners of cargo—Bail—Deficiency of bond.* In a cause of bottomry on ship, freight, and cargo, the owners of the cargo admitted the validity of the bond, and gave bail. Expenses were necessarily incurred, which reduced the value received for the ship and freight, and the amount of bail given by the owners of the cargo, to a sum total less than the bond and costs. *Held*, that the owners of the cargo could not be called upon to pay the deficiency either of the bond or costs. *The Nostra Senora del Carmine*, xxix. 572.

11. *Liability of cargo.* The master of a Swedish ship took up 390*l.* on bottomry, in Sweden, on the ship, freight, and cargo. The owners of the cargo were British. No appearance was given for the owners of the ship, which was sold under decree for less than the bond. No notice had been given to the owners of the cargo, but the shipper refused to advance the money. The master made no attempt to transship the cargo. *Held*, that the bond was good as against the cargo. *The Bonaparte*, i. 641.

12. *Ship subject to, after sale.* A British ship, upon which a bottomry bond had been taken, payable on arrival in England, was sold by the master as unseaworthy, at public auction, and with the consent of the British consul, at Bahia. *Held*, that the ship was still subject to the bond. *The Catherine*, i. 679.

BREACH OF THE PEACE.

1. *By copartner.* Where one partner by violence forces his copartner out of the business premises of the firm, threatening him with violence and danger to his life if he again enter the premises, and it is necessary for such copartner to enter and use the premises for the carrying on his ordinary business as partner, the court will permit the latter to exhibit articles of the peace against the former. *Regina v. Mallinson*, i. 289.

2. *Threat to flog.* H. had written a letter to a young lady, a relative of T. T. afterwards, in consequence of his writing the letter, violently assaulted H., and said: "If you write again, I will flog you within an inch of your life." On a subsequent occasion, T. meeting H. said to him: "Remember what I said to you, I am determined to put a stop to your proceedings." The court permitted H. to exhibit articles of the peace against T. *Hulse, ex parte*, vii. 414.

BURGESS.

1. *Duty to prepare burgess list.* Under the Municipal Corporation Act, 5 & 6 Will. c. 76, s. 15, each of the overseers, including the church-wardens, is bound to make out, sign, and deliver the burgess list of the parish. *Clarke v. Gant*, xvi. 518.

2. *Qualifications to act as councillor—Action for penalties.* Defendant's name being on the burgess list, an objection was allowed by the Mayor's Court of revision, for that his qualifying property was wrongly described in the rate-book, and his name was struck off the roll. Afterwards he acted as councillor, at which time he was legally entitled to be on the list. In an action for penalties, under the statute against acting as councillor after ceasing to be qualified, he was held not liable, since the question was not whether, at the time he acted, defendant was or was not a burgess, or was or was not inserted in the burgess roll or in a burgess list, but whether, at the time he acted, he was or was not a person so qualified, within the borough, as to be entitled to be upon a burgess list of it. *Whalley v. Bramwell*, iii. 374.

BURGLARY.

1. *Implements of housebreaking.* Whether an implement is to be considered an instrument of housebreaking, within stat. 14 & 15 Vict. c. 19, s. 1, must depend upon the purpose for which the person charged has possession of it. *Regina v. Oldham*, xiv. 363.

2. Any implement that may be used for the purpose of housebreaking, if the jury find it to have been in the possession of the person charged for that purpose, at the time and place alleged, is an implement of housebreaking within that section, although it may also be an implement which is used in the ordinary affairs of life for lawful purposes. *Ib.*

3. An intent to commit felony forms no ingredient of the offence of being found by night in the possession of housebreaking instruments, without lawful excuse, under the 14 & 15 Vict. c. 19, s. 1. *Regina v. Bailey*, xxii. 595.

CANAL.

1. *Land covered by—Ejectment.* A granted a lease of land to B in 1779. In 1794, an act was obtained for a canal, part of which was to pass over the land demised, and to be made by C. On the neglect or refusal of C, or of the other authorized persons to complete the respective portions of the canal within two years, the defaulter was to pay 500*l.* per annum until completion. C's portion of the canal was not completed within the time specified, but was subsequently made, under an arrangement between C and B, the lessee. No compensation was made to A in respect of his reversion, but all the acts of C were done with the consent of the proprietors of the lands, of whom A was one. In 1783, A mortgaged his reversion, which was sold in 1794, to D, under a decree of the court. The particulars of sale contained a statement that the canal was to pass through the land. In 1844, the lease to B expired, and the devisees of D brought an action of ejectment against C, to recover the land covered by the canal, and obtained a verdict. In a suit by C against the devisees of D, for an injunction to restrain further proceedings in the action, and for a conveyance to C, it was held, first, that the time for making the canal was unlimited; subject, however, to the payment of 500*l.* per annum, after the expiration of the specified time, until completion. Secondly, that A had acquiesced, and was not entitled to the land. Thirdly, that the devisees of D were not bound by the acts of A; but that D, having purchased with the knowledge that the canal was to remain for the benefit of the public, his devisees could not interfere with this easement. But, fourthly, that they were entitled to compensation for the real, and not the fictitious, value of the land at the time the reversion fell in, with interest at four per cent. from that time, and on payment the devisees were to execute proper conveyances to C. *Beaufort v. Patrick*, xvii. 28.

2. *As to mortgage of canals*, see *Trevilian v. The Mayor of Exeter*, xxvii. 578.

3. *As to compensation for damages arising from lawful exercise of powers*, see *Elwell v. The Birmingham Canal Navigation*, xxii. 11.

CERTIORARI.

I. WHEN TO BE GRANTED.

II. PRACTICE IN RESPECT TO.

I. When to be granted.

1. *To remove conviction by justices.* A conviction by justices of the peace may be removed into the Court of Queen's Bench by *certiorari*, where the justices have acted without jurisdiction. *Ex parte Hyde*, v. 368. *Regina v. The Justices of St. Albans*, xviii. 244.

2. *To remove order of sessions.* When a judge's order or rule of the Queen's Bench is made under the stat. 12 & 13 Vict. c. 45, s. 18, for the removal of an order of Quarter Sessions into the Queen's Bench, for the purpose of enforcing it, it is not necessary that any *certiorari* should issue to remove the order of sessions. *Hawker v. Field*, i. 310.

3. *To remove cause from county court.* *Semble*, that the jurisdiction given to the

Superior Court by the 9 & 10 Vict. c. 95, s. 90, to remove a cause from a county court by *certiorari*, is not taken away by the 13 & 14 Vict. c. 61, s. 16. *Parker v. The Great Western Railway Co.* i. 514. *Parker v. The Bristol, &c. Railway Co.* ii. 416. *Brookman v. Wenham*, ii. 269.

4. *To remove complaints in county courts, not exceeding 5l.* Where a complaint in the county court does not exceed 5l., it cannot be removed by *certiorari*, although the plaintiff is an officer of the court. Where, therefore, the bailiff of a county court entered two complaints, one for 5l. for an assault, and the other for 5l. as a fine, under the 9 & 10 Vict. c. 95, s. 114, for assaulting him in the execution of his duty, the assault complained of being the same in both complaints, it was *held*, that these were two distinct complaints, the latter being only an informal mode of claiming the fine; and that, therefore, the complaints were not removable by *certiorari*. *In re Box v. Green*, xxv. 538.

5. *To remove interpleader proceedings.* No *certiorari* lies to remove into a superior court interpleader proceedings in a county court. *M'Killar v. Summers*, xxvi. 429.

6. No *certiorari* issues out of the Court of Exchequer. *In re Allison*, xxix. 406.

7. *To remove indictment on application of one of several defendants.* The court will grant a *certiorari* to remove an indictment for conspiracy, on the application of one of several defendants, without the consent of the others, if that defendant will enter into a recognizance to pay costs if either himself or any of the other defendants are convicted. *Regina v. Foulkes*, iv. 301. *Regina v. Probert*, xviii. 111.

8. *Excess of jurisdiction of justices.* An act giving local boards power to make certain by-laws, declares that none shall be in force until confirmed by one of the secretaries of state. *Held*, that the confirmation and allowance by him does not preclude justices from inquiring into the validity of the by-law. *Held*, also, that if justices should assume the validity of the by-law because allowed by the secretary of state, and it should be an invalid by-law, this is such an excess of jurisdiction as would warrant a *certiorari*, although, for certain purposes, the *certiorari* is taken away by the act. *Regina v. The Justices of Staffordshire*, xxx. 402.

9. *Excess of jurisdiction.* The stat. 5 & 6 Will. IV. c. 63, takes away the writ of *certiorari*, and the appointment of an inspector of weights and measures without remuneration by the quarter sessions, acting under the 17th section of that statute, not being an excess of jurisdiction, under 2 & 3 Vict. c. 93, cannot be questioned in the Queen's Bench. *Regina v. Jarvis*, xxvi. 229.

10. *Erroneous procedure—Order to pay costs.* The 11 & 12 Vict. c. 43, s. 27, provides that where quarter sessions, upon an appeal against an order, direct either party to pay costs, "such order shall direct such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled." *Held*, that a mistake in ordering costs to be paid directly to the party instead of to the clerk, was not a defect of jurisdiction, but merely erroneous procedure; and, therefore, where such an order had been made, the court refused to set it aside when brought before them by *certiorari*. *Regina v. Binney*, xviii. 318.

11. *To remove indictment.* An indictment preferred at the assizes by direction of justices at special sessions, in pursuance of sect. 95 of stat. 5 & 6 Will. IV. c. 50, may be removed by *certiorari*, such indictment being a common-law proceeding, and therefore not within sect. 107, which takes away the *certiorari*. *Regina v. The Inhabitants of Sandon*, xxv. 239.

12. *To remove indictments into central criminal court.* The Central Criminal Court Act, 4 & 5 Will. IV. c. 36, s. 16, does not repeal the 7 & 8 Geo. IV. c. 29, s. 53, which enacts that no indictment for obtaining money, &c., by false pretences, shall be removed by *certiorari* into the Court of Queen's Bench; but it authorizes the several judges there specified to issue writs, in the nature of writs of *certiorari*, to remove indictments for any offences there cognizable into the Central Criminal Court from the sessions there mentioned. *Regina v. Sill*, xiv. 135.

13. *Judicial act—Granting license to sell beer.* A license for the sale of beer,

granted by the solicitor of excise, without the production of a certificate from the overseer, required by 3 & 4 Vict. c. 61, s. 2, is not a judicial act, removable into the Queen's Bench by *certiorari*. *Regina v. The Overseers of Salford*, xiv. 145.

II. Practice in Respect to.

1. *Affidavit of service of notice.* The affidavit of service of notice of application for *certiorari* to remove an order of sessions, under stat. 13 Geo. II. c. 18, must show that the persons on whom the notice was served were justices, by and before whom the order was made. *Regina v. The Inhabitants of St. James*, iv. 305.

2. *To remove replevin suits.* The conditions imposed by the 121st section of the County Court Act, 9 & 10 Vict. c. 95, on removing suits in replevin by *certiorari*, are to be complied with when the writ is delivered to the judge in court. *Mungeam v. Wheatley*, i. 516.

3. *Sufficiency of sureties.* A judge to whom such a writ was delivered refused to allow it, and proceeded to try the cause, on the ground that notice of the sureties was not given to the clerk of the court in sufficient time to enable the judge to fix the amount of the security, and the clerk to approve the sureties before the sitting of the court at which they were to be taken. *Held*, erroneous, as the question of the sufficiency of the sureties could not arise until the judge had fixed the amount in which they were to be bound. *Ib.*

4. *When returnable.* Every *certiorari* under this section ought to be made returnable so as to allow a sufficient time for the preliminary inquiries which it directs. The declaration required by that section may be made by the attorney of the party, at least if he is himself unable to attend; and, in receiving that declaration, the duty of the judge is altogether ministerial. *Ib.*

5. *Disobedience to.* Where the judge of a county court, even through mistake of the law, disobeys a *certiorari* under this section, the remedy is by attachment, or perhaps by rule to return the writ. *Ib.*

6. *Application for—Statement of facts on.* On applying for a *certiorari* under stat. 9 & 10 Vict. c. 95, all material facts relative to the state of the cause in the court below should be brought before the judge to enable him to exercise his discretion in granting or refusing the writ. *Parker v. The Great Western Railway Co.* i. 514. *Parker v. The Bristol, &c. Railway Co.* ii. 416.

7. *Service of.* Where the writ of *certiorari* was left with one of the clerks at the county court office, it was *held*, that this was good service upon the judge. *Brookman v. Wenham*, ii. 269.

8. *When quashed—County court acts.* The court will not quash a *certiorari* because the requirements of the County Court Acts have not been complied with; but the judge of the county court is bound, before allowing the *certiorari*, to see that these requirements have been complied with. *Mungeam v. Wheatley*, ii. 413.

9. *Mortgage of fund in court.* The mortgage of a claim to a fund in court, *pendente lite*, was held not void for champerty. *Cockell v. Taylor*, xv. 101.

CHARITIES.

I. ORIGIN AND PURPOSE OF TRUST.

II. WHAT IS A CHARITABLE TRUST.

III. POWERS AND DUTIES OF TRUSTEES.

IV. APPROPRIATION OF TRUST FUNDS.

V. APPOINTMENT OF NEW TRUSTEES.

VI. JURISDICTION OF COURT OF CHANCERY.

I. Origin and Purpose of Trust.

1. *Legal origin of charity obscure—Effect of usages.* Where the legal origin of a charity or a right is left in obscurity, the court will presume, from the uniformity of practice or use, that it is in accordance with the original foundation or right, and will presume whatever is necessary to give it validity. But the mere fact that a perversion of a charity has been continued for centuries is no reason why such a practice should be allowed to prevail against the manifest trusts of the foundation. *The Attorney-General v. The Master, &c. of the Hospital of St. Cross*, xxi. 378.

2. *Declaration of trust by part of the contributors.* Where a fund is raised for a charitable purpose, like that of founding a chapel, and the contributors are so numerous as to preclude the possibility of their all concurring in any instrument declaring the trusts, and such a declaration of trust is made by the persons in whom the property is vested at or about the time when the sums have been raised, that declaration may reasonably be taken *prima facie* as a true exposition of the minds of the contributors. *The Attorney-General v. Clapham*, xxxi. 142.

3. Whether Unitarians are to be considered as objects of a charity founded for "Protestant Dissenters," see *Drummond v. The Attorney-General*, ii. 15.

II. What is a charitable Trust.

1. *Purpose of foundation.* The purpose for which a foundation is made must determine whether it is spiritual or lay. *The Attorney-General v. The Master, &c. of the Hospital of St. Cross*, xxi. 378.

2. Whether a bequest to the commissioners for the reduction of the national debt, to be applied in reduction of the national debt, is a charitable use, see *Ashton v. Langdale*, iv. 80.

3. *Gift to a town.* A gift of personal estate to a town, to be applied for the benefit and ornament of the town, is a good charitable gift. *The Mayor, &c. of Faversham v. Ryder*, xxvii. 367.

4. A school for the instruction of children in good literature and learning was *held* to be a grammar school within the meaning of Sir Eardley Wilmot's Act, 3 & 4 Vict. c. 77. *The Attorney-General v. The Bishop of Worcester*, ix. 1.

5. *Mastership of St. John's Hospital—New trustees.* The advowson of the mastership of St. John's Hospital is ancillary to the charity, and at the time of the passage of the Municipal Corporation Regulation Act, was vested in the corporation of Bath upon a charitable trust, within the 71st section, and was not liable to be sold under the 139th section. *In re St. John's Hospital*, ii. 132.

III. Powers and Duties of Trustees.

1. *Removal of schoolmaster.* The trustees of a grammar school were invested by chancery with authority from time to time, upon such grounds as they should in their discretion in the due exercise and execution of the powers and trusts reposed in them deem just, to remove the master, usher, &c., from their or his office. Upon an application by the master to restrain the trustees from enforcing a resolution for his removal, it was *held*, that the word "trust" in the scheme superadded to the word "power," was to keep in view that it was a trust, for the execution of which the court was providing. That the word "trusts," especially when considered with reference to a direction to reserve a statement of the grounds of removal, had the effect of restricting the large meaning, which might otherwise be given to the word "discretion." That the regulation did not confer upon the trustees an arbitrary power to dismiss the master upon any ground which they might deem just, free from any control of this court. That the trustees are not the only and absolute judges of the sufficiency of the grounds of removal. That the trustees, not having instituted any inquiry in the presence of

the master, which might have afforded him the means of explanation and defence, the court, without determining the right or propriety of the conduct of the trustees, granted an injunction to restrain them from enforcing the resolution of removal. *Willis v. Childe*, ii. 41.

2. The trustees of a grammar school were invested with authority, upon such grounds as they should at their discretion, in the due exercise of their trusts, deem just, to remove the master, usher, &c., from his office, subject, however, to certain formalities being observed. *Held*, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed, and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the grounds of his removal. *Doe d. Childe v. Willis*, ii. 356.

3. *Discretion of trustees.* Where, in the exercise of a discretion given to trustees of a charitable foundation with regard to the proper object for the benefit of the charity, there appears an absence of indirect motive, an honesty of intention, and a fair consideration of the case, the court will not examine into the accuracy of the conclusion come to by the trustees. Trustees are not bound to set forth the particular grounds of selection; and, *semble*, it is prudent not to do so; but where reasons are stated which do not justify the conclusion, or where it is admitted that they have acted upon an erroneous principle, the court will interfere. *In re Wilkes's Charity*, vii. 73.

4. *Notice by trustees.* It is the duty of trustees of a charitable foundation to give notice of their intention to proceed to an election; but where the fact was notorious to the parties interested, and it was not shown that any one was prejudiced by the want of formal notice, the court overruled the objection. *Ib.*

IV. Appropriation of Trust Funds.

1. *Where objects are numerous.* Where the objects of a charity are numerous, and the sums to be distributed are small, the party charged with the distribution of the charity fund will be directed to lay annually a debtor and creditor account before the attorney-general, and that, notwithstanding there is a regular auditor of the accounts of the charity. *The Attorney-General v. Donnington Hospital*, xiii. 388.

2. *In case of division of parish.* A testator having given certain rents and profits for the benefit of the poor of a certain parish, and this parish having been subsequently divided, the master so divided the income as, in his opinion, best carried out the intention of the testator. *In re The Lambeth Charities*, xxi. 427.

3. *Apportionment between parish and town.* If the distinction is not clear between the town and the parish of K., a gift to the poor of said town, as the church-warden of said parish shall direct, may mean a gift to the poor generally of the town. The court has a discretion whether or not to direct an apportionment of charitable gifts made for the benefit of a parish, between a district parish and the remaining part of the parish. *Ex parte The Incumbent, &c. of Brompton*, xv. 509.

4. *Increased rents, right to surplus of.* A testator devised property producing 47*l.* a year to a corporation, "in trust and confidence," to pay three sums of 20*l.*, 10*l.*, and 10*l.* to three charitable objects; and directed that so long as certain taxes continued, what the corporation could not spare "out of the overplus of the rent," namely, 7*l.*, should be deducted out of the two sums of 10*l.* and 10*l.* The rents having greatly increased, it was *held*, that the corporation took merely seven forty-sevenths of such increase, and that also subject to the payment of the ordinary repairs, &c. of the property; and that the charities were entitled to the residue. *The Attorney-General v. The Corporation of Beverley*, xxxi. 498, and xxi. 561.

5. *Semble*, that the rule that where what was given to a charity was equal to the entire amount of the then income of the property, the charity is entitled to the whole subsequent increase of rents, applies to a case where the only portion of the rents not

directly given to the charity was given to exonerate the estate from burdens to which it was subject. *Ib.*

6. *Surplus.* If an estate is given to A in trust to pay certain annuities and expenses, surplus to A for his own certain use, though the surplus be stated at "about" a certain sum, A will hold the entire surplus after discharging the trusts, and the annuitants have no claim for a proportional part of the increased rents. *The Mayor of South Molton v. The Attorney-General*, xxvii. 17.

7. A gift by way of trust to build a bridge, makes both principal and accumulations applicable to the purpose contemplated. *Forbes v. Forbes*, xxiii. 335.

V. Appointment of new Trustees.

1. *By parish or surviving trustees.* A deed creating a charity for the poor of a parish prescribed no particular mode of appointing new trustees; the estate belonging to the charity was bought with parish funds, and the parishioners, for many years after the institution of the charity, exercised a control over its affairs in the election of trustees and otherwise; the trustees in question had been appointed by the survivors of former trustees without the intervention of the parishioners, and under a mode of procedure of comparatively modern date. *Held*, that such trustees were not duly appointed and that the appointment belonged to the parish, but the legal estate was nevertheless presumed to be vested in the existing trustees. *The Attorney-General v. Dalton*, iv. 5.

2. *Election of master—Interference of court.* By a deed of foundation it was provided that when the feoffees of the estates, fourteen in number, should be reduced to four, ten more should be appointed. The number became reduced to three, and then the schoolmaster died. One of the three trustees moved that the election of master be postponed till the whole number should be completed, but the court would not interfere. *In re Butterwick Free School*, vi. 104.

3. *New trustees under trustee act, 1850.* The Trustee Act, 1850, does not empower the court to appoint new trustees of charity property, without the consent of the Attorney-General, and his fiat is necessary previously to presenting a petition for that purpose. *In re Rolle's Charity*, xxi. 377.

VI. Jurisdiction of Court of Chancery.

1. *Dismissal of master of a school.* Where a petition is presented under Sir Samuel Romilly's Act, and in the matter of the Act 3 & 4 Vict. c. 77, the court has jurisdiction to make a declaration as to the dismissal of a master of a grammar school, although the Attorney-General's certificate is not obtained, the court having previously made order for the management of the school under Sir Samuel Romilly's Act. *In re The Godmanchester Grammar School*, vi. 46.

2. *Powers of trustees.* The court may confer upon trustees for charity purposes the power to perpetuate themselves, to lease their land, &c., there being such powers in the original deed conveying to them the land. *Ex parte The Overseers, &c. of Ecclesall Bierlow*, xiii. 145.

3. *Practice respecting orders, appointment of new trustees, &c.* To avoid the necessity of reciting the settled scheme of a charity, the order may refer to a copy of the scheme settled, approved, prepared, and signed by the judge and filed in the court; and subsequent applications for the appointment of new trustees, and on matters contained in the scheme and connected with the government and management of the charity, may be made to the judge at chambers by summons on notice to the Attorney-General. *In re The Grammar School of Conyers*, xix. 505.

4. *Sale of land and reinvestment.* The court will sanction the sale of a piece of land, which in 1747 was purchased by trustees with charitable funds and conveyed to them, it being plainly advantageous to the charity, and will also sanction the reinvest-

ment of the money in real estate. *Ex parte The Overseers, &c. of Ecclesall Bierlow*, xiii. 145.

5. *Alterations in scheme.* The decree of the court, confirming the decrees of the Commissioners for Charitable Uses for the regulation of a grammar school, is not final and conclusive, so as to preclude further alterations in the scheme by order of the court, obtained upon petition, either under Sir Samuel Romilly's Act, 52 Geo. III. c. 101, or under the Grammar School Act, 3 & 4 Vict. c. 77; and therefore, where a scheme had been directed by such decrees, and an alteration thereof had afterwards been obtained upon petitions under those acts, the court refused to treat such alteration as a nullity. *The Attorney-General v. The Bishop of Worcester*, ix. 1.

6. *Sir Samuel Romilly's act.* Sir Samuel Romilly's Act, 52 Geo. III. c. 101, has no application between trustees of a charity and strangers, but only between trustees and the objects of the trust; and it is in the discretion of the court as to what extent it ought, as between them, to be applied. *Ib.*

7. *No distinct interests.* It seems that the Act 52 Geo. III. c. 101, may be resorted to in all cases where the objects of the charity have no distinct interests, and where, therefore, the Attorney-General properly represents them all; and in all cases where, although there may be distinct interests, no substantial question of principle can arise between the several objects. *Ib.*

8. *Free school.* The term "free school" is flexible in its meaning, and is to be considered according to the context and the usage which has prevailed in the school. *Ib.*

9. *Application to review scheme.* It is competent to the Attorney-General, in a charity case, to call upon the court to review a scheme which has been settled under its decree, if he is satisfied that the scheme does not operate beneficially for the charity; but the court, in acting upon such an application, is bound to proceed with the utmost possible caution, and to require the clearest evidence, not only that the existing scheme does not operate beneficially, but that it can, by alteration, be made to do so consistently with the object of the foundation. *Ib.*

10. *Boarders.* The fact that the income of a free grammar school is sufficient to provide competent masters for the instruction of the free scholars is not of itself sufficient as a ground for the exclusion of boarders. *Ib.*

11. *Religious discipline.* Where it has been the usage of a free grammar school to admit the children of dissenters, and there is no positive evidence confining the benefit of the charity to members of the Church of England, the court in settling a scheme in which the head-master is to be a clergyman of the church, will not impose a qualification upon the scholars that they or their parents should be members of the church; nor will it give any specific directions as to religious instruction or discipline, but will (as in *The Warwick School Case*, 1 Ph. 564,) leave the details of both to the discretion of the head-master. *Ib.*

12. *Exchange of lands.* It seems that the court has no power to reverse the decision of the Charity Commissioners or the Bishop, under the Charity Commissioners Act, 1 & 2 Geo. IV. c. 92, upon the question whether an exchange of charity lands is or not for the permanent benefit of the charity. *Ib.*

13. *Attainder of founder—Escheat—Right to nominate master—Visitor.* The Duke of Suffolk, in 1437, as lord of the manor of Ewelme, founded an almshouse for two priests, one of whom was to be the master, and the other a teacher. The duke afterwards made ordinances for the government of the charity, which directed that the lord or lady of the manor for the time being should be the visitor, and appoint the masters and poor men in case of death or removal, &c. By the attainder of the duke or his successor, the manor became vested in the crown. In 1618, James the First, for the promotion of good literature and the increase of the stipend of the Regius Professor of Medicine in the University of Oxford, granted to the chancellor, masters, and scholars, and their successors, the donation and free disposition of the mastership

of the almshouse. In 1818, the Commissioners of Woods and Forests, under the 57 Geo. III. c. 97, sold the manor of Ewelme, which subsequently became vested in the Earl of Macclesfield, who, as lord of the manor and visitor of the almshouse, on the first vacancy, appointed N. to be the master; and N. and Dr. O. the Regius Professor of Medicine in the University of Oxford, each claimed the office of the master of the almshouse. Upon an information, it was *held*, that the charity vested in the Crown, upon the attainder, and did not escheat and was not affected by the acts for dissolving monasteries or chantries; that the right of nominating the master was analogous to an advowson, which the founder of the almshouse could not make inseparable from the manor, and that any lord of the manor could alien the right of patronage without parting with the manor, and *vice versû*; that the grant of 1818 was sufficient to pass the right of nomination, had it been vested in the Crown, which it was not, as the grant of 1618 was sufficient to vary the nature of the office, and to sever it from the manor, and give it for the benefit of the Regius Professor of Medicine in the University of Oxford, though a layman. *The Attorney-General v. The Chaplains, &c. of Ewelme Almshouse*, xxi. 409.

CHARTER-PARTY.

See SHIPS AND SHIPPING.

CHECK.

1. *Crossing of check with banker's name does not destroy its negotiability.* The crossing of a check payable to bearer, with the name of a banker, does not restrict its negotiability to such banker alone; but the banker upon whom such check is drawn ought not to pay it except through a banker; for if he does so, and the person actually presenting it turns out not to be the lawful holder, the circumstance of his so paying would be strong evidence of negligence on the part of the banker. *Bellamy v. Majoribanks*, viii. 513.

2. The banker's duty is the same where the crossing is by the customer or by an intermediate holder, or where the original crossing is erased, and the name of another banker written instead of it. *Ib.*

3. *Post-dated bank check admissible to show fraud.* A post-dated check on a bank is not absolutely void; if paid without knowledge of the false date the payment is good; and the check, though not admissible in evidence to prove a contract, if not duly stamped, may be used to show fraud. *Watson v. Poulson*, vii. 585.

CLUB.

See CONTRIBUTION.

COLLISION.

See SHIPS AND SHIPPING.

COMMITMENT.

Intent to commit felony sufficiently stated. Where a commitment stated "that A being a suspected person, did on, &c., at, &c., in the county of M., unlawfully frequent a certain street, to wit, a street called Regent street, with intent to commit a felony," it was *held* that the statement of the intent to commit a felony was sufficient without the insertion of the word "there." *Ex parte Jones*, x. 529. See *Warrant*.

COMMON.

Where a manor was part of a royal forest, and the crown had the right to turn deer upon the wastes to an unlimited extent, but for upwards of twenty years no deer had been seen there, and the lord of the manor inclosed a portion of the waste, it was

held, that, in determining whether sufficient common was left, the right of the crown was not to be taken into consideration. *Lake v. Plaxton*, xxvii. 505.

COMMON CARRIERS.

- I. DELIVERY OF GOODS TO CARRIER.
- II. RIGHT TO COUNTERMAND GOODS BEFORE REACHING THEIR DESTINATION.
- III. LIABILITY OF CARRIER FOR LOSS.
- IV. LIABILITY FOR INJURY TO PASSENGERS.
- V. LIABILITY OF RAILWAY COMPANY, FOR LOSS BEYOND THE LIMITS OF THEIR LINE.
- VI. SPECIAL CONTRACT.
- VII. CARRIAGE OF PACKED PARCELS.
- VIII. CARRIERS BY SEA.

I. *Delivery of Goods to Carrier.*

1. *Usage—Taking receipts from company.* By the usual course of business of a railway company certain receipts, &c., were given for pigs, taken for transportation. A, who was familiar with this usage, and who had notice that the company held themselves responsible only when such receipts, &c., were given, sent pigs without taking the receipts, &c. The pigs were never delivered, and it was *held* that A had no remedy against the company. *Slim v. The Great Northern Railway Co.* xxi. 297.

2. *Merchandise carried by passenger.* If a passenger on a railway carry merchandise packed up with his personal luggage, the railway company are not responsible for the value of the merchandise if the luggage be lost from the train. But if the merchandise be so packed as to be obviously merchandise to the eye, the railway company will be responsible for the loss in the absence of any bargain to the contrary. *The Great Northern Railway Co. v. Shepherd*, xiv. 367.

3. *Notice to carrier of value of goods.* Under the stat. 1 Will. IV. c. 68, s. 1, it is the duty of the sender of certain goods to give notice of their value and nature, in order to charge the carrier in respect of their loss, and this whether the goods be delivered at the office of the carrier or not. The notice to be affixed in the office by the carrier, is required only for the purpose of making an increased charge after having received notice of their value and nature from the sender. *Baxendale v. Hart*, ix. 505.

4. *Delivery to carrier away from his office.* A requested B, a common carrier, to send to A's place of business (away from the carrier's office) for some goods to be conveyed by B, as such carrier, for A. B did so, and his servant received the goods, which came within the classes of goods mentioned in the stat. 1 Will. IV. c. 68, and exceeded 10*l.* in value, but A did not declare their value or nature. The notice stating the increased rates of charges required by B for such classes of goods was affixed in his office, but was not in any way brought to the knowledge of A. The goods having been lost, it was *held*, reversing the case in the court below, (see vi. 469,) that although they had been delivered away from the carrier's office, and therefore the sender had not an opportunity of seeing the notice affixed therein, yet the carrier was not liable, as the sender had not declared the value and nature of the goods at the time of delivery. *Ib.*

5. *Notice by passenger of character of luggage.* If a passenger on a railway by a third class parliamentary train carry merchandise packed up with his personal luggage, the railway company are not responsible for the value of the merchandise if the luggage be lost from the train. But if the merchandise be so packed as to be obviously

merchandise to the eye, and the railway company make no charge or special bargain for the carriage, they will be responsible for the loss. *The Great Northern Railway Co. v. Shepherd*, ix. 477.

6. The rule that each passenger by a third class parliamentary train may carry with him 56 lbs. weight of luggage, permits a husband and wife, travelling together, to take 112 lbs. weight of luggage between them. *Ib.*

II. Right to countermand Goods before reaching their Destination.

1. *Countermanding direction of goods in transit.* A party who delivers goods to a railway company to carry, directed to a particular place, may countermand the direction at any moment of the transit, and demand back his goods, at least on payment of the carriage; unless, perhaps, when the unpacking and redelivering them would be productive of much inconvenience. *Scotthorn v. The South Staffordshire Railway Co.* xviii. 553.

2. *Conversion by company—Trover for goods.* The plaintiffs intrust goods to the Y. and N. M. Railway Company to be conveyed from H. to N. The goods arrived at N., the defendants' station, by the A. railway, belonging to an intermediate company. The plaintiffs demand them of the defendants, offering to pay any charges or lien, but the defendants refuse to deliver them up, upon the ground that by an agreement with the A. Company, the latter had no right to bring such goods to the defendant's station, and insist upon their being taken back to the A. line. *Held*, that the defendants were liable in trover for the goods; that the detention of them by the defendants, after a demand made upon their station-master, was sufficient evidence of a conversion; and that the plaintiffs were entitled to have their goods, though brought by mistake or without right on the premises of the defendants. *Rooke v. The Midland Railway Co.* xiv. 175.

III. Liability of Carrier for Loss.

1. *Loss of passenger's luggage.* The plaintiff was a passenger by railway from F. to W., bringing with him as luggage a small carpet bag, which was placed in the carriage he rode in. On the arrival of the train at W. station, the plaintiff got out upon the platform, with the bag in his hand, and it was taken from him by a railway porter to be placed in one of the cabs which were standing in the station. In an action against the railway company for the loss of the bag, it was proved that the plaintiff never saw the bag again after the porter had so taken it from him, and that the porter was unable to find it. It was also proved to be the practice of the railway company for their porters to assist in carrying the passengers' luggage, on the arrival of a train, to the cabs in the station. *Held*, that there was evidence of the railway company having contracted to deliver the plaintiff's bag to a cab in the station, and of their not having performed such contract. *Butcher v. The London and Southwestern Railway Co.* xxix. 347.

2. *Loss of "writing."* An instrument, bearing a bill of exchange stamp, and reading, "three months after date pay to me the sum of — value received. To Mr. C.," and accepted by C., was sent by railway to a creditor of C. for him to sign as drawer, and was lost. *Held*, to be a "writing" and not a bill, note, or security for money, within the meaning of the Carriers Act, s. 1; but that it could not be considered of value so as to exempt them from liability. *Stoessiger v. The Southeastern Railway Co.* xxv. 295.

3. *Loss of luggage of servant travelling with master—Fare paid by master.* A servant travelling with his master on a railway, may have an action in his own name against the railway company for the loss of his luggage, although the master took and paid for his ticket. The liability of the railway company in such a case is independent of the

contract. A declaration stated that the defendant received the plaintiff and his luggage to be carried "for reward to the defendants in that behalf," and it was proved that the plaintiff's master paid his fare and took the ticket. *Held*, that it was immaterial by whom the reward was to be paid, and that the allegation in the declaration was proved. *Semble*, that if the allegation as to reward meant that it was to be paid by the plaintiff, and if that allegation had been material, the payment for and on behalf of the plaintiff by his master would have been a payment by him. *Marshall v. The York, &c. Railway Co.* vii. 519.

4. *Measure of damages for loss.* A prize had been offered for the best model for a certain machine, and models intended for competition were to be sent by a certain day. Plaintiff sent one by railway, but through negligence it did not arrive until after the appointed day. *Semble*, by Erle, J., that the proper measure of damages in such a case is the value of the labor and materials expended in making the plan and model, and not the chance of obtaining the prize, as the latter is too remote a ground for damages. *Watson v. The Ambergate, &c. Railway Co.* iii. 497.

5. *Primâ facie evidence.* The judgment of an inferior court against a common-carrier must be affirmed, if the *primâ facie* liability of the defendants is not conclusively rebutted, and there is, therefore, evidence for the finding. *The Great Western Railway Co. v. Goodman*, xi. 546.

6. *Loss of articles above certain value—Statute liability.* The enactment in the 11 Geo. IV. and 1 Will. IV. c. 68, that no common carrier by land shall be liable for the "loss" of certain articles above the value of 10*l.*, unless delivered as such, and an increased charge for carriage paid or accepted, must be understood with reference to a loss of the particular articles named "by the carrier;" such as by the abstraction by a stranger, or by his own servants, not amounting to a felonious act, or by the carrier or his servants losing them, &c.; and does not extend to any loss whatever occasioned "to the owner" of the article by the non-delivery, or by the delay of the delivery of it, by the neglect of the carrier or his servants. *Hearn v. The London and Southwestern Railway Co.* xxix. 494.

7. *Quære*, whether the loss spoken of in this section must be a permanent or may be only a temporary loss? The term "loss" in the preamble means a loss of his own moneys, to which the carrier has been subject by way of compensation to the owner of the goods. *Ib.*

8. *Theft by carrier's servant.* A carrier is not liable for the theft of his servant, unless he has been guilty of gross negligence. *Bull v. The Great Western Railway Co.* vii. 443.

9. *Spontaneous combustion.* *Quære*, whether common-carriers are liable for loss by fire from spontaneous combustion. *Morewood v. Pollok*, xviii. 341.

10. *Ferrymen, negligence of—Broken handrail—Unsafe slip—Injury to mare.* The defendants, lessees of a ferry over a river, ran steamboats across for the conveyance of passengers and goods for hire. They also carried animals, but it was not their practice to take charge of the animals when on board. The plaintiff having paid the usual fare, led his mare on board at one side of the river, and remained with her until the steamboat reached the other side. For landing the passengers and animals the defendants had provided a movable slip, leading from the boat to a landing barge. The slip had a handrail which had been twice recently, to the defendants' knowledge, broken by the pressure of a horse on landing, and in the handrail was an iron spike which appeared whenever the rail gave way. The defendants had also been cautioned that the slip was unsafe. They, notwithstanding, continued to use the slip, leaving the broken rail slightly tied up, so that it appeared sound. Over this slip the plaintiff proceeded to lead his mare towards the shore, but the mare pressed against the rail, the latter gave way, and the iron spike concealed in it, injured her severely. *Held*, that the defendants, as ferrymen, were bound to provide proper means for the embarkation and landing of the animals they carried for hire, and that, although the

mare was under the control and management of the plaintiff, they were liable for the injury to her in consequence of their culpable negligence in allowing an improper slip to be used. *Willoughby v. Horridge*, xvi. 437, and see note.

11. *Loss by robbers or dangers of the roads.* The defendants received goods at Panama, to be carried to and delivered in London, "the act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers of whatever nature or kind soever excepted." The goods were stolen without violence, when in the course of transmission from Southampton to London. *Held*, that this was not a loss within the exception either of "robbers" or "dangers of the roads," as the word "robbers" meant loss by violence, and "dangers of the roads" meant either dangers of roads where ships lie at anchor, or such dangers on land as more immediately occur on roads, e. g. the overturning of carriages. *De Rothschild v. The Royal Mail Steam Packet Co.* xiv. 327.

IV. Liability for Injury to Passengers.

1. *Duty to carry mails and officers in charge of same.* An allegation in a declaration against a railway company by an officer of the post-office, that it was the duty of the defendants "to use due and proper care and skill in and about the carrying and conveying of the plaintiff," is made out by showing that an act of parliament made it the duty of the defendants to carry the mails and the officers in charge of the same. *Collett v. The London and Northwestern Railway Co.* vi. 305.

2. *Delay of passengers—Want of accommodation.* Excursion tickets were issued by a railway company at B., a place not on their line, but on a connected one, to convey passengers to L. and back, by any train advertised for that purpose. In consequence of the fullness of an advertised train, H. was subjected to great delay in returning, and to the expense of posting, for which he sued the company. *Held*, that he was entitled to recover. *Seem*, a railway company are not excused from carrying passengers according to their contract, upon the ground that there is no room for them in the train; but, in order to avail themselves of this answer, they should make their contract conditional upon there being room. *Hawcroft v. The Great Northern Railway Co.* viii. 362.

3. *Free Pass—"Not transferable"—Liability of free pass.* In an action for damages against a railway company for injuring the plaintiff by their negligence, the evidence showed that the company had been accustomed to give free passes to the reporters of Bell's Life, going to and from the races. The plaintiff, a reporter who had often travelled in this way, presented himself *bonâ fide* with such a pass, which, however, bore the name of another reporter, and the words "not transferable," and also a notice that any party other than the person named therein using the pass would be liable to the same penalties as a passenger not having paid his fare. He showed his pass to a servant of the company at the station, who said it was all right, and opened the door of the carriage for him to enter. *Held*, that there was evidence to go to the jury that the plaintiff was lawfully in the carriage. *The Great Northern Railway Co. v. Harrison*, xxvi. 443.

V. Liability of Railway Company for Loss beyond the Limits of their Line.

1. *Receiving goods at one terminus to carry to another.* Where a railway company receive goods at one terminus to carry them to another, they are answerable for any loss that may occur between them, although it may be on a line of railway that does not belong to such company; and the receipt of goods so to be carried is *primâ facie* evidence of such liability. *Watson v. The Ambergate, &c. Railway Co.* iii. 497.

2. Where a railway company receives goods for reward, to carry from one station to another, they are answerable for a loss occurring between them during the transit,

though it may happen on a line of railway belonging to another company. *Scotthorn v. The South Staffordshire Railway Co.* xviii. 553.

3. *Notice—Promise by station clerk.* A railway company professing to carry goods from B. to Y. within a specified time, is liable, on a promise made by the station clerk that the goods shall be forwarded to a place beyond Y., (on the line of another railway,) before a particular hour; and this, it would seem, notwithstanding a general notice has been published that the company would not be responsible for forwarding goods beyond Y. *Wilson v. The York, &c. Railway Co.* xviii. 557.

4. *Place without the realm—Notice of contents of packages—Refusal to take certain kinds of goods.* A common carrier from a place within to a place without the realm, is subject to the ordinary liabilities at common law of a carrier. A carrier has no general right in every case to require to be informed of the contents of packages tendered to him. If a carrier gives out that he will not take a certain kind of goods and yet continues to take them for all the world, he has no right to insist on his rule in the case of one person. *Crouch v. The London and Northwestern Railway Co.* xxv. 287.

5. *Notice that goods will be carried only to terminus of line.* A railway company were accustomed to carry goods from Bristol to Paddington, and so stated in their receipt notes, and that they would be responsible only between these limits. In one of these notes under the name of the consignee was added, in pencil mark, his address, at Brompton, which was beyond the station at Paddington. The declaration stated that the company undertook to deliver at Brompton. *Held*, a fatal variance and that the defendants were not liable for the damage after the goods were delivered at Paddington. *Fowles v. The Great Western Railway Co.* xvi. 531.

VI. *Special Contract.*

1. *For carriage of cattle—Misdirection.* A railway company received cattle to be transported, giving their owner a ticket for them, on which was stated, *inter alia*, that the company were not responsible for their non-delivery within any certain or reasonable time. This ticket was not read to him, nor was his attention directed to its contents. In an action against the company for not carrying the cattle with reasonable dispatch, the judge did not direct the jury as to the legal effect of the ticket, but left it for them to say whether the company received the cattle as common carriers, or under the special contract in the ticket. *Held*, a misdirection, there being no evidence of the company having received the cattle otherwise than under the special contract. *The York, &c. Railway Co. v. Crisp*, xxv. 396. See, also, *Hughes v. The Great Western Railway Co.* xxv. 347.

2. *For carriage of cattle—Defective truck.* The plaintiff, who had some cattle conveyed by a railway company, received for them a ticket, which he signed, containing a clause: "N. B.—This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be liable for any injury or damage howsoever caused, and occurring to live stock of any description travelling upon the L. and Y. Railway, or in their vehicles." Owing to the defective construction of the truck into which the cattle were put, they broke out, and were injured. *Held*, that there was no implied stipulation that the truck should be fit for the conveyance of cattle; and that the company were protected by the terms of the ticket from liability to the plaintiff for the damage to the cattle. *Chippendale v. The Lancaster, &c. Railway Co.* vii. 395.

3. *What constitutes—Carriage of live stock.* The plaintiff delivered a horse to the defendants, (a railway company,) to be carried by them, but, upon his doing so, he was required by them to, and did sign a ticket, which contained the following words: "This ticket is issued subject to the owner undertaking to bear all the risk of injury by conveyance and other contingencies; the company will not be responsible for any

damage, however caused, to horses," &c. *Held*, that this amounted to a "special contract" within the 6th section of the Carriers Act, and that the company were thereby exempted from all liability for any damage that might be occasioned to the horse. *Morville v. The Great Northern Railway Co.* x. 366.

4. *Service of printed notice.* The York and North Midland Railway Company issued printed notices, stating that fish would be conveyed at reduced rates from S. upon the condition, amongst others, that the company was not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any market, nor for any loss or damage arising from any delay or stoppage, nor were they to be required to carry by any particular trains. The notice also stated that the station clerk or servants of the company had no authority to alter or vary the conditions in the notice. The plaintiff, a fish dealer at S., sued the company as common carriers, for loss occasioned by delay in delivery of fish, forwarded by the defendants' railway after he had been served with a copy of the notice. At the time of delivery of the fish at the company's station in S., the plaintiff objected to the station-master, that the notice was of no use, and not binding upon him. The judge, at the trial, left to the jury the questions of whether or not the notice had been served upon the plaintiff, and whether a special contract existed between the plaintiff and the company for the carriage of the fish upon the terms in the notice; and he directed them that if, being served with the notice, the plaintiff afterwards forwarded the fish, they ought to infer an agreement on the plaintiff's part to such terms, unless there appeared an unambiguous refusal by the plaintiff to be bound by the notice, and an acquiescence by the company in that refusal, and that it was to be observed, that the station-master had no authority to alter or vary the notice. The jury found for the defendants. *Held*, that the direction was right, and that the jury were warranted in inferring a special contract to carry the fish upon the conditions stated in the notice, the plaintiff's objections to the station-master being of no avail whatever. *Held*, also, that the 4th section of the Carriers Act, 11 Geo. IV. and 1 Will. IV. c. 68, did not invalidate a contract so made. *Walker v. The York and North Midland Railway Co.* xxii. 315.

5. *Damages to horses—Negligence of servants.* A railway company letting trucks for hire for the conveyance of horses, delivered to the owner of the horses a ticket, in which it was stated that the owners were to undertake all risks of injury by conveyance and other contingencies, and further stipulated that the company would not be liable for any damages, however caused, to horses or cattle. *Held*, that the owner of the horses could not recover for damage done to them through the breaking of an axle, which was attributable to the culpable negligence of the company's servants. *Austin v. The Manchester, &c. Railway Co.* xi. 506.

6. The plaintiff, being the owner of a horse, delivered it to the defendants, a railway company, to be carried on their railway, subject to conditions which stated that the owners undertook all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling on the railway. The horse having been injured by the horsebox being propelled against some trucks through the gross negligence of the company. *Held*, (*hesitante* Platt, B.) that the company, under the terms of the contract, were not responsible for the injury. *Carr v. The Lancashire, &c. Railway Co.* xiv. 340. See other cases in the note.

VII. Carriage of packed Parcels.

1. *Action by carrier against company for overcharges.* The plaintiff, a carrier, sought to recover, in an action for money had and received, the amount of sums alleged to have been overcharged by the defendants for carriage of goods by their railway incorporated by the 5 & 6 Will. IV. c. 107. In addition to the rates fixed by the company for the carriage of goods, they charged the plaintiff a sum for "loading,

unloading, covering, and risk of stowage." The plaintiff never required the company to load or unload. *Held*, that the rate fixed for "conveyance," where the company acted as carriers, included the above charges. *Parker v. Great Western Railway Co.* viii. 426.

2. *Allowance to carriers—Ticking-off notes.* Up to a certain time the company had made an allowance to the plaintiff and other carriers for requiring them to sign certain ticking-off notes and declarations whenever they delivered goods to be carried by the company. In order to make these, some trouble was required in weighing and classifying the goods. The allowance was discontinued after the decision in *Parker v. The Great Western Railway Company*. The same notes were not required from persons not being carriers. *Held*, that the requiring such additional matter from carriers without allowance, did not entitle them to an action for money had and received, but that it was the subject of an action for damages. *Ib.*

3. *Booking-fees.* The plaintiff and other carriers were in the habit of making charges for booking parcels. The company entered into an agreement with E. S. to convey goods to and from their station for 1,000*l.*, and to relinquish booking-fees, which he did. *Held*, that this was no violation of the proviso against inequality of charge, the plaintiff not being bound to charge any thing for booking, but doing it merely for his own benefit. *Ib.*

4. *Packed Parcels.* The company charged the plaintiff more for "packed parcels" than they charged the public in general. *Held*, that the plaintiff was entitled to recover back the sums so paid. *Ib.*

5. *"Kind or class" of goods.* The company, by a scale-bill, announced that on miscellaneous goods, not being aggregate of one "kind or class," they would charge extra. *Held*, that, by having used the words "kind" and "class" as synonymous, they were bound by their own definition, and could not charge goods of the same class in their scale-bill as goods unconnected with goods of a like nature. *Ib.*

6. *Parcels under one cwt.—Aggregate above one cwt.* By a subsequent scale-bill the goods were divided into "classes" without any miscellaneous class, and it was announced that a parcel-rate would be charged on all parcels under one cwt. When several parcels in one lot of goods of the same class but of different kinds, each separately being under one cwt., but in the aggregate above one cwt., were directed to one consignee, the company charged tonnage-rate on such lot of parcels; but when a similar lot of parcels was directed to different consignees, the company charged each separate parcel at the parcel-rate. *Held*, an unequal mode of charging. *Ib.*

7. *Miscellaneous goods.* The mere division of goods into "classes" in the scale-bill would not enable the plaintiff to treat all the goods in a particular class as goods "of a like nature," or as goods of a "like description." *Held*, that where several parcels of goods of the same kind were sent together and amounted to a greater weight than the weight fixed upon by the company as the dividing point between the rates, they could not be charged an additional sum as "miscellaneous goods." *Ib.*

8. *Charge in addition to toll for tonnage.* *Held*, that in addition to the toll which the company were empowered to take for tonnage, they were also entitled to charge a reasonable sum for conveyance of goods as carriers, including loading, &c., and were not restricted to "such sum as they should think expedient for locomotive power and carriages." *Ib.*

9. *Several small parcels of like nature to different consignees.* *Held*, that where several small parcels of a like nature, being altogether less than the scale-bill limit, were delivered in one lot directed to different consignees, the company were entitled to charge them as one "small parcel" at the parcel-rate, and where they were not of a like nature, though of the same "class" in the scale-bill, the company were entitled to charge each of them as a separate parcel at the parcel-rate. *Ib.*

10. *Overcharge by company to carrier.* The Great Western Railway Company was obliged to charge for carriage to all persons equally, but they charged P., a carrier,

differently from and more than the public. *Held*, in accordance with *Parker v. The Great Western Railway Company*, that the overcharge was recoverable as money received to the carrier's use, the fact of his being a carrier not rendering the circumstances of goods sent by him different (under sect. 50 of 7 & 8 Vict. c. 3) from those of goods sent by the public. *Edwards v. Great Western Railway Company*, viii. 447.

11. *Scale-bills—Classes of goods.* The company, as they might by statute, published scale-bills, specifying divers classes, one of which comprised miscellaneous goods, "not being aggregate of one class or kind," and was charged the highest price for carriage, and charged P. under the miscellaneous class for aggregate goods, which, though of different kinds, were within the same class in the scale-bills. *Held*, that this was an overcharge, and that the word "class" must be taken to mean something more than "kind," and to apply to the classes mentioned in the scale-bills. *Ib.*

12. *Assistance in loading.* P.'s servants, unrequested by the company, assisted its servants in loading, &c.; the public did not. *Held*, that P. was not entitled to any deduction on this ground. *Ib.*

13. *Overcharges.* The company, before the decision in *Parker v. The Great Western Railway Company*, had entered into an agreement with K. to allow him discount; but after that, refused to make the allowance. K. recovered a verdict for the amount, which the company paid. P. claimed the same on the ground that he and K. had been charged unequally, K. having been allowed that amount; it was *held*, that this was not an allowance which made the charge unequal. *Ib.*

14. *Payment under protest—Interest.* P. paid the overcharges under protest, and after notice of action to the company he sent in a claim in writing of interest. It was objected, that as the notice of action did not contain a claim for interest it could not be recovered; but as there was no plea of want of notice of action, and as the action and all matters in difference had been referred to an arbitrator, it was *held*, that the arbitrator might award interest under the 3 & 4 Will. IV. c. 42, s. 4. *Ib.*

15. *Overcharge to carrier—Small parcels.* By a provision of a statute, companies were empowered to demand for any parcel not exceeding 500 lbs. weight any sum they chose. "Provided, that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, &c., shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages." *Held*, that the defendants were not entitled to charge the plaintiff, for the carriage of packages containing small parcels, a larger sum than they charged to other persons. *Crouch v. Great Northern Railway Co.* xxv. 449.

VIII. Carriers by Sea.

1. *Damage by rats.* Damage by rats to goods, during the voyage, does not come within the exception of "a danger or accident of the sea and navigation," contained in a bill of lading. *Laveroni v. Drury*, xvi. 510. And see note.

2. *Loss by fire on board lighter.* The 26 Geo. III. c. 86, s. 2, limiting the responsibility of ship-owners for a loss occasioned by fire, does not extend to the case of a fire happening on board a lighter, employed in carrying goods from the shore to be loaded on board a ship. *Morewood v. Pollok*, xviii. 341.

COMPENSATION.

I. FOR WHAT INJURIES COMPENSATION MAY BE ALLOWED.

II. JURISDICTION OF ARBITRATORS, JUSTICES, AND JURIES.

III. PROCEEDINGS TO OBTAIN COMPENSATION.

IV. INVESTMENT OF MONEY; COSTS, &c.

I. For what Injuries Compensation may be allowed.

1. *Land taken by railway company.* Where the words of a railway company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification to the party whose land is taken by the company, the court will incline to that construction of the words which will make them consistent with the general intent. *Eton College, ex parte*, i. 51.

2. *Actionable injury to land.* Where a railway company do that which would be an actionable injury to land, unless done under the powers conferred by their act, the owner or occupier is entitled to compensation under sect. 68 of stat. 8 & 9 Vict. c. 18. *Glover v. The North Staffordshire Railway Co.* v. 335.

3. *Land not actually taken or injuriously affected.* A railway company requiring the plaintiff's land for their railway served him with notice, pursuant to the 8 Vict. c. 18. The plaintiff afterwards, pursuant to provisions of the same statute, served the company with notice requiring them to issue their warrant to the sheriff to summon a jury to inquire into the value of the land, claiming to be paid by way of compensation for the purchase by them of the fee-simple of the land. *Held*, that as the land had not been actually taken or actually injuriously affected by the company, within the meaning of the 68th section, the plaintiff was not entitled to compensation. *Burkinshaw v. The Birmingham &c. Railway Co.* iv. 489.

4. *Crossing highway by railway on level—Approach to house—Jurisdiction of House of Lords.* One who holds lands adjoining a railway, cannot claim compensation from the company in respect that, at a short distance from the entrance to his grounds, the railway crosses on a level an important public road, the main approach to his house. And the judgment of the sheriff, whereby a sum has been assessed as compensation in respect of such level crossing, will be set aside. *Held*, so, reversing the judgment of the Court of Session, by Cranworth, L. C., and Lord St. Leonards, and that the question was not closed against the House of Lords, by the words, in the Lands Clauses Consolidation Act, that "such judgment (of the sheriff) shall in no case be subject to review * * * * * on any ground whatever," nor by the objection that the alleged error of the sheriff, in point of law, was acquiesced in, nor that the company did not point out to the sheriff to direct the jury to say how much they gave for severance, and how much for level crossing, separately. *Caledonian Railway Co. v. Ogilvy*, xxix. 22.

5. *For future unforeseen damages subsequently sustained.* In 1845, a landowner received, under an arbitration, compensation for land, and "in respect of damages which might be sustained by reason of making a railway." *Held*, that he was not precluded from insisting on a further compensation for future unforeseen damages subsequently sustained. *The Lancashire, &c. Railway Co. v. Evans*, xix. 295.

6. A railway company being about to construct their line over land of W. C., it was referred to an arbitrator to fix the amount to be paid to W. C. as the price of the land, as well as for injury to his remaining estate, and to determine what bridges, arches, culverts, &c., should be made. The arbitrator awarded 7,900*l.*, as the amount of compensation, and directed what works should be constructed. The money was paid to W. C., and the works directed were done. *Held*, that this sum covered all damage known or contingent by the construction of the railway on the lands purchased, and all other damage from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated when the compensation was awarded; but that it did not include any contingent and possible damage which might arise afterwards by the works of the company at other places which could not have been foreseen by the arbitrator. *Lawrence v. The Northern Railway Co.* iv. 265.

7. *Ascent of bridges over line of railway—Railways Clauses Consolidation Act.* The provision in sect. 26 of the Railways Clauses Consolidation Act, that in the exercise

of their powers the company shall do as little damage as may be, and shall make satisfaction to all parties interested for all damages sustained by them, applies only to cases of damage to individuals, for which compensation may be made, and does not control the enactment in sect. 50, as to the ascent of bridges over the line. *Regina v. The East and West India Docks, &c. Railway Co.* xxii. 113.

8. *Easement not land.* *Semble*, per the Lord Chancellor Cranworth, an easement is not "land" within the meaning of the Lands Clauses Consolidation Act. *Pinchin v. The London and Blackwall Railway Co.* xxxi. 249.

9. *Notice by company—Rights of subsequent incumbrancers.* Where a railway company had given due notice to all persons interested in certain lands, it was held that the company could not, by a purchase from the holder of the legal estate of such lands, defeat the rights of subsequent incumbrancers. *Hill v. The Great Northern Railway Co.* xxiii. 565.

10. *Tenant for life, right to interest.* Lands held under the see of W. by a lease for lives, renewable on payment of a fine to the bishop, were taken by a railway. Held, that the bishop, for the time being, was not entitled to the dividends of the investment of the compensation money as they accrued due, but that such dividends should be accumulated, with liberty to apply on the dropping of any life. *Ex parte the Bishop of Winchester*, xii. 342.

11. *Canal—Pumping the water from one level to another.* A canal had three levels, of which A was the highest, B the middle, and C the lowest level. The proprietors (though without authority under their act to do so) erected engines between the C level and the plaintiff's mill-forge, and pumped back the water, which, after serving the purposes of navigation in levels A and B, had flowed into level C. In 1826, a new act was passed. The 15th section gave the canal proprietors authority to maintain engines, &c., for supplying the canal with water, and "from time to time to raise the water of the canals from one level to another, or to any reservoirs; and for any of the purposes aforesaid to use such engines as they should judge proper, making satisfaction for all damages sustained by the owners of any mills, &c., taken or injured." By the 80th section, the proprietors were forbidden to take any water out of the river above the plaintiff's forge, and they were directed to maintain flood-weirs, so that all waste water running into level C, not required for the canal, should flow into the river above the plaintiff's forge. The proprietors pumped up as before the water out of the level C back into the level A; in consequence of which, except on extraordinary occasions, no water escaped over the weirs. Held, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other, did not give the plaintiff a right to compensation under the act. *Ellwell v. The Proprietors of Birmingham Canal Navigation*, xxii. 11.

12. *User and formation of railway—Mode of ascertaining and recovering.* The 68th section of the Lands Clauses Consolidation Act points out the mode for ascertaining and recovering the amount of compensation to be paid to a landowner by the railway company in respect of his claim for compensation, as being injuriously affected by the execution of the works, as well where the injury is alleged to arise from the user of the railway, as from the actual formation of the railway. *The London and North-western Railway Co. v. Bradley*, v. 100.

13. *For loss of office—Sum in gross or annuity.* The lords of the treasury may make an order to pay a sum in gross by way of compensation, for the loss of an office, or they may order an annuity, commencing at a future or a by-gone time; but they have no power to order compensation for a time during which the party held office and enjoyed the profits of it. *Regina v. The Mayor, Aldermen, &c. of Lichfield*, v. 230.

14. *Common of pasture.* From 1833 to 1850 A, the owner and possessor of a farm, exercised the right of pasturing the sheep thereof in the waste of the manor. In 1848 he became lord of the manor. The wastes were inclosed, under 8 & 9 Vict. c. 118,

and A received an allotment in respect of his manorial rights, but claimed, besides, compensation for "common of pasture or feeding or right of pasturage," in respect of the farm. *Held*, that if a common appurtenant to the farm existed before 1848, A still had an interest for which he should be compensated, which might be popularly described as above. *Lloyd v. Powis*, xxx. 176.

15. *Lands Clauses Consolidation Act—Consequential damages—Sheriff's jury—Injunction.* The right to compensation, under the 68th section of the Lands Clauses Consolidation Act is not confined to direct interference with land, but extends to consequential damage. A sheriff's jury has jurisdiction over the question and the amount of damage. *The East and West India Docks, &c. Railway Co. v. Gatlke*, iii. 59.

16. *Inclosure Act—Allotments to lord of manor—Compensation by lord for damage done in digging for coals, &c.* An inclosure act enacted that certain allotments should be made to the lord of a manor for his right to and in certain soil; it was also enacted that if the lord should enter on any of the lands for the purpose of digging, &c., any coals or other minerals, he should make compensation for the damage done." *Held*, that although there was no express reservation of mines and minerals under the land so inclosed, yet he was entitled to dig for them, paying compensation for the damage done. *Held*, also, that stones got from quarries are minerals. *Micklethwaite v. Winter*, v. 526.

II. Jurisdiction of Arbitrators, Justices, and Juries.

1. *Field taken by canal company.* The defendants were authorized by an act to take a certain field held by the plaintiff as lessee. An arbitrator was appointed to settle the compensation. The company had taken a portion of the field, leaving the plaintiff no approach to the residue; but had delivered to his lessor a grant of a way more commodious than the old one. The arbitrator made no award as to the right of way, and did not apportion the rent of the land. *Held*, that the arbitrator had acted rightly, under the act, in awarding a money compensation only, and that he would have exceeded his powers if he had adjudicated either on the question of the right of way, or of the apportionment of the rent. *Ware v. Regent's Canal Co.* xxv. 444.

2. *Interest of master in school-premises taken by railway company.* The governors of a school were incorporated, and seised in fee of the school premises. W. was appointed master, and put into possession of part of the premises. The relation might be terminated by master or governors, on giving three months' notice. A railway company bought a part of said premises, for a sum which was to compensate both governors and master, but the master got no share of it. The interest of the master in the rest of the premises was injuriously affected, and he proceeded, under sect. 68 of stat. 8 & 9 Vict. c. 18, to determine the amount of his compensation. Upon *mandamus* to the company to take up the award of the arbitrator, it was *held*, that W. had no greater interest in the house than as tenant for a year, or from year to year, and therefore was not entitled to have his claim settled by arbitration under sect. 68, but could obtain compensation only by the determination of two justices, under sect. 121. *Regina v. Manchester, Sheffield, and Lincolnshire Railway Co.* xxix. 180.

3. *Time of making award by arbitrator.* An arbitrator, under the Lands Clauses Consolidation Act, is bound to make his award within three months of the time when the matter is referred to him for arbitration. *Evans v. The Lancashire Railway Co.* xviii. 425.

4. *Title to land taken—Right of way—Surplusage.* The 68th section of the Lands Clauses Consolidation Act, (8 Vict. c. 18,) which gives the owner of lands, &c., taken for public works, the right to have his damages fixed by a jury, or by arbitrators, does not give such jury or arbitrators jurisdiction to inquire into the claimant's title to the land, but only to decide the amount of damages. When such a jury, on a claim for damages for obstructing a right of way, find a verdict denying the right of way, and, therefore, finding that no damage was sustained; but award contingently 150*l.* in case

they are compelled to assume the existence of such a right—held, by Lord Campbell, C. J., and Coleridge, J., that the prior part of the finding could not be rejected as surplusage, so as to make it a verdict for 150*l*. *Regina v. London and Northwestern Railway Co.* xxv. 37.

5. *Jurisdiction of justices to award compensation.* An adjudication by two justices of a sum to be paid by a railway company as compensation for land taken for the road, is an order within stat. 11 & 12 Vict. c. 43, s. 1, and is bad if the complaint is made more than six months after the cause of complaint arose. *In re Edmundson*, xxiv. 169. *Regina v. The Leeds and Bradford Railway Co.* xi. 484.

III. Proceedings to obtain Compensation.

1. *Action of debt.* The defendants, a railway company, by their works injuriously affected the lands of the plaintiff. They offered him 60*l*. compensation. A jury, summoned pursuant to the provisions of the statute 8 & 9 Vict. c. 18, (the Lands Clauses Consolidation Act,) assessed the compensation at 215*l*. *Held*, that the plaintiff was entitled to recover in an action of debt against the company the costs of the inquiry as well as the amount of the compensation. *The Southeastern Railway Co. v. Richardson*, ix. 464.

2. *Arbitration or jury.* There is no equity arising from the provisions of the 68th section of the Lands Clauses Consolidation Act, to restrain a party alleging himself to be "injuriously affected" from recovering compensation by an arbitration or a jury, in the manner thereby prescribed, and the balance of authority is against the principle of the decision of Lord Cottenham in the *London and Northwestern Railway Co. v. Smith*. *The Lancashire, &c. Railway Co. v. Evans*, xix. 295. See *East and West India Docks Co. v. Gatlke*, iii. 59.

3. *Invalid appointment of arbitrator—Rule to set aside award.* An injury having been done to the premises of B. by the tunnel of a railway company, for which the company refused compensation, B. served them with a notice under the Lands Clauses Act, 8 & 9 Vict. c. 18, dated the 5th of December, requiring them to appoint an arbitrator on their behalf, and stating that it was his intention to appoint S. D. M. his arbitrator, and that if, within fourteen days after the notice, the company failed to appoint an arbitrator for them, he would appoint the said S. D. M. to act for both parties. The company having refused to refer the matter to arbitration, B., on the 1st of January following, served them with a notice, which, after reciting that B. had appointed the said S. D. M. his arbitrator, stated that he then appointed the said S. D. M. to act as arbitrator on behalf of both parties. S. D. M. having awarded a sum of money to be paid by the company to B., a rule was obtained by B. for the company to pay the amount, and a cross-rule was obtained by the company to set aside the award on the ground stated in the rule, that the arbitrator had awarded respecting matters over which he had no jurisdiction. *Seem*, first, that no valid appointment of an arbitrator to act for B. had been made by him, and that this objection to the award had been sufficiently pointed out by the rule, but the court, under the circumstances, discharged both rules. *Bradley v. London and Northwestern Railway Co.* i. 410.

4. *Notice of arbitration—Injunction.* T. claimed against the Duke of N. damages for injury done to his brewery by the erection of a new market at S. The damages claimed were—first, for narrowing a street bounding the brewery; secondly, for temporary obstruction of the thoroughfare; and thirdly, for obstruction of the access of light and air, and contracted ventilation. This last damage did not appear to have been pressed, or discovered, until the new market buildings had arisen to a considerable height. The defendant gave one notice, embracing all the three heads, to proceed by arbitration, according to sects. 25 and 68. There had been a treaty for compensation for the two former heads, but it did not appear to have been completed and carried out. There had been no treaty for compensation as to the third. *Held*, that the

nature of the compensation treated for being quite clear, the defendant could be restrained by injunction from proceeding under the notice he had given. *Duke of Norfolk v. Tennant*, x. 237.

5. *Lands Clauses Consolidation Act, lands taken under—Lawful possession by company.* The ascertaining the compensation for lands entered upon and taken under sect. 85 of the Lands Clauses Consolidation Act, is no exercise of a compulsory power on the part of the company. Sect. 68 applies to lands entered upon and used under sect. 85, and the landowner is bound to initiate proceedings for settling the compensation. Where a railway company have complied with the provisions of sect. 85, and entered upon and taken land within the prescribed period for exercising their compulsory powers, their possession after the prescribed period, without having the compensation assessed and the land conveyed to them, is not unlawful, and an ejectment cannot be maintained against them. *Doe d. Armistead v. North Staffordshire Railway Co.* iv. 216.

6. *Powers for compulsory purchase—Notice by landowner—Entry by company.* A notice given by a railway company to a landowner requiring his land for the purpose of the undertaking, is an exercise of the powers for the compulsory purchase of land within the meaning of sect. 123 of the Lands Clauses Consolidation Act, 1845, and if such notice be given within the prescribed period, the steps necessary to acquire the possession of the land may be taken afterwards. The entry on land, under sect. 85, is not the exercise of a power for compulsory purchase, but is the exercise of a power for carrying that purchase into effect. *Marquess of Salisbury v. Great Northern Railway Co.* x. 344.

7. *Warrant to sheriff—Undersheriff interested.* Under sect. 39 of the Lands Clauses Consolidation Act, the promoters of a railway company may issue their warrant to summon a compensation jury to the sheriff of the county, although the undersheriff be interested as a shareholder. In such a case, the sheriff should take the inquiry in person or appoint some disinterested deputy. *Worsley v. South Devon Railway Co.* iv. 223.

8. *Entry by company not made unlawful by unlawful continuance in possession.* Where the promoters of a railway company have entered upon and taken land under the Lands Clauses Consolidation Act within the period prescribed for exercising their compulsory powers, their continuance in possession after that period, without compensation to the owner of the land, does not render their original entry unlawful. *Ib.*

9. *Arbitration with landowner—Submission by secretary on behalf of company.* Where, in pursuance of the arbitration clauses of the 8 & 9 Vict. c. 18, parties agree to refer a question of disputed compensation for land required by a railway company, and the secretary, on behalf of the company, signs the appointment of the arbitrator, an award made under such submission is valid, although all the previous forms imposed by the statute have not been complied with, those forms being necessary only in the case of a compulsory arbitration. *Collins v. The South Staffordshire Railway Co.* xii. 565.

10. *Local drainage act—Commissioners' appointment—Inquisition.* By sect. 1 of a Local Drainage Act, the lords of three manors, or, in their absence, their respective agents, appointed as therein prescribed, were to be commissioners for executing the act. By sect. 2, no person shall be capable of acting as a commissioner, or as an agent, until he shall have made a prescribed declaration. By sect. 3, in case any commissioner shall act before he shall have made the said declaration, he shall forfeit the sum of 50*l.* By sect. 6, no act of the commissioners shall be valid unless at a meeting to be holden by virtue of the act. The commissioners were empowered to take lands for the purposes of the act; and the sections for that purpose were similar to those contained in the Lands Clauses Consolidation Act. The three lords of the manors separately appointed the defendants their agents, not having previously made the declaration required. The defendants required to take, for the purposes of the act, 3 acres, 1 rood, 25 perches of the plaintiff's land. They gave the plaintiff a notice

in writing, describing the land by metes and bounds, and containing the particulars required by the act. The plaintiff refusing to treat, they issued a warrant to summon a jury, to assess the sum to be paid to him for the purchase of 3 acres, 1 rood, 25 perches of land required; but the warrant did not refer to the notice, and did not describe specifically which 3 acres, 1 rood, 25 perches were required. The plaintiff had 200 acres of land in the district. The notice and warrant were in the defendants' names, as commissioners. A jury assessed the price of the land pointed out to them, which was, in fact, the land described in the notice. The inquisition recited the warrant, but not the notice, and did not show in respect of what land the price was assessed. *Held*, first, that the defendants, by the above-mentioned appointment, were themselves commissioners under the Local Act; and that the notice and warrant were properly issued in their names. Secondly, that the lords of the manors, in appointing the defendants to be their agents, did not act as commissioners, and therefore it was not necessary that they should have made the declaration required; and that, at any rate, the omission would not make the appointments void. Thirdly, that the inquisition was not void, because it did not show specifically in respect of what land the price was assessed; and it was sufficient that in fact the land described in it was the same as that shown to the jury. *Ostler v. Cooke*, xvi. 108.

IV. *Investment of Money, Costs, &c.*

1. *Lands of vicarage taken by railway company—Reference to master dispensed with.* Land belonging to a vicarage was taken by a railway company, and the purchase-money paid into court to the account of the vicar. On a petition by the vicar, stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title-deeds had been examined and found correct; and praying for a conveyance and payment of the money out of court, without a reference to the Master, the court made the order. *Ex parte The Vicar of East Dereham*, xiii. 131.

2. *Lands in trust—Consols—Payment of dividends.* A part of some lands, which had been vested in trustees, under the Municipal Corporations Act, was taken by a railway company, and the purchase-money was paid into court. Order made for the investment in consols, and the payment of the dividends to any two of the trustees for the time being. *In re Collins's Charity*, §c. iii. 143.

3. *Lands of persons under disability—Small surplus paid to tenant for life.* Where money has been paid into court in respect of lands taken by a company from persons under disability, and, with the exception of a small surplus, has been afterwards laid out in the purchase of lands to be settled to the same uses, if such surplus is under 20*l.* the court will allow it to be paid to the tenant for life, but not otherwise. *In re Bateman's Estate*, xiii. 138.

4. *Purchase-money and costs, including brokerage, ordered to be paid to petitioner.* Where the purchase-money for lands taken by a railway company was paid into court it was ordered, upon petition, to be invested, and the costs, including the brokerage charged by the accountant-general and all reasonable charges incidental to taking said land and investing said money, to be paid to the petitioner by the company. *In re Braithwaite's Trust*, xxi. 20.

5. *Lands of Eton College.* Upon the petition of Eton College for an investment in the funds of the purchase-money of land bought of the college by a railway company, it was *held*, that the company was liable to pay the costs of such investment, under the 80th section of the Lands Clauses Consolidation Act of 1845. *Eton College*, *ex parte*, i. 51.

6. *Application to court for investing money.* Lands having been taken for the purposes of a railway company, and the money paid into court, and other lands being approved of, to be purchased therewith, and to be settled to like uses as the former

lands, it was *held*, that only one application to the court would be necessary for carrying this purpose into effect; and that the draft conveyance approved by the conveyancing counsel, being engrossed, with a blank for the date and other particulars of the order, the court would make one order directing the blank to be filled up and the contract to be completed. *In re Caddick's Estate*, xvii. 82.

7. *Death of petitioning rector.* If, on the death of the rector who petitioned for an investment of the money arising from the sale of rectory lands, the new rector consents, the proceedings may go on—*semble*. *Ex parte The Rector of Lea*, xiii. 167.

8. *When second petition necessary.* When the purchase-money of lands taken by a railway company is invested in other lands sold in a suit in this court, a second petition, intitled in the cause, becomes necessary, and the company must bear the expenses of both petitions. *Carpmael v. Profit*, xxi. 121.

9. *Interest on land damages.* A railway company took possession of certain lands, and stipulated to pay interest on the purchase-money from the delivery of the vendor's abstract till the day on which the purchase should be completed. The company paid the money into the Bank of England, and received from the vendor an account for interest up to the time of payment; and, this account having been mislaid, another was sent to the company two years after, at their request, in which interest was brought down to the latter period. No application had been made by the vendor for investment, and it was *held*, that the interest ceased to run from the time of payment into the bank. Costs of the application were not given to the company, on account of their delay in paying the purchase-money. *Lewis v. The South Wales Railway Co.* xv. 424.

10. *Deposit for payment of land—Interest.* Money was paid into court under the 69th clause of the Lands Clauses Consolidation Act, and the vendor gave notice that he should claim interest till the completion of the purchase. The purchaser not objecting till a year after notice, interest was decreed. *Ex parte The Earl of Hardwicke*, xii. 138.

11. *Apportionment of costs of investment.* A corporation asked that the amount of compensation paid into court by a railway company for lands taken might be invested, together with other moneys. *Held*, that the order should provide for the payment of costs, according to the Lands Clauses Consolidation Act, and that the corporation should pay the extra costs, by reason of the amount invested. *King's College, ex parte*, xix. 317.

COMPOSITION DEEDS.

1. *Accession to.* A creditor cannot be said in any sense to have acceded to the provisions of a composition deed, unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed. *Forbes v. Limond*, xxxi. 179.

2. *Execution of, by registered judgment creditor—Release—Merger of debts.* If a registered judgment creditor execute a composition deed made by the debtor, the deed containing a saving clause in respect of any subscribing creditor's lien, or other specific charge for his debt, and a proviso that no subscribing creditor shall be prevented from suing any person other than the debtor, his heirs, &c., the deed is to be construed according to the intention of the parties, and, therefore, the creditor's charge is not released by his execution of the composition deed; nor is the debt merged by the assignment of it to trustees for the benefit of the subscribing creditors, and it retains its priority over subsequent registered debts of creditors not parties to the composition deed; and a suit may be maintained by one creditor in behalf of himself and other creditors, parties to the deed. *Squire v. Ford*, v. 32.

3. *Construction of—Priority of debts.* By a deed of composition with creditors, it was provided that the creditors should be paid out of the property ratably, and without preference, and that any creditor holding a mortgage security might be paid the amount of his debt and interest. *Held*, that this deed did not render the simple

contract debts specialty, and that bond creditors were not entitled to more than the penalty of the bond. *Clowes v. Waters*, xii. 326.

4. *To be executed before day specified.* An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtor of their respective claims, is an agreement entered into with such creditors only as actually signed before that day, and cannot be enforced in favor of a creditor, who, in consequence of a misapprehension by both parties of their respective rights, failed to sign the release before the day specified. *Emmet v. Dewhirst*, viii. 83.

5. *Misapprehension by creditor—Specific performance.* A creditor who, through misapprehension of his rights respecting certain securities, fails to sign the release within the specified time, is not entitled to a bill in equity for specific performance of the agreement. *Ib.*

6. *Within statute of frauds.* Such an agreement, being an agreement to pay the debt of another, is within the 4th section of the Statute of Frauds, and cannot, in the absence of fraud, be varied by a subsequent parol agreement. *Ib.*

7. *Reservation of creditor's remedies against surety.* A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety, is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. Therefore, where one of the creditors who acceded to a composition deed, was also a residuary legatee of a surety for the compounding debtors to another creditor, and one of the compounding debtors happened to be the surety's executor, it was held, that the residuary legatee's accession must be taken to have been in respect of his direct debt only, and did not preclude him from insisting on the surety's estate being indemnified by the debtors. *Close v. Close*, xxvii. 535.

8. *Uncertainty of amount of claim—No sum set against creditor's name.* R., assigned extensively to G. and Company on a *del credere* commission. In 1846, the affairs of R. having become embarrassed, it was agreed that they should be wound up by him under a deed of inspectorship and license. The deed recited that R. was indebted to sundry persons in the sums set opposite their names in the schedule, and then gave free license to R. to stay in England, without suit, &c., till December, 1847, and provided for payments of dividends to creditors, "ratably upon their said respective debts." The inspectors were to have power to retain ratable dividends for creditors who had not executed the deed. G. and Company executed the deed, but entered their firm in the schedule as creditors, without any sum opposite, it being impossible, as they stated at the time, to estimate what, if any, loss they would sustain upon the goods until the whole had been sold. The claim of the plaintiffs, G. and Company, as to 1,974*l.* had been admitted by the inspectors. In 1846, and 1847, dividends were paid under the deed, the dividends paid to G. and Company, being only upon 1,974*l.* The accounts of sales of goods were not finally closed till 1849, when R. owed G. and Company, upon the balance of that account, 5,300*l.*, upon which G. and Company now claimed an additional dividend. Held, that they were not precluded from so doing by reason of their having executed the deed without any sum specified opposite their name. *Graham v. Ackroyd*, xix. 654.

9. *Fraudulent stipulation by one creditor for preference—Counter fraud.* To an action for goods sold, the defendant pleaded a release, to which the plaintiff replied that the release was obtained by fraud of the defendants, and issue was joined on a traverse of the replication. It appeared by the evidence that the defendant, being indebted to several persons, and, amongst others, to the plaintiff, proposed a composition of 6*s.* 8*d.* in the pound, which was agreed to by the majority of the creditors in number; but the plaintiff refused to concur unless he was paid 13*s.* 4*d.* in the pound upon part of the debt, and the other part was paid in full. Upon receiving notes for the amount agreed upon, and the positive assurance of the defendants that no other creditor than himself was preferred, and that no one of them was to have any thing beyond the

6s. 8d., he signed a release for his whole debt. The assurance of the defendants that no other creditor was preferred was untrue, as there was no doubt but that they had preferred other persons besides the plaintiff. *Held*, by Wightman, J., that it was no answer upon this issue to show that the plaintiff himself had also contracted for a preference, in fraud, not of the defendants, but of the other creditors, and that the defendants could not set up a counter fraud by them and the plaintiff, by which they colluded to deceive other persons, as an answer to a charge of fraud practised by the defendants upon the plaintiff, which would have the effect of depriving him of part of his original just right. By Coleridge, J., and Erle, J., that the replication was not proved, because the whole stipulation for a preference being a fraud on the part of the plaintiff towards other creditors, no part of it could be legally relied on by him as forming a material inducement for this deed; and that the fact of the plaintiff having obtained a preference for himself, not vitiating the release as against himself, the defendant having also given a preference to others, was no fraud upon the plaintiff. *Mallatieu v. Hodgson*, v. 279.

COMPROMISE.

1. *When supported.* To support a compromise, it is sufficient that the parties entering into it thought at the time that there was a *bond fide* question between them, though it may eventually turn out that there was, in fact, no such question. *Ex parte Lucy; In re The Midland Union, &c. Railway Co.* xxi. 199.

2. *As to the principles applicable to family compromises*, see *Smith v. Pincombe*, x. 50.

CONFLICT OF LAWS.

1. *Marriage contract.* A contract of marriage made in London, in the Scotch form, will be construed in England according to the law of Scotland. The domicile of the parties must determine the remedies by which the contract must be carried into effect. *Duncan v. Cannan*, xxiii. 288.

2. *Marriage settlement.* A husband and wife who have made a marriage settlement of personal estate in a foreign form, must be taken to have contracted not only for such powers of disposition over the property as are expressly reserved, but also for all such as, by the law according to which the settlement is to be construed, are incident to the estates created by it, and such powers are not lost by the parties afterwards becoming domiciled in a country by the law of which those powers are not incident to the estates. *Duncan v. Cannan*, xxxi. 443.

3. *Marriage in America—Sentence pronounced at Rome—English forum.* The status of parties, domiciled subjects of, and married in, America, was held not to be so affected by a sentence pronounced at, and founded on a rule of law peculiar to Rome, the persons being then resident at Rome, and going subsequently to England, that an English forum would, by reason of such sentence, refuse to entertain questions arising out of the marriage state of such persons. *Connelly v. Connelly*, ii. 570.

4. *Land out of jurisdiction—Equities.* Whether the court will enforce against defendants, having in their hands proceeds of the sale of land situated out of the jurisdiction, the equities to which such proceeds would have been subject if the land had been situated within the jurisdiction, depends upon the question, whether the contract which is sought to be enforced was or was not, by the *lex loci rei sitæ*, capable of being fulfilled. *Waterhouse v. Stansfield*, xii. 206.

5. *Proceeds brought within jurisdiction.* The rights of the parties interested in the proceeds of the sale of land situated out of the jurisdiction, do not cease to be governed by the *lex loci rei sitæ* by the circumstance of such proceeds being brought in specie within the jurisdiction. *Ib.*

6. *Restraint on alienation.* A law permitting alienation of land, only upon the terms of the proceeds being applied in a particular manner, is a restraint upon alienation; and restraints upon the alienation of land are always governed by the *lex loci rei sitæ*. *Ib.*

7. *Application of proceeds of sale governed by lex loci rei sitæ.* The *lex loci rei sitæ* must govern the application of the proceeds of the sale of the estate, just as much as of the estate itself. *Waterhouse v. Stansfeld*, xiii. 465.

8. *Restraint on alienation by foreign law.* When the law of a foreign country places a restraint upon the alienation of property, a contract here respecting that property cannot be enforced against the foreign law. *Ib.*

9. *Parol agreement made in foreign country.* An action cannot be maintained in England on a parol agreement which is not to be performed within a year, although made in France, and valid and enforceable there. *Leroux v. Brown*, xiv. 247.

CONSANGUINITY.

Nephew and niece—Half-blood. Under a decree directing an inquiry to ascertain the nephews and nieces of a testator, nephews and nieces of the half blood will be included with those of the whole blood. *Grieves v. Rawley*, xxi. 310.

CONSISTORY COURT.

As to the constitution of the Consistory Court, see Rawlinson v. Medwin, xvi. 285.

CONSPIRACY.

1. *To violate act of parliament, indictment for.* In an indictment for a conspiracy to violate an act of parliament charging the acts prohibited by the statute as the means by which the conspiracy is to be effected, it is not necessary to allege those acts as specifically as in a conviction under the statute. *Regina v. Rowlands*, ix. 287.

2. *To injure tradesman.* In conspiracy to injure a tradesman in his trade, under the 6 Geo. IV. c. 129, it is sufficient to allege that the defendants conspired, &c., by "molesting," "using threats," "intimidating," and "intoxicating" workmen hired by the tradesman in order to force them to depart from their work; and, also, that they conspired, &c., to "molest" and "obstruct" the tradesman and his workmen, with the same object, and in order to force him to make an alteration in the mode of carrying on his trade, the words used being those employed in the statute, and it not being necessary to set out the means of molestation, intimidation, &c., more specifically. *Ib.*

3. Counts framed upon the 4 Geo. IV. c. 34, charged that the defendants conspired, &c., by "molesting" and "obstructing" and by "using threats and intimidation" to obstruct such workmen as might be willing to be hired by the tradesman to prevent them from hiring themselves to him; *held* sufficient. *Ib.*

4. Other counts charged the defendants with conspiring to intimidate, prejudice, and oppress A B in his trade, and to prevent his workmen from continuing to work for him; and with conspiring by divers subtle means and devices and wicked acts and practices to injure and oppress A B in his trade, and to induce his workmen to leave their hiring before the period of their agreement was completed; and with conspiring to intimidate, prejudice, and oppress A B in his trade, and to entice and seduce away his workmen from their employment, and thereby to injure and oppress the said A B in his trade. *Quære*, whether they were not too vague. *Ib.*

5. *To induce sale at reduced price.* An indictment alleged that S. sold B. a mare for 39*l.*; that while the price was unpaid, B. and C. conspired by false and fraudulent representations made to S. that the mare was unsound, and that B. had sold her for 27*l.*, to induce S. to accept 27*l.* instead of the agreed-on price of 39*l.*, and thereby to defraud S. of 12*l.* *Held*, that the indictment was good, and that, being supported by proof of the facts alleged, it warranted a conviction. *Regina v. Carlisle*, xxv. 577.

CONSTABLE.

Special, to execute distress warrants, powers of. Where a party was appointed by
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the police commissioners, under the 2 & 3 Vict. c. 47, a constable to keep the peace, on the written requisition of certain church-wardens, stating that additional persons were required for the purpose of executing distress warrants to recover rates, it was *held*, that the appointment of the party as constable made him a constable for all purposes, and that the requisition of the church-wardens need not show on the face of it the necessity for his appointment. *Allen v. Preece*, xxviii. 449.

As to action against constable, see *Mellor v. Leather*, xviii. 230.

CONTEMPT.

1. *Of court of admiralty—Attachment for.* It is a contempt of court for which an attachment may issue, for the master of a vessel forcibly to eject a person who is in possession of the ship under a warrant from court. *The Bure*, i. 676.

2. *By marrying ward of court.* By marrying a ward of court, without the sanction of the court, the husband commits a contempt by which the court acquires a jurisdiction over the husband and wife by which it may decline to part with the capital of a fund belonging to the wife. *Martin v. Foster*, xxxi. 379.

3. *Attachment for, against partners—Breach of judge's order.* An attachment for disobedience of a judge's order cannot issue against two partners, unless each has been served with the order. *Ex parte Willand*, xx. 293.

4. *By bailiff, in carrying away goods.* A bailiff went to the premises of a defendant, and seized the goods there under a *fi. fa.* The goods were in possession of a claimant, who had advertised them for sale on the following day. The sheriff thereupon obtained an interpleader summons, and served it upon the claimant before the sale. The claimant nevertheless proceeded with the sale, and the goods were removed by his direction, notwithstanding the opposition of the sheriff's officers; on the following day, the interpleader summons was heard and dismissed, on the ground that the goods were not in the sheriff's possession. The claimant was, in fact, entitled to the goods under a bill of sale. On motion for an attachment against the claimant for a contempt of court in carrying away the goods, it was *held*, that he was justified in so doing, the goods being his property, although the interpleader summons was not disposed of. *Day v. Carr*, xvi. 578.

CONTRACT.

I. MAKING THE AGREEMENT.

II. IMPLIED CONTRACTS.

III. CONSIDERATION.

IV. CONDITIONS PRECEDENT, CONCURRENT, &c.

V. ILLEGALITY OF CONTRACTS.

VI. VALIDITY OF CONTRACTS.

VII. RESCISSION, &c., OF CONTRACTS.

VIII. PRINCIPLES OF CONTRACTS.

IX. CONSTRUCTION OF PARTICULAR CONTRACTS.

I. Making the Agreement.

1. *Letters—Contract to buy—Specific performance.* A party directed his agent to buy a lease of a house for 3,200*l.*, and sign an agreement. This agent wrote to the agent of the owner, offering 3,200*l.* The owner wrote across the last-mentioned letter: "I agree to sell my house upon these terms;" and thereupon the agent of the owner wrote to the agent of the other party: "my employer will take your offer;" and added, "make an appointment to meet to draw the agreements." The day following, the agent of the purchaser said that his employer had closed on another

house. *Held*, that the letters constituted a contract to buy, and specific performance was decreed, with costs. *Cowley v. Watts*, xvii. 147.

2. *Entry of contract in broker's book—Variance between bought and sold notes.* Where there is an entry of the contract between buyer and seller, by a broker acting for both parties, in his book, signed by him, that entry is the binding contract between the parties, and a mistake made by him when sending them a copy of it, in the shape of a bought or sold note, will not affect its validity. And where the broker omits to enter and sign any contract in his book, and sends bought and sold notes to the buyer and seller respectively, if these agree they constitute a binding contract; but if there be any material variance between them, they are both nullities, and there is no binding contract. *Sivewright v. Archibald*, vi. 286.

3. *Mere proposal.* Certain guardians of the poor issued an advertisement, stating that they would receive tenders for the supply of the workhouse with meat for three months, from thirty to fifty stone (setting out the description of meat); that sealed tenders were to be forwarded to the clerk, and that all contractors would have to sign a written contract after acceptance of tender. The defendant wrote to the plaintiffs as follows: "I propose to supply your house with meat according to advertisement for the ensuing three months at 6*d.* per pound." The defendant's proposal was accepted, and he was informed that he was appointed butcher, upon which he immediately declined the appointment. *Held*, that the transaction amounted merely to a proposal for a contract, and that there was no binding contract until a written agreement had been signed. *The Governor, &c. of the Poor of Kingston-upon-Hull v. Petch*, xxviii. 470.

4. *Letters not amounting to contract—Conditional settlement.* A party desirous of a certain marriage, to which opposition was made, unless a certain amount of property should be settled on the intended wife, of which amount the party was not possessed, wrote to a rich uncle relative to the matter, who replied to that and to a subsequent communication from the trustees or guardians of the lady to the same effect, that he had made his will giving certain estates to his nephew, which were considerable, and he was confident that he should not alter the will to the nephew's disadvantage; that the said estates would fall to the nephew on his (the uncle's) death, unless some unforeseen occurrence should take place; but refusing to make any settlement whatever in his lifetime. The marriage afterwards took place, the nephew executing a conditional settlement of the said estates, the uncle subsequently signing the settlement as one of the trustees thereof, but not otherwise. The devise being subsequently revoked, and the nephew having filed a bill to compel the trustees under the uncle's will to convey to him said estates, it was *held* that the letters written by the uncle did not amount to a contract, and the bill could not be sustained. *Muunsell v. White*, xxxi. 1.

5. *Letter not amounting to contract—Promise to leave money by will.* A father in India wrote to the guardian of his daughter in England, saying: "You may assure the young gentleman she may choose that on his marriage with her he shall have a given sum; nor will that be all; she shall be noticed in my will, but to what amount I cannot say." He had previously made a will giving the daughter a large sum; afterwards he made a second will overlooking the daughter. B. made marriage proposals to her, was informed of the letter to the guardian, and they were soon married. After the death of the father the daughter filed a bill, insisting that the father had agreed to settle upon her the sum mentioned in the first will; but it was *held* that the general words of the letter did not amount to a contract, and it was not clearly proved that the parties married solely on the faith of the representations there made. *Moorhouse v. Colvin*, ix. 136.

6. *To pay legacy.* R., one of B.'s sons, being about to be married to the daughter of C. B. represented to R. and C., that R.'s legacy would be paid, although he could not claim immediate payment. On the faith of these representations a settlement was executed, by which R. agreed to pay part of the legacy to the trustees of the

settlement, and C. made certain provisions for his daughter and the children of the marriage, which was shortly after solemnized. *Held*, that B. was bound to make good his representations that the legacy would be paid, and that the trustees of the settlement and R. were therefore entitled to stand as creditors against B.'s estate for the settled and unsettled parts of the legacy respectively. *Hutton v. Rosseler*, xxxi. 531.

7. *No precise words necessary to.* No precise words are necessary to constitute a covenant, but it is not sufficient that it appears that the parties contemplated that a certain thing might be done; but there must be an implication of an absolute agreement that it shall be done. *James v. Cochrane*, xii. 537.

8. *Bought and sold notes.* A broker acting for A, contracted verbally to buy hemp of B, and sent him a note stating the terms; B sent back another note, stating terms materially different. In a suit against B for non-delivery, treating the note signed by him as the contract, his liability was *held* to depend on the fact whether both parties intended that note as the contract, when he would be liable; or whether B intended to be bound only in case A should sign a note to bind himself as buyer. *Moore v. Campbell*, xxvi. 522.

9. *Made by letters—Assignees of bankrupt—Agency.* The assignees of a bankrupt, being about to sell property seized by them, were notified by the plaintiff of his claim to a portion of the property under a bill of sale, whereupon the defendants, the attorneys of the assignees, informed the plaintiff's attorney, by letter, that in consideration of the plaintiff assenting to the sale, they, on behalf of the assignees, consented that the net proceeds of the effects included in the bill of sale should be paid to the plaintiff to the extent of the balance due for principal and interest. This letter was written by the authority of the trade assignee, who managed the sale of the bankrupt's effects, but without the authority of the official assignee. The next day the plaintiff's attorney answered the letter, saying: "that in compliance with the undertaking given by you herein," he, on behalf of the plaintiff, consented to the sale. After the sale the defendants again wrote to plaintiff's attorney, referring to their former letter, and stating that, unless informed within two days of the course the plaintiff intended to pursue, they should consider themselves absolved from their promise, and contest the validity of the bill of sale. *Held*, that the first two letters constituted a complete contract; that the last letter could not be looked to in construing the contract; and that upon the face of the contract it appeared that the defendants contracted merely as agents. *Lewis v. Nicholson*, xii. 430.

II. Implied Contracts.

1. *Representation.* Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act on it, equity will bind him by such representation, treating it as a contract. But where there is no representation of fact, but only of intention, or that a state of facts will probably exist, there is no contract. *Maunsell v. White*, xxxi. 1; *Jorden v. Money*, xxxi. 20; *Hutton v. Rosseler*, xxxi. 531.

2. A party who, by representations, has induced another to enter into irrevocable engagements, must be restrained from taking proceedings to enforce obligations and promises, the abandonment of all intention to enforce which was the subject of those representations. *Money v. Jorden*, xiii. 245.

3. *When implied from silence or acquiescence.* A party who stands by and remains silent can give to others rights against him in the same way as if he had been active in making representation, only where it is his duty not to be silent or where he might reasonably infer that such silence would be taken by others as sanctioning a particular course of conduct. See *Pelly v. Wathen*, ix. 65.

4. *To pay witness summoned.* There is an implied contract on the part of a person

who summons a witness to attend a trial, to pay the expenses of the witness. *Pell v. Daubney*, i. 450.

III. Consideration.

1. *Agreement to do a legal and moral act a good consideration.* Wherever a man may do an act without a breach of any legal or moral obligation, that act may be a valid consideration for a promise to pay money to him. Per Lord Campbell, C. J., *Hall v. Dyson*, x. 424.

2. *Promise of marriage—Remaining unmarried.* In an action for breach of promise of marriage, the declaration alleged, that in consideration that the plaintiff had promised to marry the defendant, the defendant promised to marry her; that the plaintiff continued and still is unmarried, and, until the discovery of the defendant's marriage, was ready and willing to marry him; that after the defendant's promise, the plaintiff discovered that the defendant was and still is married, and that the plaintiff had not at the time of the defendant's promise any notice of the defendant's then marriage. *Held*, that the declaration was good, and that the plaintiff's remaining unmarried was a sufficient consideration for the defendant's promise to marry her. *Millward v. Littlewood*, i. 408.

3. *Agreement to employ another.* W. agreed in writing with G. that, in consideration of £l. lent him by G. and of wages to be paid, he would work for G. for twelve months. G. agreed to pay him every Saturday such wages as the articles made by him would amount to at the usual rates. After twelve months either party might terminate the service by three months' notice. G. was to deduct 10s. per week till the £l. were paid. *Held*, that the agreement bound G. to employ W. during the period mentioned in it; that there was, therefore, a good consideration for W. to serve G.; and the agreement was valid. *Regina v. Welch*, xx. 82.

4. *Agreement to discharge liability on promissory note.* A plea to an action on a promissory note given by the defendant to his father, that the father's property having been unequally divided, he, the defendant, had complained thereof to his father; and it was between them agreed, that the son should make no more complaints and that the father should discharge him from liability on the note, is bad, there being no consideration for the promise by the father. *White v. Bluett*, xxiv. 434.

5. *Substitution of separate for joint liability.* The acceptance by a creditor of the separate liability of one of several persons jointly liable is a sufficient consideration for the discharge of the others from their joint liability. *Lyth v. Ault*, xi. 580.

6. *Charge upon estates to secure money borrowed.* A charge created by C. S. upon his estates to secure the payment of a sum of money borrowed for S. H. S. is a good consideration, not only for a collateral charge upon the estates of S. H. S. to indemnify C. S. and his estate from the payment of the money borrowed, but also for a settlement of the S. estates upon his family. *Ford v. Stuart*, xi. 166.

7. *Agreement to pay interest due by mercantile usage.* In an action by executors, the defendant pleaded that no interest was due to the plaintiff's testator, but that afterwards it was agreed between the parties that the defendant should pay interest, and should not be required to pay the principal until after six months' notice given by the testator. It was proved by a balance of accounts stated by the testator and sent by him to the defendant, that interest was not payable for a year which had elapsed long before the making of the last agreement pleaded, and that by mercantile usage the testator was entitled to interest after the year. Hence there was no consideration for the agreement, and it was *held* that the plea was not supported. *Orme v. Galloway*, xxiv. 521.

8. *Past consideration.* Declaration stated that heretofore, to wit, &c., in consideration that the plaintiff, through placing confidence in the defendants that they were acting fairly by the plaintiff in recommending the plaintiff to purchase of the defendants on their recommendation 211 pockets of hops at 63s. the cwt., the defendants promised

the plaintiff that they were not then abusing the said confidence of the plaintiff, in recommending the purchase at the said price; that the plaintiff, relying on the said promise, did then, to wit, &c., through placing confidence in the defendants that they were at the time of the said promise acting fairly by the plaintiff in then recommending him to purchase at the said price, purchase of the defendants on their recommendation at the said price. The declaration then alleged that the defendants broke their said promise in this, that, at the time of making it, they were abusing the plaintiff's confidence in this, that at the time of their said recommendation the hops were worth only 50s. the cwt., as the defendants then well knew, by means whereof the plaintiff had sustained damage, &c. *Held*, that the consideration could not be regarded as a past one, and that the declaration was good. *West v. Jackson*, iv. 208.

9. *Inadequacy of consideration.* Inadequacy of value, though it is not by itself a sufficient ground for avoiding a sale, is yet of great weight when coupled with circumstances of oppression. *Cockell v. Taylor*, xv. 101.

10. *Forbearance to sue, good consideration for.* *Semble*, that a promissory note for a portion of a debt is, although part payment is not, a good consideration for a contract not to sue for the remainder during a limited period. *Moss v. Bainbridge*, xxxi. 565.

11. *Promise to do what party is legally bound to do.* A promise to do that which the promisor is already legally bound to do, is not a good consideration for a contract. *Crowhurst v. Laverack*, xvi. 497. See, also, American cases in note.

12. *Forbearance to sue—Promise to pay existing debt inoperative without consideration.* The first count of a declaration was debt for chattels; the third trover; the fourth detainue; the fifth that, at the time of the writing the letter therein mentioned, the plaintiff's claims in the first, third, and fourth counts had accrued, that the defendant ought to have paid or satisfied them, and had been requested to do so, and that the defendant had requested the plaintiff to give him time for payment or satisfaction, which the plaintiff had done; and that the defendant, being unable to pay, and to obtain further time, wrote to the plaintiff a letter. The letter was then set out with innuendoes, as follows: "That I have wronged you in not having, because incapable, repaid or returned that which you lent me, (thereby meaning the loan in the first count mentioned,) it were useless for me to deny. I know how worthless are promises of reparation, how wholly disregarded are entreaties for indulgence, (meaning that the defendant did then entreat for indulgence from the plaintiff for payment or satisfaction of the said claims,) yet I will say that the most anxious endeavor and hope of every future day shall be to prove my gratitude in the only way in which the world esteems the proof, by restoring you all that I owe," (meaning the payment or satisfaction of the said claims.) Averment, that, in pursuance of the letter, and on the faith of the defendant's promise therein, the plaintiff, at the defendant's request, gave the defendant further time for payment, &c. *Held*, on demurrer to the fifth count, that it was bad; for that the letter did not show any contract of forbearance to sue, or any consideration on which to found a fresh promise by the defendant to pay claims which he was already liable to pay, and that, the original consideration being exhausted by the promise to pay implied by law, any subsequent promise was without consideration, and afforded no foundation for a new action. That the letter did not contain a promise to pay. *Deacon v. Gridley*, xxviii. 345.

IV. Conditions Precedent, Concurrent, &c.

1. *Averment of conveyance in action for purchase-money.* If the defendant has agreed to pay certain purchase-money by a given day, and that then the plaintiff should convey to him certain property, it is the defendant's duty to pay the money on that day, and it is not necessary for the plaintiff to aver a conveyance, in an action of *assumpsit* for the purchase-money. *Yates v. Gardiner*, v. 541.

2. *Independent agreements—Lease.* Certain "articles of agreement" signed by

plaintiff and defendant, and which were held by the court to amount to a lease, concluded thus: "That no abstract, or investigation of title shall be required, beyond evidence of the seisin and possession as owner by the plaintiff, and his ancestors for twenty-one years last past; that the defendant shall immediately do all acts necessary to transfer and vest the said shares in the plaintiff." *Held*, that the agreement by the defendant to transfer the shares was independent of the implied agreement by the plaintiff to produce evidence of seisin and possession for the twenty-one years; and that the production of such evidence was therefore not a condition precedent to the plaintiff's right to a transfer of the shares. *Stratton v. Pettit*, xxx. 479.

3. *Independent covenants to take and supply coke.* Plaintiffs by deed covenanted to buy, and defendant to supply, all the coke used by plaintiffs; the amount to be 600 tons per week; if plaintiffs needed more coke, they engaged to take the same from the defendants, and if the consumption should be materially diminished, the company was to give three months' notice to the defendants. *Held*, that the covenant by the company to take all it required was not a condition precedent to the defendants' liability to supply, but that the covenants were independent. *The Eastern Counties Railway Co. v. Philipson*, xxx. 421.

4. *Agreement by railway company to carry coals.* The defendants, a railway company, agreed with the plaintiffs to carry coals from U. to K. and to find wagons, the Y. and B. Company undertaking to haul the wagons to and fro between U. and Y., and the contract was founded on the basis that there should be no unreasonable detention of wagons, whether empty or full, between Y. and U. *Held*, that the neglect and refusal by the Y. and B. Company to haul between U. and Y. was an answer to an action by the plaintiff against the defendants for neglecting and refusing to carry from U. to K. *Jonassohn v. The Great Northern Railway Co.* xxviii. 481.

5. *Right to determine lease.* A lease containing many covenants on the part of the lessee, some of little importance and very difficult to fulfil, provided that if the lessees should desire to quit the premises at any one of certain periods during the time, and should give notice thereof in writing, then "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed," the lease should be void, &c., but without prejudice to either party's claim for damages for a breach of any covenant. The performance of all the covenants by the lessees was *held* to be a condition precedent to their right to determine the lease. *Grey v. Friar*, xxvi. 27.

6. *Lease—Agreement to supply coal.* By an agreement between A and B it was provided that A should grant to B a lease of a certain manufacturing establishment for twelve years, B to purchase all his coal for the establishment from A; A not to be liable to supply more than 500 tons of coal a week. In an action brought by B against A for not supplying the coal, it was *held* that the granting a lease by A was not a condition precedent to his obligation to supply coal. *Wood v. The Governor and Company of Copper Miners*, xxvi. 343.

7. *Agreement to take wool in vessel, declaring name.* A contract was made by which the plaintiffs agreed to bring — bales of wool from Odessa, declaring the name of the vessel, as soon as the wool was shipped, to the defendants, who agreed to buy the wool at so much per pound. The name of the vessel was not announced to the defendants till some time after she had sailed, and on her arrival they refused the wool. *Held*, that the declaring the vessel's name was a condition precedent, and therefore the defendants were not bound. *Graves v. Legg*, xxv. 552.

8. *Agreement to take coke satisfactory to inspecting officer—Pleading.* Where by a contract, the plaintiffs agreed that they would, during a certain term, supply to the defendants all the coke they should require, said coke to be of the best quality, and to the satisfaction of the inspecting officer of the defendants' company; the defendants having refused during said term to accept said coke, in an action for a breach of the contract, it was *held*, that according to the true construction of the agreement, it was a

condition precedent to the right of the plaintiffs to insist upon the defendants' acceptance of the coke, that it should be to the satisfaction of their inspecting officer; and consequently that the declaration, which omitted that allegation, was bad in substance. *Grafton v. The Eastern Counties Railway Co.* xxii. 557.

9. *Work to be done to satisfaction of architect—Pleading.* By a building contract the works were to be executed to the satisfaction of the architect, additions not to be executed without his orders and the value to be ascertained by him; the averment in the declaration was that the architect required additions to the work, which were executed by the plaintiff; and that all things had happened to entitle him to have the values and amounts ascertained, but that the architect did not ascertain the same, and that the balance of the whole account was unpaid. Plea, that all things necessary to entitle the plaintiff to have the values and amounts ascertained, had not happened, because the certificate of the architect that the works had been completed to his satisfaction, had not been obtained. On demurrer, it was *held*, 1. That the satisfaction of the architect was a condition precedent to entitle the plaintiff to have the amounts and values of the extra work ascertained. 2. That the declaration was bad, for not alleging that the certificate of satisfaction had been obtained, unless the general averment was sufficient for that purpose; and if it were, 3. That the plea was a good answer to the action. *Glenn v. Leith*, xxii. 489.

10. *Building contract—Certificate of surveyor a condition precedent to payment—Pleading.* A building contract between A and B contained a proviso that the payments to be made by B should only be due provided the certificate of the surveyor of B, for the time being, should first be obtained. A having sued in *indebitatus assumpsit* for the balance alleged to be due, it was *held*, that under the general issue, the absence of the certificate was a good answer to the action, and that the plaintiff was not at liberty to show that it was withheld fraudulently and in collusion with the defendant. *Milner v. Field*, i. 531.

11. *Condition, neither precedent nor concurrent.* A lease contained a covenant by the lessor to do certain work, and at the end of the covenant were these words, "and the whole of which is agreed to be left to the superintendence of the defendant and the plaintiff's son." *Held*, that this was neither a condition precedent to, nor concurrent with the covenant. *Jones v. Cannock*, xviii. 81.

12. *Delivery a condition precedent to payment.* Where an agreement, as described in the declaration, was "to deliver fifty tons of iron for the price of 9*l.* per ton, the said goods to be delivered forthwith, and the said price to be paid in cash in fourteen days from the time of the making of the said contract," it was *held*, upon demurrer, that it sufficiently appeared upon the face of the contract, as stated, that the delivery was intended to be a condition precedent to the payment. *Staunton v. Wood*, vii. 411.

13. *Particular act to be done before estate can vest.* If the meaning of an instrument, as gathered from the whole context, is that no estate is to vest unless on a particular act being done or a particular event happening, then the condition, however expressed, is a condition precedent. *Egerton v. Brownlow*, vii. 170.

14. *Assignment of shares in consideration of covenant of indemnity against joint liability.* If A agrees to assign to B certain shares with due formality, in consideration of B's covenanting to indemnify him against certain of their joint liabilities, and B commits a breach of his covenant before A has completed his assignment, A must nevertheless complete the transfer, the consideration given by B being the covenant, and not the keeping of that covenant. *Gibson v. Goldsmid*, xxvii. 588.

15. *Reasonable time.* A tenant held under an agreement giving him the option of purchasing the estate on giving three months' notice. The notice was given, and a few weeks later the vendor gave the vendee notice that he would allow him six weeks, and no more, to complete the sale. The sale not being completed within the six weeks, it was *held* that time was not of the essence of the contract, and a reasonable time must be given. *Pegg v. Wisden*, xv. 12; see also *Parkin v. Thorold*, xi. 275, and xiii. 416.

16. *Delivery upon the order of a third party.* A. contracted to deliver to a railway company a quantity of sleepers within a specified time, "as, and when, and in such quantities, and in such manner" as the engineer of the company, by order in writing, should, at any time within the period mentioned, require. *Held*, that an order by the engineer was a condition precedent to any delivery of the sleepers by A. *The Great Northern Railway Co. v. Harrison*, xiv. 189.

17. The defendants agreed to lease the plaintiffs certain premises for twelve years, to be used in the manufacture of a patent fuel, and also to supply him with coals for the manufacture, for the same period. The plaintiff was to purchase all his coals of the defendants, but they were not bound to furnish more than 500 tons per week. The plaintiff was to use the premises for no other purpose. *Held*, that the granting a lease was not a condition precedent to the obligation to supply coals. *Wood v. The Governor and Company of Copper Miners*, xxvi. 343.

18. *Agreement to supply sleepers within a specified time.* An indenture between the plaintiffs and the defendants contained a covenant by the plaintiffs that they would supply sleepers within the time specified, "as, and when, and in such quantities, and in such manner," as the engineer of the company, by order in writing, "from time to time, or at any time within the period limited by the specification, should require." The specification stated that the number of sleepers required was 350,000; that one half would have to be delivered in 1847, and the remainder by midsummer, 1848. *Held*, first, that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers. Secondly, that an order by the engineer was a condition precedent to any delivery of the sleepers by the plaintiffs. Thirdly, that the company were bound to cause such order to be given within the time limited by the specification. Fourthly, that although the engineer had power to alter the time for the delivery of the sleepers, such power was to be exercised within the period limited by the specification. Fifthly, that the engineer, as to matters in which he had a discretion, e. g. as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties, but as to giving the order for the delivery he was a mere agent of the company. *The Great Northern Railway Co. v. Harrison*, xiv. 189, and *Harrison v. The Great Northern Railway Co.* viii. 469.

V. *Illegality of Contracts.*

1. *Of contract against public policy—Restraint of trade.* The question whether a contract is void as against public policy, is one of law for the court when the circumstances raising the question are conceded. *Tallis v. Tallis*, xviii. 151.

2. The defendant covenanted not directly nor indirectly to be concerned in the canvassing trade, (publishing books in numbers and soliciting purchasers by travelling agents,) in London or within 150 miles of the general post-office, nor in any town in Great Britain in which the plaintiff, or his successors might at the time have an establishment, or might have had one within the six months preceding. *Held*, not unreasonably in restraint of trade so as to make void the contract. *Ib.*

3. *Of contract to keep partner's name secret.* A contract between partners, doing business as pawnbrokers, that the name of one partner shall be kept secret, is illegal under stat. 39 & 40 Geo. III. c. 99. *Fraser v. Hill*, xxviii. 25.

4. *Of contract by spiritual person holding benefice.* The 1 & 2 Vict. c. 106, ss. 29, 31, which renders it illegal for a spiritual person holding a benefice to engage in or carry on trade, allows a contract so entered into to be enforced, although the party with whom it was made was at the time aware that the other party was a spiritual person holding a benefice. *Lewis v. Bright*, xxx. 245.

5. *Of contract to secure payment of money due under illegal contract.* In an action of covenant the defendant pleaded that he had bought land of the plaintiff, for the purpose of selling it by lottery, "as the plaintiff at the time of making the agreement."

well knew," that a part only of the purchase-money was paid, and the covenant made to secure the rest. *Held*, that the plea was good, that after verdict it ought to be taken to mean that the covenant was given in pursuance of the illegal agreement, and even if not so understood, that the covenant could not be enforced, since it was given as a security for the payment of money due under an illegal contract. *Bridges v. Fisher*, xxv. 207.

6. *Of contract respecting delivery of game out of season.* The 1 & 2 Will. IV. c. 32, does not render illegal a contract made during the game season whereby a party licensed to deal in game undertakes to deliver to another live game at a period out of the season. *Porritt v. Baker*, xxix. 500.

7. A declaration alleged a contract for the reciprocal delivery of pheasants, averring performance on the part of the plaintiff, and, as a breach, non-delivery by the defendant. The defendant pleaded that his contract was to deliver at any time of the year, contrary to the statute, and that he was asked to deliver at a time when it was contrary to that statute that the defendant should knowingly have any game in his possession, &c. *Held*, that the plea was bad, as not necessarily showing a contract rendered illegal by the statute. *Ib.*

8. *Of contract to do unlawful act, the party to endeavor to get it legalized.* Defendants were authorized by an act to bridge a river in one place, but began to bridge it in another, by placing a pier in the stream; for this public nuisance plaintiffs had them indicted. The parties then agreed by deed that defendants should complete the bridge, so that navigation should not be interrupted, within a year—or on default pay to plaintiffs 1,000*l.* liquidated damages; and this, whether an act to authorize the building were obtained or not, plaintiffs to endeavor to get such an act passed. Declaration on the covenant for 1,000*l.* Plea, the provisions of the deed, and further, that the works were not authorized by any act then existing. Replication, that the works were necessary to carry out the railway, that an act authorizing them was obtained so soon after the agreement that defendants might have completed the works within the year. *Held*, by Lord Campbell, C. J., and Wightman, J., that the covenant to complete was independent and absolute; that the covenant to pay 1,000*l.* was illegal, as for the continuance of a nuisance; therefore, plea good. By Lord Campbell.—The covenant was also void, as the covenantees knew it to be *ultra vires* of the directors. But by Coleridge, J., and Erle, J., that the plea was bad: First, because the stipulation for the payment of 1,000*l.* was confined to securing the performance of the works, which defendants were bound to perform, within a given time; and that, upon the true construction of the deed, the consideration for the non-prosecution of the indictment was the previous agreement to perform those works. Secondly, because the contract really tended to the main purposes of the act of incorporation, though adopting different means. By Lord Campbell, Coleridge, J., and Wightman, J.—The first replication is bad, as claiming power to do an unlawful act, in order to carry out the purposes of the act of incorporation, against its provisions or beyond them. The second replication is bad; an act is not the less unlawful because the person binding himself to perform it agrees to get it legalized. *The Mayor, &c. of Norwich v. The Norfolk Railway Co.* xxx. 120.

9. *Truck act—Artificer—Payment of wages in goods.* The plaintiff contracted to load ironstone at so much per ton, but did not stipulate for his own personal labor. He employed men to do the work under him, and from time to time he worked personally. *Held*, that he was not an "artificer" under the Truck Act, 1 & 2 Will. IV. c. 37, ss. 3, 5, 25, which prohibits the payment in certain trades of wages in goods, &c. *Sharman v. Sanders*, xvi. 431.

10. *Contract by uncertificated person.* A person who is not within any of the exceptions specified in the 44 Geo. III. c. 98, s. 14, cannot recover for his services in drawing or preparing any conveyance or deed relating to any real or personal estate, or any proceedings in law or equity. *Taylor v. The Crowland Gas and Coke Co.* xxvi. 460.

VI. Validity of Contracts.

1. *Note given under undue influence.* A promissory note having been given, under undue influence, by a patient to his surgeon, for an amount far beyond what was justly due, the surgeon was restrained from recovering the whole amount, but the note was retained as a security for what should prove to be justly due. *Billing v. Southee*, x. 37.

2. *Want of mutuality.* If parties of the second part execute an agreement on the faith that the parties of the first part will also execute it, who do not, then the parties of the first part cannot enforce the agreement against the other parties. *Ex parte Carew*, xxxi. 519. See, also, *In re The Dover, Hastings, &c. Railway Co.* xxiii. 77.

3. As to the effect of misrepresentation of facts in inducing a party to execute an agreement, see *Ex parte Carew*, xxxi. 519.

4. *Contract to make engineer of a company, who is also a shareholder, an arbitrator of claims against company.* The holding of shares in a railway by the chief engineer does not avoid a contract which makes him an arbitrator, not final, concerning claims against the company. *Ranger v. The Great Western Railway Co.* xxvii. 35.

5. *Of contract by party when intoxicated.* In a suit for specific performance, the intoxication of the defendant at the time of the making of the agreement is no ground for defence, no fraud being alleged. *Shaw v. Thackray*, xxiii. 18.

6. As to when a contract by an incorporated company must, in order to be valid, be under seal, see *The Governor and Company of Copper Miners v. Fox*, iii. 420.

VII. Rescission, &c., of Contracts.

1. *What amounts to rescission.* Under a contract required by the Statute of Frauds to be in writing, goods were sold, to arrive by a certain ship to be taken from the quay. The purchaser afterwards verbally consented to the goods being warehoused instead of being delivered from the quay. *Held*, in an action for non-delivery of the goods, that such consent did not support a plea of rescission of the contract. *Moore v. Campbell*, xxvi. 522.

2. *Rescission must be promptly made.* Where a party contracts for the purchase of flour of a specified quality, and flour of an inferior quality is delivered, he cannot, after using more than was necessary to test its quality, and disposing of a portion of it, rescind the contract and recover the price paid as money had and received to his use. *Harnor v. Groves*, xxix. 220.

3. *Agreements not performed within stipulated time.* A contract cannot be avoided on the ground that certain things were not done within a stipulated time, unless, from the nature of the case, time is shown to be of the essence of the contract. *Roberts v. Berry*, xvii. 400.

VIII. Principles of Contracts.

1. *Extrinsic circumstances.* In construing a contract or conveyance, the court cannot, where the terms are clear, look to extrinsic circumstances to discover the intention of the parties, but can look only at those terms, and (if necessary, by reason of any ambiguity,) to the nature of the thing conveyed, or the subject of the contract; and they are bound by the construction thus arrived at, even although it plainly appears from the facts that it is contrary to the intention of the parties. *The Loughor Coal and Railway Co. v. Williams*, xxx. 496.

2. *Presumption in favor of lawful intent.* Where a contract is capable of two constructions, the one importing a lawful and the other an unlawful intent, the presumption is in favor of the former construction. *Moss v. Bainbrigge*, xxxi. 565.

3. *Real meaning of words to be ascertained—No definite sum.* In construing contracts the court must ascertain the real meaning of the words used, and where no

definite sum is mentioned or referred to, the court cannot enforce any contract. *Moorhouse v. Colvin*, ix. 136.

4. *Same in equity and at law.* A written contract must receive the same construction in a court of equity as in law. *Parkin v. Thorold*, xi. 275. But see the same case, xiii. 416.

IX. Construction of Particular Contracts.

1. *Authority to sell coal—Ready money.* The defendant, a coal factor, sold coals for the plaintiff upon the following authority: "Please sell for me 250 tons of coal at such a price as will realize me not less than 15s. per ton, net cash, less your commission." *Held*, not to support a declaration for breach of contract in not selling for ready money. *Boden v. French*, iv. 363.

2. *Recital in an unexecuted deed—Agency.* R. contracted with the assignees of Messrs. E., for the purchase of certain claims of the bankrupts against the estate of G. F. B. He represented that he acted on behalf of himself and M., who was clearly cognizant of the negotiations and contract. Several documents passed between the parties, and finally a draft of a deed was prepared, which recited that the contract was a joint purchase by R. and M. This was submitted to M., who approved of it; and at that time, he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M. objected to the contract, and refused to join in the purchase. *Held*, that there was no evidence that M. had entered into any agreement, or that R. acted as his agent; and that the recital of an agreement in a document intended to be executed, would not bind a party who had done nothing to recognize it, though at one time it was apparent that he was willing to execute it, and the bill was dismissed against M., with costs; but as R. admitted the plaintiff's case, a decree was made against him without costs. *Foligno v. Martin*, xvii. 475.

3. *Forbearance to sue.* An agreement by a creditor not to take proceedings against the debtor, during his life, nor against the debtor's estate, during the life of his wife, if she should survive him, construed (as to the latter clause) to mean, that any beneficial interest which the wife might take in the property of the husband should not be disturbed during his life, and not to be an agreement that the creditor should be debarred from suing the personal representative of the husband; and, therefore, the creditor obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life. *Harman v. Richards*, xvii. 548.

4. *Bill of sale of articles specified in inventory.* A bill of sale purported to assign "all the household goods and furniture of every kind and description in [a certain house,] more particularly mentioned and set forth in an inventory or schedule of even date." The bill of sale did not specify all the goods and furniture in the house, *Held*, that the bill of sale operated only as an assignment of the articles specified in the inventory. *Wood v. Rowcliffe*, v. 471.

5. *Sale of goods for "fair value"—Arbitration.* H., by parol, sold goods to the defendant, at an agreed price, and the defendant took possession. Afterwards, by articles of agreement, it was agreed between them as follows: "That H. shall sell, and the defendant shall purchase (the same goods,) and that the price to be paid for the same shall be the fair amount of the value thereof, such amount to be settled, in case the parties shall differ as to the same, by arbitration in manner hereinafter mentioned," &c. The defendant continued in possession of the goods, and never objected to the price originally fixed. H. having become bankrupt, his assignees sued the defendant for the amount, as for goods sold and delivered. *Held*, in the absence of evidence that the parties had differed as to the amount fixed, that the fair value mentioned in the agreement must be taken to be the value previously ascertained and agreed to. *Cannan v. Fowler*, xxiv. 328.

6. *Agreement to return deposits if act not obtained—Stamp—Interest.* The directors

of a projected railway company, after the subscribers' agreement had been prepared, issued a circular letter, stating that if the act were not obtained, they would return the whole of the deposits without deduction. Upon the faith of this, the plaintiff applied for and obtained an allotment of shares. The letter of allotment was accompanied with a copy of the circular, and stated that the plaintiff would receive his scrip on executing the agreement, which contained a clause fully indemnifying the directors for all their expenses, and authorized them to reimburse themselves out of the funds of the company, and to apply to this purpose the deposits and calls. The plaintiff paid the deposits, signed the agreement, and obtained the scrip. The directors failed in obtaining the act, and 1*l.* per share was returned to the shareholders, the rest of the funds having been applied to the necessary expenses. Afterwards, the plaintiff, by letter, demanded the rest of his deposits, and interest from a certain date. *Held*, first, that the contract upon which the plaintiff had paid his deposits was that, in the event of an act not being obtained, the whole of his deposits should be returned, and that the express undertaking to that effect in the circular was not in any way affected by the terms of the subscribers' agreement executed by the plaintiff. Secondly, that the contract for the shares was not entirely evidenced by writing, and did not therefore require a stamp. *Mowatt v. Londesborough*, xxv. 25.

7. *Where penalties may be deducted from amount due.* Penalties under a contract may be deducted from the amount of a payment due under the contract. But where a contract expressly stipulated that in a certain event a company might take possession of works, tools, &c., and complete and pay for them out of any money due the contractor, and the payments made before the taking possession should be taken by him in full satisfaction, and all balances of money which would have become due and all the tools and materials should become the absolute property of the company, and the contractor should make up any deficiency, it was *held*, that the tools, &c., were mere machinery to enable the company to finish the works at the cost of the contractor, and that it was not entitled to the surplus, if any, but was bound to account to him. *Ranger v. The Great Western Railway Co.* xxvii. 35.

8. *Sale of cargo by bill of lading.* Where parties contracted for the sale of a cargo, described as the cargo of a certain vessel, as it stands, the quantity to be taken from the bill of lading, and on measurement it was found to fall short of the amount stated, there being no evidence to show how the deficiency arose, or that either party was aware of it, or had measured it before the sale, it was *held*, that the parties had agreed by the contract to take the quantity as fairly represented in the bill of lading, and that the price was to be paid on that footing, the purchaser taking the chance of the actual quantity turning out to exceed or fall short of that specified in the bill of lading; and that consequently the action could not be maintained. *Covas v. Bingham*, xxii. 183.

9. *"Presentation" of delivery order, meaning of.* A delivery order for goods, stated that the parties signing it, held certain goods which they engaged to deliver to A's order, on the "presentation" of the document duly indorsed. *Held*, that "presentation" meant delivering up the document, and that A's indorsee was not entitled to the delivery of the goods on merely showing the order. *Bartlett v. Holmes*, xx. 277.

10. *Rent regulated by average price of wheat.* A lessee covenanted to pay a certain rent, subject to a proviso for increasing or reducing it every year according to the average price of wheat in every year, (such average to be ascertained from the current year's average, under the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, s. 56.) These returns give an annual average computed from the averages of the last seven years, and no averages of the one year only. *Held*, nevertheless, that the parties must be taken to be bound by the septennial average published annually as the average for the year. *Kendall v. Baker*, ix. 449.

11. *Agreement not to carry on business at certain place, breach of.* On an agreement between A and B for the purchase of B's shop, stock in trade, and the good-will of the

business, in which B agreed that he would not carry on the said business either directly or indirectly at C; and, after making said agreement, B commenced business at D, and supplied persons resident at C with goods as before, and solicited orders therefor in C, it was *held*, that B had been guilty of a breach of the agreement, and that it was not necessary to the carrying on of business within the meaning of the agreement, that B should have his place of business at C aforesaid. *Turner v. Evans*, xxii. 144.

12. *Sale of wool*—"Say not less than" certain amount. It was stipulated that the defendant should sell to the plaintiff what wool he might pull within a certain time, "say not less than 100 packs of wool." *Held*, (*dissentiente Coleridge, J.*) that in the absence of an averment that the word "say" had any peculiar meaning, the agreement imported that the defendant should pull and supply to the plaintiff 100 packs as a minimum during the specified period, and that the plaintiff should take any further quantity which should be pulled by the defendant during the period. *Leeming v. Snaith*, iii. 365.

13. *Life insurance policies, security on*. A being the holder of several policies of insurance on the life of B, and being unable to keep them up, entered into an agreement with C, for the purpose of C keeping them up. The agreement consisted of three instruments; first, a letter, by which it was stated that C was to pay the premiums, and to have his advances and interest secured by a deposit of the policies, a bond, and an equitable mortgage of certain estates. No time was specified for the repayment of the advances and interest. Secondly, a bond for 6,000*l.*, referring to the letter, for repaying the advances and interest at the expiration of six months from the death of B. Thirdly, an agreement, also referring to the letter, and to the deposit of the policies to secure the payment of the advances and interest at the expiration of six calendar months from the death of B, by which agreement the advances and interest were secured to be paid at six months after the death of B, upon certain estates. A died, living B, leaving a considerable amount of advances and interest unpaid, and having before his death assigned the policies to trustees, for his creditors. C now filed his bill, claiming to have all his advances and interest paid, and that the agreement might be varied, and made to conform to the letter, and that, if necessary, the policies might be sold. *Held*, first, that, upon the true construction of the three instruments, C had no security on the policies available till after the expiration of six months from the death of B. *Brougham v. Squire*, xix. 99.

14. *Rectification*. Secondly, that the agreement could not be rectified, there being nothing to rectify it by except the letter itself, the letter and agreement being incorporated in effect into one instrument, and the letter not specifically pointing out the time when the security was to be available. *Ib.*

15. *Collateral security*. By memorandum of agreement between the defendants, brewers, and one C., a publican, the defendants agreed to lend C. 150*l.* on his promissory note, payable on demand, with interest, C. depositing a lease of certain premises as security for the repayment of the 150*l.* and interest, and the defendants agreeing not to call for repayment for two years, on condition that the interest, the rent of the premises, and C.'s account with the defendants for beer were duly paid; and, in case of non-performance of any of the conditions, the defendants were to be at liberty to enforce payment of the note, and if not paid, with costs and interest, they might then sell the lease and deduct from the proceeds the 150*l.* and interest, as also any money due to them from C. for beer. *Held*, that on tender by C., or, he having become insolvent, by his assignee, of the amount of the note and interest, the latter became entitled to the possession of the lease; and that the agreement gave the defendants no right to detain the lease on account of any money due to them from C. for beer, the lease being deposited only as security for the 150*l.* and interest. *Chilton v. Carrington*, xxviii. 340.

16. *Agreement not to sue—Promissory note*. A made his promissory note payable on demand, with interest, in favor of B and C, the executors of D. A was, with sev-

eral other relatives, to be entitled to certain benefits, under D's will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the executors were authorized to lend the funds in their hands on personal security, and a part of these funds having been lent to A, (as well as to the other legatees,) he gave the executors the note in question. By the agreement it was settled that the notes given to the executors should not be sued on till the youngest legatee had arrived at the age mentioned in the will. The executors did not sign this agreement; but when it had been signed by the other parties, took it into their possession. The executors brought the action while the legatee in question was alive, and before he had attained the specified age. A pleaded the agreement as an answer to the action, averring that plaintiffs accepted and received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age. At the trial the agreement was proved. *Held*, that the plea was bad in substance, for that the agreement was collateral, and was not between the same parties as the note. *Salmon v. Webb*, xvi. 37.

17. *Agreement to give marriage portion.* A father bound himself to give his daughter a marriage portion of 2,000*l.*, and said that she was and should be noticed in his will. He had previously made a will, giving her a lac of rupees; but afterwards he revoked the gift. *Held*, affirming a decree below, that there was no contract by the father to give more than the 2,000*l.* *Moorhouse v. Colvin*, xiii. 167.

18. *Express warranty.* An express warranty will not be extended by implication from other parts of the contract in which it occurs. *Dickson v. Zizinia*, ii. 314.

19. *Joint contract.* The plaintiff signed a proposal, "on behalf of the members of an orchestra," to which he himself belonged. The defendant accepted the proposition, but failed to pay the amount agreed on. The plaintiff alone brought an action, stating the contract to be with him. *Held*, that the contract was joint, and that he could not recover. *Lucas v. Beale*, iv. 358.

20. *County lunatic asylum—Probationary plans, liability for.* A declaration against the clerk to a committee of visitors of a county lunatic asylum stated, that the committee agreed with the plaintiff, in consideration that he would render his services as an architect in examining the site of a proposed lunatic asylum, and preparing the requisite probationary drawings for the committee, &c., that a certain sum should be paid to him, and averred that he did prepare requisite probationary drawings, &c. Plea, that the plaintiff prepared divers drawings which were not approved of by the committee, but rejected by them, and that, save as aforesaid, the plaintiff did not prepare any probationary drawings for the approval of the committee; wherefore, &c. It was *held*, that "probationary" drawings meant drawings to be approved of by the committee; that if any of the visitors could contract for the payment for plans not approved of, yet there was no contract here which would make them liable for dismissing the plaintiff; and that the plaintiff could not recover on the *indebitatus* count. *Moffatt v. Dickson*, xxiv. 291.

21. *Executory contract, notice to manufacturer not to supply more goods.* When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract. *Cort v. The Ambergate, Nottingham, &c. Railway Co.* vi. 230.

22. *Apportionment of salary.* Where a plaintiff contracts to serve for a certain sum per year payable semi-annually, with a proviso that if the defendant shall dismiss him without adequate and just cause, the plaintiff shall receive a certain pension, and the defendant does so dismiss him in the middle of a term, the plaintiff cannot recover his

proportionate pay for the unfinished term, under the Apportionment Act, 4 & 5 Will IV. c. 22, s. 2. *Lowndes v. The Earl of Stamford*, xiv. 23.

23. *Agreement to carry all goods intrusted to one.* An agreement was entered into, October 1, 1851, between the plaintiff and the defendants, by which the former agreed to carry by wagons, &c., all merchandise intrusted to him, between two towns; the terms were fixed, and it was mutually agreed that the agreement should be in force for twelve months from its date. On the 18th of March, 1852, the defendants gave the plaintiff notice that the arrangement would cease and discontinue from and after April 1. The action was brought on the 2d of April, for wrongfully discharging the plaintiff from his agreement; and it was *held*, that the action was not maintainable, the agreement being only that the plaintiff should carry all goods intrusted to him, the defendants not having covenanted to intrust him with any. *Burton v. Great Northern Railway Co.* xxv. 478.

24. *Contract between engineer and provisional committee of railway company.—Personal liability.* In an action by an engineer against a provisional committee-man of a railway company, it appeared that, at a meeting of the committee, at which the plaintiff was present, it was resolved, "that the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the company, and that no such responsibility shall attach to them." At another meeting, at which the plaintiff was also present, a resolution was passed, which contained a statement that the plaintiff had said "that he would make no claim for his services until there should be sufficient funds of the company to meet any demand he might be entitled to make." The plaintiff stated in a letter, that "he never understood that, unless the project were successful, the engineers were to abandon all claim; but he did understand, that the individuals comprising the committee were not to be held personally liable." At a subsequent meeting of the committee, it was resolved, "that the committee bind themselves to be answerable to the extent of 1,000*l.*, to be applied to engineering and surveying purposes." The scheme was abandoned; and deposits to the amount of 4,168*l.*, which had been received by the committee, were returned to the shareholders. *Held*, that the defendant was not responsible, the contract being that the plaintiff should be paid out of such funds as could be properly applied in satisfaction of his claim, and there were no funds of that description. *Landman v. Entwistle*, xiv. 491.

25. *Agreement between landowner and architect—Remuneration dependent on certain event.* The declaration stated that L., being possessed of land, agreed with M., an architect, that he should lay out the land for building purposes, &c., without charge, but should the land be disposed of for building purposes, M. should be appointed architect on L.'s behalf; but should L., or his executors, wish to dispense with M.'s services, that he or they should remunerate him for making the preparations. M. made the surveys, &c.; L.'s executors dispensed with M.'s services, and put it out of their power to dispose of the land for building purposes, and thereupon M. claimed remuneration for the preparations. *Held*, that he was not entitled to recover, the disposing of the land for building purposes being the event in which he was to have any remuneration; that even if the declaration could be taken as charging the executors with wrongfully putting it out of their power so to dispose of the land, no contract could be implied from the agreement that L. or they should not dispose of the land otherwise than for building, in which case M. was not entitled to any thing. *Moffatt v. Laurie*, xxix. 224.

26. *Contract of hiring—Dismissal after commencement of year—Commencement of service.* The plaintiff was engaged by the defendants to superintend their smelting works in Spain, by the following letter: "We shall require you to enter into an engagement for at least three years, at our option, at a salary of 250*l.* We should further require you to visit some of the principal smelting establishments in England, and go out by way of Gibraltar, which is the shortest." The plaintiff commenced

visiting the smelting establishments on the 1st of February, 1850, and shortly after sailed for Spain, where he served the defendants up to the middle of February, 1851, and was then dismissed by them. *Held*, that this was a contract binding the plaintiff to stay three years, and giving the defendants the option of determining the service at the end of each year, and, therefore, that the defendants having dismissed the plaintiff after the commencement of a current year, were bound to pay his salary for that year. *Held*, also, (Parke, B., *dubitante*,) that the service commenced on the 1st of February. *Down v. Pinto*, xxiv. 503.

27. *Agreement to procure employment for a workman if discharged.* A agreed to serve B as a manufacturer and assistant for the term of seven years, at a salary of 100*l.* per annum, and B agreed if he should, from any cause, give up his business, or not require A's services, that he would use his best endeavors to procure for A employment in some similar business, for which he would receive at least 100*l.* per annum, or in case he should be unable to do so, he would pay A the yearly salary of 100*l.* during the residue of the term. B discharged A during the term. *Held*, that the agreement did not leave it open to B merely to pay A after his discharge 100*l.* a year without first using any endeavors to obtain a situation for A, but that he was bound to use his best endeavors to procure for him employment in some similar business. *Rust v. Nottidge*, xvi. 170.

28. *Between attorney and joint-stock company, to retain former during year.* A mutual agreement between A, an attorney, and a joint-stock company provided that A, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business done for the company, and should for such salary advise and act for the company on all occasions, with certain exceptions. *Held*, that there was an implied undertaking on the part of the company to retain A as their solicitor during the year. *Emmens v. Elderton*, xxvi. 1.

29. *Covenant to pay sum to be adjudged by third person.* J. E. covenanted with the plaintiffs, a corporation, "on the execution" of the deed, to build a gas tank. In case of failure to perform all the conditions of the deed as to this, plaintiffs were to receive from defendant and his sureties, what plaintiffs' engineer should adjudge. In an action for not finishing the work, nor paying the sum adjudged, it was *held*, that the non-execution of the deed by the plaintiffs until after the 30th June, 1853, was no defence, notwithstanding the plaintiffs, being a corporation, were not bound to pay for the work before they had executed the deed. *Held*, also, that the adjudication of J. E., the engineer, was not in the nature of an award by an arbitrator, and that therefore his power to adjudicate could not be revoked by any of the parties to the deed. *The Northampton Gas-Light Co. v. Parnell*, xxix. 229.

30. *Positive contract to take and pay for property.* The defendants, a railway company, covenanted to pay the plaintiffs, contractors, so much per sleeper for a lot to be supplied. The preceding part of the deed contained a covenant by the plaintiffs to supply the company with sleepers according to the specification, as one of the engineers of the company should direct, and one of them was to give notice when and in what numbers they should be delivered. The specification referred to mentioned the number, place of delivery, and limit of time for delivery. The company were empowered to retain in their hands a certain sum, as a guarantee for the completion of the contract, until the whole should have been supplied. *Held*, that this was a positive contract to take and pay for all the sleepers, notwithstanding the discretion vested in the engineers to decide when and in what quantities the sleepers were to be delivered. *Held*, also, that before they were bound to deliver any of the sleepers, the plaintiffs were entitled to notice when and in what quantities they were to be delivered; and that a declaration, which stated that the plaintiffs were always ready and willing to deliver the sleepers, according to the specification, when and in such quantities as any of the engineers of the company should require, but that the com-

pany's engineers gave no requisition within the times during which the sleepers were to be delivered, was good upon general demurrer. *Harrison v. The Great Northern Railway Co.* viii. 469, and same case in error, xiv. 189.

31. An agreement for the supply of coals for the manufacture of patent fuel by the plaintiffs, provided that the plaintiff should purchase all the coals he required of the defendant, if the latter could furnish the quantity required from time to time, not exceeding 500 tons a week; and in case the defendants could not, from some substantial cause, supply the quantity demanded, they were to give six months notice of such inability. *Held*, that an inability to supply, from a substantial cause, was no excuse for not supplying it unless six months' notice of the inability were given, and that the agreement referred only to coals required by the plaintiff for the manufacture of patent fuel. *Wood v. The Governor and Company of Copper Miners*, xxvi. 343.

32. *Withdrawal of opposition to railway—Agreement by company to purchase lands not conditional—Specific performance.* In consideration of the withdrawing of opposition to a bill before parliament to enable a company to build a road, the company, by their agent, agreed to purchase certain lands of an owner at certain rates per acre, and to make other compensation, and the contract was not conditional on the railway being made; it was *held* that, though the road was abandoned, the owner was entitled to specific performance, and that the price to be paid was sufficiently stated in the agreement. *Stuart v. The London and Northwestern Railway Co.* x. 57.

33. *Withdrawal of opposition to railway—Union of companies—Agreement not conditional.* H. and Y., with several others, calling themselves the L. and N. Y. Railway Company, introduced a bill into parliament to establish a railway. They agreed with plaintiff that if he would not oppose this railway, which was to pass through his land, they would, on being incorporated, pay him a certain sum by way of damages. They afterwards agreed to join with a rival company, calling itself the L., M., and N. Railway Company, in the same project. The two companies agreed to adopt the agreement with the plaintiff, and were afterwards incorporated by the name of the L., M., and N. Railway Company. *Held*, that the incorporated company must be taken to be the parties on whose behalf H. and Y. entered into the agreement with the plaintiff; and the court also was of opinion that, as the plaintiff had withdrawn his opposition to the bill in parliament, the company, according to the true construction of the agreement, were bound to pay the sums agreed to be paid to him, although they had not taken possession of any part of his estate. But, the question as to the construction of the agreement being a legal one, a case was directed for the opinion of a court of law. *Preston v. The Liverpool, Manchester, &c. Railroad Co.* vii. 124.

34. *Money to be paid in case of amalgamation of railway companies—Withdrawal of opposition to railway bill.* A became a party to a deed with the projectors of a railway, by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that, if the bill of these projectors should not be passed within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A declared on that clause by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law; that at the end of six months they had given notice to put

an end to the agreement, and that they had not taken the plaintiff's land. *Held*, that this plea was no answer to the action, the notice not having been given before breach of the covenant. *Capper v. The Earl of Lindsey*, xiv. 9.

CONTRIBUTION.

1. *Between defendants who have set up statute of limitations and those who have not.* There is no right of contribution between defendants who have protected themselves against a demand by setting up the statute of limitations and other defendants who might equally have set up the statute but who, having neglected to do so, are found by the decree to be liable to the plaintiffs. *Fordham v. Wallis*, xvii. 182.

2. *Joint contractor—Proportion to be recovered after death of co-contractors.* Where of several joint-contractors one is compelled to pay more than his share of the debt, he may maintain an action at law for contribution against the others, (and it seems, against the representatives of such as have since died.) In determining the proportions, the number originally contracting must be looked to, and not the number liable when the debt was paid. Therefore, where one of twelve co-contractors paid the whole debt after the death of two of them, it was *held*, that he could recover one twelfth, and not one tenth, from each of the survivors. *Batard v. Hawes*. *Same v. Douglas*, xx. 137.

3. *Liability of a lessee of an estate subject to charge.* As to the liability of a married woman, to whom an estate, subject to prior charges, has been demised under a power, by way of jointure, to contribute to the charges, see *Evans v. Evans*, xix. 533.

4. *Club—Liability of committee of, to contribute.* Where the members of a club, at a general meeting, authorize the members of the committee of management to borrow money on their own responsibility, but with the guarantee of the society for its repayment, and the money is borrowed and placed to the account of the committee, and one of the committee draws checks upon the bank in which the money is, and otherwise so conducts himself as to show his knowledge of the whole transaction, he is liable to an action for contribution by another member of the committee from whom the lender has received the whole sum. *Mountcashell v. Barber*, xxiv. 362.

5. *Club—Construction of rule of—Power of committee to raise money.* One of the rules of a club was in these words: "All the concerns of the club, the domestic and other managements, and regulations for its establishment and management, shall be conducted by a committee of sixteen members." *Semble*, that this did not authorize the committee to raise money by debentures, or otherwise to pledge the credit of members. *In re The St. James' Club*, xiii. 589.

CONVICTION.

1. *Jurisdiction of court to order justices to draw up orders of conviction.* The stat. 11 & 12 Vict. c. 44, s. 5, which prescribes that if a justice shall refuse to do any act relating to his office he may be directed by rule of court to do it, does not authorize the court to order justices to draw up one joint conviction, instead of two separate convictions against each of two persons against whom a joint information has been laid, and heard and determined before the justices. *Clee and Osborne in re*, x. 363.

2. *Brought before court of exchequer by affidavit.* As no *certiorari* issues out of the court of exchequer, a conviction is properly brought before it if verified by affidavit. *In re Allison*, xxix. 406.

3. *On corrected verdict.* Where, by mistake, a verdict of "not guilty" was delivered, but was corrected within a reasonable time, a conviction on such corrected verdict was held to be right. *Regina v. Vodden*, xxii. 596.

4. *Forms of.* The forms of convictions given in the schedule to the 11 & 12 Vict.

c. 43, apply to all cases; and convictions drawn up in such of the forms as are applicable to the case are sufficient. *Id.*

5 *Under Game Act.* By the Game Act the *certiorari* is taken away. *Quære*, whether the objection that there is no proper adjudication of the penalty be one for which the *certiorari* may nevertheless issue; but the conviction having been brought up by *certiorari* under 12 & 13 Vict. c. 45, s. 18, in order to be enforced, the court entertained the objection. *Regina v. Hyde*, ix. 305.

6 *For burning offensive substances.* A private statute prohibited the burning of any rags or bones, or other offensive substances, for making manure, or for any other purpose of trade or manufacture. On motion to bring up and quash a conviction before justices, for burning "offensive substances," namely: clay and earth, ashes, cinders, and other foul refuse matter for the purpose of manufacturing bricks, it was held, that it was matter of evidence what was comprised in the expression, "other foul refuse matter;" that possibly it might comprise the very substances prohibited by the statute; that the conviction, therefore, did not, upon the face of it, show that the justices had acted beyond their jurisdiction, and that as the writ of *certiorari* was taken away by the statute, the court could not interfere. *Ex parte Strong*, xxx. 394.

7. A conviction stating an intent to commit felony, generally, is good. *Regina v. Brown*, viii. 321.

COPYHOLD.

I. ADMITTANCE; FINE.

II. SURRENDER.

III. MISCELLANEOUS CASES.

I. *Admittance; Fine.*

1. *Effect of admittance—Power in will—Surrender.* When by the custom of the manor there has been only an admittance of A as donee of a power in a will *quousque*, the effect of such admittance ceases upon the exercise of the power, and until A afterwards obtains a fresh admittance, as bargainee under the execution of the power, he cannot compel the lord to receive and enroll a surrender by him of the estate. *Regina v. Corbett*, xxii. 96.

2. *Tenant may direct lord whom to admit.* The copyhold tenant may direct the lord to admit into the tenancy either such a person as A nominates, or A himself. *Glass v. Richardson*, xv. 198.

3. *Conveyance by copyholder in fee to canal company—Ejectment by purchaser of manor—Equitable estate.* The act of Parliament, (33 Geo. III. c. 80,) incorporating the Grand Junction Canal Company, declared, in general terms, that it should be lawful for every person seised, possessed, or interested in any lands (therein mentioned) to sell and convey the same to the company, and that, upon their executing a deed in the form prescribed by the act, all the estate, use, trust, and interest of any person therein, should from thenceforth be vested in and become the sole property of the said company forever, and that such deed should bar "every person whomsoever therein." J. S., being a copyholder in fee of some of the lands of the manor of R., sold them to the company, and executed a deed in the form prescribed by the act, and many years afterwards died, his name still appearing on the court rolls. The appellant D., having in the mean time purchased the manor of R., made proclamation, on J. S.'s death, for the person entitled to be admitted to come in; but no person came in, and he seized *quousque*, and subsequently recovered possession of that portion of the canal in an ejectment at law, the court being of opinion that the equitable estate only of J. S. passed to the company under the act of parliament. Upon a bill by the company

against D. and J. E. S., the customary heir of J. S., the Vice-Chancellor of England decreed, that J. E. S., should be admitted as tenant, and that he should hold as trustee for the company, the company paying the fine and fees upon admittance. *Held*, affirming that decision, that D. having seized *quousque*, and having recovered at law, he could not now be allowed to contend that the legal estate of J. S. had passed to the company, and that his customary heir was a stranger. *Dimes v. The Grand Junction Canal Co.* xvi. 63.

4. *Single fine.* A tenant in fee of a copyhold estate devised the same to the defendant and three other persons, in fee, upon certain trusts. One of the other three disclaimed the estate, and the remaining two released to the defendant, her heirs and assigns, the copyhold tenement in question. It was *held*, that the lord of the manor was entitled to a single, and not to a treble fine, on the admission of the defendant. *Wellesley v. Withers*, xxx. 162.

5. *Joint tenants—Admission to entirety—Fine.* Where a copyhold estate is devised to several as joint tenants, the lord is bound to admit any one of them to the entirety, and cannot refuse to do so on the ground that the amount of fine claimed by him is not paid. *Regina v. The Lord of the Manor of Wanstead*, xxiv. 160.

II. Surrender.

1. *Surrender, lord not bound to accept.* A copyhold tenant cannot compel his lord to accept and enroll a surrender "to such uses and in such manner as A shall appoint," which surrender is executed and to take effect in the lifetime of the copyhold tenant. *Flack v. The Master, &c. of Downing College*, xxiv. 251.

2. *May be taken by infant deputy steward.* A surrender taken out of court, of copyhold lands of a married woman, and requiring, therefore, her separate examination and consent, may be well taken by a deputy steward who is an infant. (*Dubitante* Sir J. L. Knight Bruce, L. J.) *Eddleston v. Collins*, xvii. 296.

3. *By one joint tenant, to the use of his will—Severance of joint tenancy.* S. and J. being joint tenants of copyhold lands for life in remainder expectant upon the determination of a previous life-estate in M., with several inheritances in tail, with cross-remainders in tail, S. and her husband, without the concurrence of M., surrendered their estate and interest to the intent that the lord should regrant the same to such person or persons as the husband should by will appoint; S. died in the lifetime of her husband and of J.; the husband afterwards died, having by his will appointed the surrendered share to his executors. *Held*, that the *quasi* estate tail of S. was not barred, and that whether the life-estate of M. was under the same instrument as that under which S. and J. derived their title, or whether M.'s tenancy was under her paramount title of free-bench, still her concurrence was necessary, in order effectually to bar the estate tail in remainder. *Held*, also, that there was, under the circumstances, no severance of the joint tenancy. Whether the surrender by a joint tenant to the use of his will would *per se* effect a severance of the joint tenancy, *quære*. *Edwards v. Chappion*, xxi. 230.

4. *To uses under will, and of a nominee inter vivos.* Difference between a surrender to uses under a will, and a surrender to the uses of a nominee *inter vivos*,—the former being founded on a custom, the latter without authority. *Flack v. The Master, &c. of Downing College*, xxiv. 251.

5. *Devise by surrenderee who has not been admitted.* The surrenderee of a copyhold, who has not been admitted cannot by devise give a legal title to his devisee; and the devisee does not gain such title by admittance; and the case is the same whether the surrender was for value or voluntary. *Matthew v. Osborne*, xx. 238.

6. "There is not free-bench in a mere equitable estate in copyholds, any more than there is dower in a mere trust estate in freeholds." *Smith v. Adams*, xxvii. 182.

III. *Miscellaneous Cases.*

1. *Fine upon enfranchisement.* When copyhold lands taken by a corporation are enfranchised under act 8 & 9 Vict. c. 18, s. 96, the lord is not entitled to any fine as upon admittance upon the execution or enrolment of the conveyance, pursuant to the 95th section, or in estimating the compensation for enfranchisement under the 96th section. *The Ecclesiastical Commissioners v. The London and Southwestern Railway Co.* xxvi. 268.

2. *Lease by copyholder—Forfeiture.* Where a lease is made by a copyholder with the license of the lord, a forfeiture committed by the copyholder does not destroy the term granted by such lease. *Clarke v. Arden*, xxx. 455.

3. *Ejectment by lord.* A person who is in receipt of the rent from the occupier is entitled to defend as landlord an action of ejectment by the lord, and to set up such lease as an answer to such action, notwithstanding the copyholder has committed a forfeiture. *Ib.*

4. *Disclaimer by bankrupt copyholder.* *Quære*, whether a disclaimer by a copyhold tenant after he has become bankrupt be void by reason of his estate being then vested in his assignees? *Ib.*

5. *Action for mesne profits of copyhold—Judgment in ejectment—Estoppel.* In an action for the mesne profits of a copyhold, to which the defendant pleads not possessed, the plaintiff may reply, by way of estoppel, a judgment in ejectment in his favor; and if he does not reply it, the judgment is not conclusive evidence of his title. *Matthew v. Osborne*, xx. 238.

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I. *For what granted and what protected by.*

1. *Wood engravings in book.* Wood engravings printed in a book as illustrations of stories therein, and on the same sheet with the letter-press, are part of the book, and are protected by the copyright in the book; and it is not necessary that the name of the proprietor and the date of publication should be printed on each engraving, under the provisions of the 8 Geo. II. c. 18. A piracy of such engravings was restrained by injunction. *Bogue v. Houlston*, x. 215.

2. *In case of new editions of book.* Where the first edition of a book had been published before the Copyright Act was passed, but subsequent editions had not been registered, it was held, that such parts of the book as were in the first edition were protected, but that no suit could be maintained as to the parts introduced in the subsequent editions. *Murray v. Bogue*, xvii. 165.

3. *Articles in periodicals, copyright in.* By stat. 5 & 6 Vict. c. 45, s. 18, when the proprietor of any periodical work shall employ any person to compose any article thereof, and the same shall have been composed on the terms that the copyright therein shall belong to such proprietor, the copyright shall be the property of such proprietor. Held, that these terms may be merely implied; and where nothing is said about the copyright, it is to be inferred to belong to the proprietor. *Sweet v. Benning*, xxx. 461.

4. *Payment of authors.* *Semble*, that where the proprietors of a review employ persons to write in the review, the articles written must be paid for, in order to vest the copyright in the proprietors, under stat. 5 & 6 Vict. c. 45. *Richardson v. Gilbert*, iii. 268.

5. *Agreement between author and publishers—Bankruptcy of publisher—Assignment of agreement.* Where an author and a firm of publishers agree that the former shall prepare a work, correct proofs, &c., and the latter shall bear the expenses, the two sharing the profits, and this contract shall continue for a given number of years and through as many editions as are wanted in those years, and one of the firm becoming bankrupt, the book is assigned by the firm to another party for value, then the author is released from his contract, for the agreement could not be assigned without the author's consent, it being wholly of a personal character, and the author is at liberty to contract with any other party. *Stevens v. Benning*, xxxi. 283.

II. *Foreign Authors.*

1. *Alien author—Residence in England—Importation of copies published abroad.* An alien author first published a literary work while himself present in England; an edition of the same work was afterwards published at Frankfort-on-the-Maine, and copies imported into this country, and sold by a London bookseller. The alien filed a bill for an injunction to restrain the sale, and, on motion, the same was granted, the plaintiff undertaking to bring an action if the defendants desired it. *Ollendorff v. Black*, i. 114.

2. *Foreign author residing abroad.* A foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires a copyright therein; and a British subject, to whom such work is assigned by the foreign author, also gains such right. *Boosey v. Jefferys*, iv. 479.

3. *Englishman resident abroad—Foreign author, assignment of copyright by—First publication in England.* An Englishman, though resident abroad, will have copyright in a work of his own first published in this country. A foreigner will gain a copyright by first publishing his work in England, if he be then a resident here, though the work have been composed abroad, and though he came here solely with a view to its publication. Copyright commences by publication. (Per Lord Chancellor Cranworth.) If at that time and while he prints and publishes, the foreign author is here, he will have a copyright. (Per Lord St. Leonards.) Whatever would constitute him a resident, so as to make him subject, in point of allegiance, to the country, and would give to him the common rights to which every foreigner coming here is entitled, is sufficient. B., a foreign musical composer, resident at that time in his own country, assigned to R., another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the law of this country, to an Englishman. The first publication took place in this country. *Held*, reversing the judgment of the court of exchequer chamber, that the foreign assignee had not, by the law of this country, any assignable copyright here in this musical composition. *Jefferys v. Boosey*, xxx. 1. See *Novello v. James*, xxxi. 280.

4. *Foreign print.* The proprietor of a foreign print cannot claim copyright therein under the International Copyright Act, 7 & 8 Vict. c. 12, unless the date of publication and name of the proprietor are engraved on the plate, and printed on the print, as required by the 8 Geo. II. c. 13. *Avanzo v. Mudie*, xxviii. 572.

III. *Registration of Book.*

1. *Entry at Stationers' Hall, varying or expunging.* Certain articles of agreement between A, the author, and B, in relation to the publishing, prices, and disposal of a copyright were held not to entitle B to register it at Stationers' Hall pursuant to the 5 & 6 Vict. c. 45, s. 13; and such entry having been made by B, the court granted a rule to vary or expunge it. *Ex parte Bastow*, xxviii. 419.

2. *Expunging of entries at Stationers' Hall—Primâ facie evidence—Copyright in music.* Upon a rule nisi to expunge three entries made in the registry at Stationers' Hall, kept under sect. 11 of stat. 5 & 6 Vict. c. 45, on the ground that they would be *primâ facie* evidence in an action which had been brought against defendant for publishing the pieces of music mentioned in them, alleged to be the copyright of plaintiff, the court (plaintiff refusing to consent not to use the entries on the trial of the action) declined to expunge the entries, but directed an issue whether there was copyright in the music, and whether plaintiff was the proprietor of the copyright, on the trial of which the entries should not be used; and ordered that the rule should be enlarged until the trial of the issue. *Ex parte Davidson*, xxii. 272.

IV. *Infringement.*

1. *Cases, marginal notes of—Digest.* Copying into a digest, verbatim, the marginal notes of cases from reports, is an infringement of the copyright of the reports. *Sweet v. Benning*, xxx. 461.

2. *Guide book—Compilation.* M. published a guide book, partly original, partly compiled. W., who had never been in the country described, was employed by B., to write a guide book to the same country. W. compiled his book partly from foreign works and partly from original manuscript, and appeared to have used M.'s work, but not unfairly. *Held*, that B. could not be restrained from publishing the guide book of W. *Murray v. Bogue*, xvii. 165.

3. *Piracy of English book—Rebuttal of charge.* A charge of piracy of an English book cannot be rebutted by showing that the part complained of was copied from a foreign book, which foreign book appeared to be copied from the English book. *Ib.*

4. *Lithographing copies for private use.* Under the Copyright Act, 5 & 6 Vict. c. 45, an action will lie at the suit of the owner of the copyright in a musical composition, for lithographing copies of it for the private use of the members of a musical society who perform gratuitously, and not for the purpose of sale or exportation. *Novello v. Sudlow*, xi. 492.

5. *Remedy at common law and by statute.* The provision in sect. 15 of the above statute does not restrict the right conferred by the previous sections of the act, and the owner of copyright is entitled by common law to his remedy by action for the infringement of that right. *Ib.*

V. *Assignment.*

1. *Attestation of.* Per Lord St. Leonards. No assignment of copyright under the 8 Anne, c. 19, the benefit of which is claimed by the assignee, although from a foreigner, can be good in this country, unless it is attested by two witnesses. *Jefferys v. Boosey*, xxx. 1.

2. *Partial.* There cannot be a partial assignment of copyright. *Ib.*

3. *Registration of.* Sect. 13 of 5 & 6 Vict. c. 45, provides for the assignment of a copyright by the registration of the assignment by the proprietor in the registry of copyrights at Stationers' Hall. *Ex parte Bastow*, xxviii. 419.

4. *Agreement for—Equitable copyright—Specific performance.* Captain M. by an instrument in writing, not sealed or attested so as to pass the legal copyright, agreed to assign the copyright in "Monsieur Violet," to R. B. for 300*l.*, with a stipulation that a deed of assignment of the copyright should be executed. The 300*l.* was duly paid by R. B. *Held*, that the effect of this was to vest the equitable copyright in R. B., who would be entitled to a decree for a specific performance of the contract, and that the plaintiff was consequently entitled to succeed upon issues denying the title of Captain M.'s son to grant the copyright, after his father's death. *Simms v. Marryatt*, vii. 330.

COPYRIGHT OF DESIGN.

1. *Designs—Paper-hangings—Article of manufacture—Imitation of design.* The Copyright of Designs Act, 5 & 6 Vict. c. 100, s. 4, excludes from the protection of the act, the proprietor of any registered design applied to an article of manufacture, unless every such "article of manufacture" published by him has thereon the letters "Rd." One class of articles of manufacture mentioned in the statute is "paper hangings." According to the usage of the trade, paper-hangings are sold for the purpose of papering rooms, in lengths of twelve yards, but it is also the practice of manufacturers to sell or otherwise issue in the way of their trade, patterns of paper-hangings in pieces of twenty-seven inches long, cut off from the lengths of twelve yards, and where the design is a registered one, the practice is almost universal of marking with the letters "Rd," each of those pattern pieces. *Held*, that such patterns were an "article of manufacture" within the meaning of the statute, and that a proprietor who had issued them to the trade without such mark, was not entitled to recover against a party who had imitated the design. *Dissentiente Coleridge, J. Heywood v. Potter*, xvi. 242.

2. *Ventilator—Registration.* A design was registered for a new ventilator; the inventor's claim was stated to be for the general configuration and combination of the parts, none of which if taken *per se* and apart from the purposes thereof were new or original. *Held*, that this was not a design for the shape and configuration of an article of manufacture within the 6 & 7 Vict. c. 65, and therefore not the subject of registration. *Regina v. Bessell*, iv. 311.

3. *Brick—Shape or configuration—Registration.* By 6 & 7 Vict. c. 65, a limited copyright is granted for "any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article," provided such design is registered. A newly invented brick, the utility of which consisted in its being so shaped that, when several bricks were laid together in building, a series of apertures was left in the wall, by which the air was admitted to circulate, and a saving in the number of bricks required was effected, is a design capable of being registered under the above statute. *Rogers v. Driver*, i. 269.

4. *Semble*, that where the invention is the subject of a patent, it may still be registered under the Copyright of Designs Act. *Id.*

CORPORATIONS.

I. CHARTERS.

II. RIGHTS, POWERS, AND DUTIES OF CORPORATIONS.

III. LIABILITIES OF CORPORATIONS; ACTIONS AGAINST.

IV. CONTRACTS OF CORPORATIONS, WHEN BINDING.

V. OFFICERS, ELECTION AND ELIGIBILITY OF.

VI. SHAREHOLDERS; REGISTRY OF SHARES.

VII. LIABILITY OF SHAREHOLDERS; EXECUTIONS AGAINST.

VIII. CONSTRUCTION OF PARTICULAR STATUTES.

I. Charters.

1. *Forfeiture of—False certificate of capital paid in—Repeal of charter by scire facias—Revocation.* A charter granted by the crown to certain persons to form a company directed that 100,000*l.*, half the intended capital of the corporation, should be subscribed within twelve months, and 50,000*l.* of it paid up within the same period; and that the corporation should not begin business until it should have been certified to the board of trade, by three directors, that the required capital had been subscribed,

and the 50,000*l.* paid up. There were other directions respecting the preparing, executing, and depositing a deed of settlement. Then followed a proviso to the effect, that if the corporation should fail to enter into, execute, and deposit the deed of settlement within the time prescribed, or "shall not comply with any other the directions and conditions in our said letters-patent contained, it shall be lawful for us, our heirs or successors, to revoke and make void our said royal charter, and every clause, matter, and thing therein contained, either absolutely or under such terms and conditions as we or they shall think fit." The company commenced business without having 50,000*l.* of the capital paid, but three directors of the company had knowingly sent in a certificate to the board of trade, falsely stating that it had been paid up. *Held*, by some of the judges, that the sending in the false certificate was a breach of a condition in the charter; by others, that though not a breach of a condition, it was a misuser and abuse of their franchise by the corporation; but that on either view, the sending the certificate and commencing business without the prescribed capital, rendered the charter liable to forfeiture. *Held*, by all, (excepting Parke, B.,) that the first proviso did not limit the power of repealing the charter by *scire facias*, but was intended (though possibly without effect) to give the crown an additional power of revocation; consequently, that a party aggrieved might, on the fiat of the attorney-general, proceed by *scire facias* to repeal the charter, without having previously obtained a revocation of it by the crown, under the great seal or sign manual. Parke, B., however, was of opinion that the non-payment of the capital, and the giving the false certificate, were breaches of directions and conditions in the charter; that by the proviso it became necessary for a party seeking to avoid the charter for such breaches, to obtain first a revocation in writing under the great seal or sign manual; and that it was lawful for the crown to annex such a condition to the charter. *The Eastern Archipelago Co. v. Regina*, xxii. 328. See also *Regina v. The Eastern Archipelago Co.* xviii. 167.

2. *Valid until impeached.* A subsisting charter of incorporation is valid until it is impeached and disturbed; and the rights of parties under it are to be dealt with by the court, irrespectively of what might be the result of future proceedings by the attorney-general or the crown to set it aside. *Robinson v. The Governors of London Hospital*, xxi. 371.

II. Rights, Powers, and Duties of Corporations.

1. *Right to interfere with private property—Statute powers—Diversion of stream.* Persons obtaining from the legislature power to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the legislature has sanctioned, and to proceed only in the mode which the legislature has pointed out; but (except in a proceeding at the instance of the attorney-general) any one seeking the assistance of a court of equity, to restrain the violation of such a contract with the legislature, is bound to show that he has a private interest in the matter. Therefore, where a waterworks act empowered a company to divert the water of a stream (without limit as to quantity) by means of an open channel filled with loose stones, and they were diverting it by means of a culvert, it was *held*, that another company who were entitled to the water of a stream into which the diverted stream had flowed, were not entitled to an injunction to restrain a violation of the terms of the act as to the mode of diversion. *The Mayor of Liverpool v. The Chorley Waterworks Co.* xxi. 620.

2. *Application of funds.* A railway company, incorporated by act of parliament, is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever. *The East Anglian Railways Co. v. The Eastern Counties Railway Co.* vii. 505.

3. *Mortgage of canal—Lien.* Under an act giving power to mortgage a canal in order to complete certain improvements thereon, the corporation raised money, a part

of which they applied in paying off incumbrances upon their other corporate property. *Held*, to be contrary to the provisions of the act, and to create a lien for the benefit of the mortgagees of the canal upon the corporate property, other than the canal, so far as that property was still vested in the corporation. *Trevilian v. The Mayor of Exeter*, xxvii. 578.

4. *Railway company—Rights of shareholders—Half shares—Payment of interest or dividends.* After the creation of the original shares in a railway company, a further capital was raised in half shares, upon which a resolution of the directors guaranteed interest at 6l. per cent. for ten years. On a motion by a holder of original shares, to restrain the company from paying any interest or dividends on the half shares out of the profits of capital subsequently created, in preference to the interest or dividends on the original shares, and from paying any preferential interest or dividends on the half shares, while any of the floating or unsecured debt of the company was unpaid, except out of the clear profits of the current half year, the company entered into an undertaking not to make such payments, unless under the authority of parliament, until the hearing or further order. By a subsequent act of parliament, it was enacted that it should be lawful for the company to commute the guarantee attached to the half shares into any other guarantee or privilege, perpetual or terminable, which should be agreed upon by four fifths of the shareholders of the company at meetings, after notice, as therein mentioned. The directors thereupon proposed to commute the guarantee into an annual payment for each half share in perpetuity. Upon a motion to restrain the company from, in any manner, acting on or giving effect to the proposed scheme for the commutation of the guarantee, or from declaring or paying any commuted or other dividend on the original or half shares, while any of the unsecured debt remained due, and except out of the clear profits of the current half year, and so far as such profits should be sufficient after payment of such debt; and upon a cross-motion to discharge the undertaking, it was *held*, that the act of parliament authorizing the commutation did not take the case out of the undertaking; and that, therefore, the undertaking was binding until the hearing of the cause, or the further order of the court; that the undertaking was not an agreement which bound the defendants to do nothing in the matter, the subject of the injunction, except under the order of the court, or unless the court should be of opinion that what they proposed to do was proper to be done, but was in the nature of an injunction obtained without agreement, and which the defendants might apply to discharge; that, upon the construction of the resolution, the holders of half shares were entitled to the guaranteed 6l. per cent. out of any funds of the company, which could be lawfully so applied, and therefore out of future profits, before any dividend could be payable upon the whole shares; that, independently of the construction of the resolution, the act of parliament having authorized a commutation of the guarantee, and the commutation having received the consent required by the act, the company might lawfully carry it into effect; that the principles which apply to partnerships composed of a limited number of persons, apply to such companies; and that the majority of the partners in a partnership of a limited number, constituted with similar provisions as to profits, could overrule the minority upon the question, whether profits should be divided while debts of the partnership were unprovided for; and that the manner in which profits were to be ascertained and divided was a question of internal management, and within the power of the company to direct. *Stevens v. The South Devon Railway Co.* xii. 229.

5. *Lease of railway to another company—Costs of bills in parliament.* A covenant by one railway company, by whose act of incorporation the acts authorized to be done by them were confined to the railway to be made by them, to take a lease of the railway of another, and to pay the costs of soliciting bills pending in parliament, by which the latter company were to be authorized to make extensions and branches of their railways is beyond the scope of the authority of such company, and, there-

fore, illegal and void, however beneficial to their railways the objects of the covenant, if carried out might be. *The East Anglian Railways Co. v. The Eastern Counties Railway Co.* vii. 505.

6. *Contract between railway companies varying rights of shareholders contrary to authority of parliament and against public policy.* The S. and B. Railway Company opposed a bill in parliament, by which the L. and N. W. Railway Company sought to authorize a lease to them of the S. U. Railway, then in progress. An agreement in writing was afterwards made between the two companies that, in consideration of the withdrawal of such opposition, the profits from traffic on the S. and B. and S. U. Railways should be divided in stated proportions. The S. and B. Company filed a bill for specific performance, and it was *held*, that the directors of the L. and N. W. Railway Company, were trustees for their shareholders, and that their entering into such contract was a breach of trust as between them and the shareholders, as creating a partnership between the L. and N. W. and the S. and B. Companies, determinable only at the option of the latter, which varied the rights of the L. and N. W. Company's shareholders in the gross receipts of their business, and that the S. and B. Company knowingly participated in such breach of trust. *Held*, further, that the contract was contrary to the authority given by parliament, and was against public policy. *The Shrewsbury, &c. Railway Co. v. The London, &c. Railway Co.* xxi. 319.

7. *Covenant by railway company to build bridge or pay money—Ultra vires of directors—Agreement to procure act of parliament to legalize it.* A railway company undertook to build a bridge across a public navigable river at a place where they were not authorized by their act to build. The corporation of N. preferred an indictment against the company for a public nuisance. A deed was afterwards executed, whereby the corporation covenanted that they would allow the pier to remain, and the company covenanted that they would, at their expense, within twelve months, complete the bridge, or forfeit 1,000*l.*, and would use their best endeavors to obtain an act of parliament for sanctioning the proposed works. *Held*, by Lord Campbell, C. J., and Wightman, J., that the covenant to construct the bridge within twelve months was independent and absolute; and that the covenant to pay the 1,000*l.*, whether the act of parliament, agreed to be obtained, should be obtained or not, if the works were not completed within the stipulated time, being for the continuance of a public nuisance, was illegal; by Lord Campbell, C. J., that the covenant was also void, on the ground that, with the knowledge of the covenantees, it was *ultra vires* of the directors to bind the company by such a covenant, the company having no power to erect a bridge, except at the place fixed by the act of parliament. But by Coleridge, J., and Erle, J., that the stipulation for the payment of 1,000*l.* was confined to securing the performance of the works, which the company were bound to perform within a given time; and that, upon the true construction of the deed, the consideration for the non-prosecution of the indictment was the previous agreement to perform those works. Also, that the contract was not unconnected with the purpose of the incorporation of the company, but tended directly to effect the main purpose thereof, namely, the making the railway communication between two *termini* in the best practicable mode, though the contract adopted different means or modes, by or through which the purpose was to be effected. By Lord Campbell, C. J., Coleridge, J., and Wightman, J., that the company, in the construction of their railway, must comply with the provisions and keep within the limitations of the company's act; and that the act which the company bound themselves to do was no less unlawful by reason of their binding themselves at the same time to procure an act of parliament by which it should be legalized. *The Mayor, &c. of Norwich v. The Norfolk Railway Co.* xxx. 120.

8. *Power given by statute to make river navigable—Commissioners to assess damages—Extinction of.* By stat. 1 Geo. I. st. 1, c. 24, s. 18, certain persons were empowered to erect weirs and dams in the River Kennet, and to make the river navigable, and any damages sustained thereby by owners of lands, mills, &c., were to be settled and

assessed by commissioners appointed under the statute. All the commissioners being dead, and no successor having been appointed, it was *held*, (Lord Campbell, C. J. *dissentiente*,) that the powers given by the statute still exist, notwithstanding compensation for damages can no longer be obtained in the manner provided by the statute. *The Proprietors of the Kennet, &c. Canal Navigation v. Witherington*, xi. 472.

9. *Responsibility of directors—Shares placed at their disposal.* The office of directors of a company is a place of trust, and unambiguous expressions alone can confer upon them any special power. A resolution by the shareholders to place shares at the disposal of the directors, without more, does not render them irresponsible, but they are bound to give explanations to the shareholders, and cannot derive any personal or pecuniary advantage from the mode of dealing with the shares; a suggestion of the application of money for secret purposes will not exonerate the directors from accounting, nor can any person in a fiduciary position retain any remuneration for his services. An acquiescence in the acts of the directors cannot be raised by a production of the share register books at the meetings of the company. *The York and North Midland Railway Co. v. Hudson*, xix. 361.

10. *Power of majority to bind minority.* The rule, that the majority cannot bind the minority in a joint-stock company, as to acts not contemplated by the common contract, has not been applied to corporate companies for a public undertaking involving public interests and duties under the sanction of parliament. *Ffooks v. The London and Southwestern Railway Co.* xix. 7.

11. *Receiver may be appointed of parliamentary corporation.* A receiver and manager may be appointed of the property of a parliamentary corporation, although by the act a committee was constituted, to whom all the powers of management were referred. *Fripp v. The Chard Railway Co.* xxi. 53.

12. *Protection against consequences of loss of possession.* A corporation, put out of possession by a receiver under an order of the Court of Chancery, will be protected by the court against the consequences of such loss of possession, under the liberty to apply. *Ib.*

III. *Liabilities of Corporations ; Actions against.*

1. *Parol contract by directors—Assumpsit for use and occupation.* A corporation is liable in *assumpsit* for use and occupation by permission of plaintiff, under stat. 8 Vict. c. 16, s. 97, which provides that any contract, which, if made between private persons, would be valid, although made by parol only, may be made by parol in behalf of the company by the directors, and shall be binding on the company. So it seems the corporation would be liable, independent of the provisions of that statute. *Lowe v. The London and Northwestern Railway Co.* xiv. 18.

2. *Liability for use and occupation for what period.* Although a corporation may be liable in an action for use and occupation of premises, it can only be so for the period of actual occupation, and a continuous occupation for several years will not render the corporation tenants from year to year. *Finlay v. The Bristol and Exeter Railway Co.* ix. 483.

3. A railway company, through their solicitor, hired rooms from the 16th of December, 1846, for one year, but occupied them until the 16th of December, 1848, previously to which time they removed their furniture and effects, left the keys in the doors, and paid the rent up to that day, but gave no notice to quit. *Held*, that the defendants were not liable in use and occupation for rent subsequently to December 16, 1848. *Ib.*

4. *Money borrowed—Covenant to repay.* Where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument which, on its face imports a covenant for repayment, if money be so borrowed and so secured, and not duly repaid, an action may be maintained against the corporation

on breach of the covenant, although there are no specific statutory provisions enabling them to bind themselves by such a covenant. *The Eastern Union Railway Co. v. Hart*, xiv. 535.

5. *Property of, taken in execution.* Property acquired by a municipal corporation after the passing of the stat. 5 & 6 Will. IV. c. 76, is not liable to be taken in execution for debts due before that period. *Arnold v. Ridge*, xxiv. 242.

6. *Trespass.* Trespass will lie against a corporation. *The Eastern Counties Railway Co. v. Broom*, ii. 406. See, also, *Roe v. The Birkenhead, &c. Railway Co.* vii. 546.

7. *Ratification of tort committed by agent.* The plaintiff below had been taken into custody by a railway inspector, charged with having no ticket, refusing to pay the fare, intoxication, and assaulting the inspector. At the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings. *Held*, that such attendance was no evidence of ratification by the company, it not appearing that the facts were known to the company. *Ib.*

8. *Malicious prosecution.* *Quære*, whether an action for malicious prosecution can be maintained against a corporation. *Stevens v. The Midland Counties Railway Co.* xxvi. 410.

9. *Contract not under seal.* *Assumpsit* for non-delivery of sections of railways which the defendants agreed to furnish the plaintiffs, in consideration that the plaintiffs would sell them iron rails. The plaintiffs were incorporated to carry on the business of copper miners; and the contract in question was not under seal. *Held*, that the action could not be maintained by the corporation, as the contract was not under seal, and did not fall within any of the exceptions to the general rule, that a corporation can only bind itself by deed. That the contract was not incidental or ancillary to carrying on the business of copper miners, and was therefore not binding on the corporation. That no other charter authorizing the company to deal in iron could be presumed to exist, the charter which was given in evidence not supporting such an authority. That, as the corporation could not be sued upon this contract, and as the alleged promise by them formed the consideration for the defendant's promise, the corporation could not sue upon the contract. *Semble*, that the doctrine cannot be supported, that a corporation may sue as plaintiffs upon a simple contract, upon the ground that by so doing they are estopped from objecting that the contract was not binding upon them. *The Copper Miners Co. v. Fox*, iii. 420.

10. *Local board of health, suit by, must be in name of clerk.* Upon a petition presented by the Llanelly Local Board of Health, it was *held*, that the local board was not a body corporate under the Public Health Act, 11 & 12 Vict. c. 63, and must sue in the name of their clerk, as directed by the 138th section. *Ex parte The Local Board of Health of Llanelly*, xvii. 422.

11. *Liability of local board of health.* A municipal corporation which is constituted a local board of health under the 11 & 12 Vict. c. 63, may be sued on a contract entered into by them under their common seal, according to the provisions of that act. *Nowell v. The Mayor, &c. of Worcester*, xxv. 507.

12. A local board of health under that statute are liable on contracts entered into by them, though the provisos in the 85th section have not been complied with—those provisos being only directory, and not conditions precedent to the right to contract with third parties. *Ib.*

13. *Payment of salaries by municipal corporations.* A town clerk was appointed to his office on the basis of a report which fixed his salary at 250*l.* a year, and defined his duties to be (*inter alia*) "to prepare all precepts, orders, and other documents required for laying borough rates, to abide by and see that all orders of the council are properly carried out, and all necessary documents prepared for so doing, and to act as the professional adviser of the mayor and council in the business of the council;" and it also provided, "that he be paid the usual professional charges for conducting or

opposing bills in Parliament, conducting actions or suits, &c., preparing leases, &c., and also he be paid all travelling and other expenses out of pocket." *Held*, that he was entitled to be paid all such extra costs as were *bonâ fide* incurred for the purpose of warding off threatened litigation, whether litigation did or did not in fact result. *Regina v. Prest*, i. 250.

14. *Pledge of particular funds—Action for arrears of salary.* The Municipal Corporations Act, 5 & 6 Will. IV. c. 76, s. 92, enacts: "That after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest of all moneys belonging to the corporation, shall be paid to the treasurer, and by him carried to the account of the borough fund, which fund shall be applied towards payment of the salary of the mayor, &c., and of the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint. *Held*, that an officer appointed by the council with a salary cannot maintain an action of debt against the corporation for arrears of such salary. *Addison v. The Mayor, &c. of Preston*, x. 489.

IV. Contracts of Corporations, when binding.

1. *Appropriation of funds of corporation—Illegal contract.* A corporation is limited, in the appropriation of its funds, to the purposes authorized in its charter, and the charter being a public act is presumed to be known to all. A contract, therefore, by which the corporation agrees to pay money for a purpose not authorized by its charter is illegal and void, and no action can be maintained thereon. *MacGregor v. The Deal and Dover Railway Co.* xvi. 180.

2. *Power of directors to borrow money.* The directors of a company have no implied authority to borrow money on the credit of the company, for any purpose, however useful or necessary to the objects for which the company is formed. *Burmester v. Norris*, viii. 487.

3. By the deed of settlement under which a company was carried on, a capital was provided, and there were powers to alter the provisions of the deed by the vote of a special general meeting. There was also a clause "that the affairs and business of the company shall be under the sole and entire control of the directors; and three of them shall, at all meetings of directors, and for all purposes, be competent to act. *Held*, that under this deed the directors had no express authority to borrow money for the necessary purposes of the company. *Ib.*

4. *Parol contract by directors.* The agent of an incorporated railway company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers, upon certain terms. The sleepers were received and used by the company. *Held*, that there was evidence from which the jury might find a contract by the company; the 97th section of the 8 & 9 Vict. c. 16, having provided that the directors may contract by parol, on behalf of the company, where private persons may make a valid parol contract. *Pauling v. The London and Northwestern Railway Co.* xxii. 560.

5. *How contract must be made.* A public company incorporated under act of parliament cannot contract, except in the mode and upon the conditions specified either in the special act or the general act to which it is subject. *Homersham v. The Wolverhampton Waterworks Co.* iv. 426.

6. *Work done and goods supplied—Seal.* Wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, and such work is done or such goods are supplied, and accepted by the corporation, and the whole consideration for payment is executed, the corporation cannot refuse to pay upon the ground that the contract was not under seal. *Clark v. The Guardians of Cuckfield Union*, xi. 442.

7. *Guardians of poor-law union—Seal.* *Semble*, the reason for which a seal was required to authenticate the acts of a corporation does not exist with equal force in

respect to the guardians of a poor-law union, as to municipal corporations, and others of a similar character; the former, according to the statute by which they were originally constituted, act by regulations adopted at a board composed of not less than three guardians. *Ib.*

8. *Agreements between corporations—Word “successors” not necessary.* An agreement by one corporation to grant an easement to another need not be by deed, and may be permanent although made with the company only, and not to the company and their successors. *The Great Northern Railway Co. v. The Manchester, &c. Railway Co.* x. 11.

9. *Public company—Right to mortgage property—Rights of mortgagees.* A public company was authorized to borrow money and mortgage its property to secure payment. A mortgage was executed, but certain formalities required by statute in the deed and transfer thereof were not observed. Subsequently the company borrowed another sum of money and executed a second mortgage, and the first mortgagees agreed that the rates, duties, and receipts of the company should be applied, first, to the payment of the interest on the second mortgage; second, to the payment of the interest on the first mortgage; and third, to the payment of the principal of the second mortgage. *Held*, that the first mortgage was valid, notwithstanding the informalities and that the second mortgagees did not by the agreement acquire such a priority over the first, as to be able to sell the property discharged of the first mortgage. *Jortin v. The Southeastern Railway Co.* xxxi. 320.

10. *Power to take land—Mortmain.* A power for a corporation to accept and take, and for persons to give, for its benefit, real estate, notwithstanding the Statutes of Mortmain, and so far as they are not restrained by law, is a power for the corporation to take land, provided the grant is made in the form prescribed by the Statutes of Mortmain. *Robinson v. The Governors of London Hospital*, xxi. 371.

11. *Contracts with public companies—Mode of contracting—Secretary.* Persons dealing with railway or other similar companies should always bear in mind that such companies are essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials; and should insist upon all contracts with them being by deed under the seal of the company, or signed by directors, or otherwise executed in the manner prescribed by the act of parliament regulating the company—there is no safety or security for any one dealing with such a body upon any other footing. The secretary of such a company has, of himself, no independent authority to bind the company by letters or documents signed by him. *Williams v. The Chester and Holyhead Railway Co.* v. 497.

12. *Contract between director and company.* The 85th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, enacts, that “no person interested in any contract with the company shall be capable of being a director, and no director shall be capable of being interested in any contract with the company during the time he shall be a director.” The 86th section enacts, that “if any director, at any time subsequent to his election, be either directly or indirectly concerned in any contract with the company, then the office of such director shall become vacant, and he shall cease from voting or acting as a director.” *Held*, that if a contract be entered into by a director with the company after his election, it is not rendered void, but the office only of a director is vacated. *Foster v. The Oxford, Worcester, and Wolverhampton Railway Co.* xiv. 806.

13. *Solicitor to—Retainer under seal.* Although a town clerk, who has acted as solicitor to a municipal corporation, cannot recover his professional costs against them in an action without proving a retainer under the corporate seal, yet, where an order for payment of such costs has been made by the town council, the mere absence of a retainer under seal will not be a sufficient ground for quashing the order under 7 Will. IV. and 1 Vict. c. 78, s. 44, if the costs were incurred under resolutions of the town council. *Regina v. Prest*, i. 250.

14. *Covenant to pay for work to be done at certain time.*—*Non-execution of deed by company.* A covenanted with the plaintiffs, a corporation, that he would, "on the execution" of the deed, commence, and forthwith build and finish a certain gas-holder tank, the same to be finished within three months from the date of the deed, and in default thereof, A was to pay to the plaintiffs such sum as B should award. In an action for not finishing the work at the time specified and to recover the amount awarded, it was *held*, that the non-execution of the deed by the plaintiffs until after the time specified for the completion of the work, was no defence, notwithstanding the plaintiffs, being a corporation, were not bound to pay for the work before they had executed the deed. *The Northampton Gas-light Co. v. Parnell*, xxix. 229.

V. Officers, Election and Eligibility of.

1. *Disqualification for office in.* A corporate officer who sells to one holding a contract under the town council, acting as local board of health, articles to be used in fulfilling the contract, is not disqualified for office under 5 & 6 Will. IV. c. 76, s. 28. An agreement by the council to pay to A. a certain sum on the successful termination of a contract he had held, and assigned to them, is "a security for the payment of money only," under 5 & 6 Vict. c. 104, s. 1, and does not disqualify A. *ut sup.* *Le Feuvre v. Lankester*, xxv. 116.

2. *Quære*, whether sect. 28 of the 5 & 6 Will. IV. c. 76, disqualifies for the office of mayor as well as that of alderman or councillor. *Ib.*

3. *Semble*, that a contract with the town council acting as local board of health in a corporate district operates as a disqualification under the Municipal Corporation Act. *Ib.*

4. *Disqualification for councillor in.* Under the Municipal Corporation Act, a party who has entered into an existing contract for profit with a council is disqualified for the office of councillor, even though he could not sue upon the contract, by reason of its not being under seal. *Regina v. Francis*, xii. 419.

5. *Who may be councillor in.* The 5 & 6 Will. IV. c. 76, s. 28, enacts that no person shall be qualified to be a councillor unless (*inter alia*) he "be rated to the relief of the poor in such borough upon the annual value of not less than 15*l.* *Held*, that this refers to the sum inserted in the rate-book as "ratable value," and not as "gross estimated rental," stated in the rate-book. *Baker v. Marsh*, xxviii. 194.

6. *Election of alderman by minority of councillors.* At a meeting of the town council a minority of the councillors present delivered voting papers to the mayor for certain persons to be elected aldermen. The mayor and the majority of the town councillors had been advised that the day was not the proper one for the election. The mayor consequently declined to proceed with the election, and no election was declared. It was, in fact, the duty of the council to have proceeded to the election on that day, had they known the law. *Held*, that the act of the minority was not the act of the town council; that the election had not been part held, but that there had been no election; and that a *mandamus* might issue calling upon the council to proceed to elect aldermen. *Regina v. The Mayor, &c. of Bradford*, iv. 194.

7. *Special overseer—Borough rates.* A special overseer appointed under the 7 Will. IV. and 1 Vict. c. 81, s. 3, to make, levy, or collect borough rates in a parish lying partly within and partly without a borough, is not an annual officer, nor such an officer as could be appointed under the 5 & 6 Will. IV. c. 76, s. 58. *The Mayor, &c. of Birmingham v. Wright*, iv. 189.

8. *Measurement of coals imported—Appointment and fees of meter.* *Held*, that the right of a corporation, by custom, by means of their deputies, to measure all coals imported into the port, was not converted into a right to weigh them by the stat. 5 & 6 Will. IV. c. 63. *Held*, also, that as the coal meter claimed fees for his own benefit by the custom, he was an officer, and not a mere servant, of the corporation; that the

appointment, therefore, ought to have been under the seal of the corporation, no custom being alleged of appointing such an officer without deed. *Smith v. Cartwright*, vi. 528.

9. *College—Election of warden.* James I., by charter in 1619, granted to E. A. license to found a college, to consist of a master, warden, &c., according to such ordinances, &c., as he should make. In 1619, E. A. by deeds created the college, and in 1626, made certain ordinances, &c. These ordinances provided that certain church-wardens, not of the number of whom the college was to consist, should be assistants to the master, &c., and that if the place of warden should be void "the master, assistants, and fellows should proceed to election, &c.;" in another case the assistants were directed "to join with the fellows in the election of a new master," &c. *Held*, first, that by these ordinances, coupled with the invariable usage, the assistants had a voice in the election of warden; and, secondly, that E. A., although he could not alter the constitution of the college, had power to give the assistants, who were not members of the corporation, a right of voting for a corporate officer; and, thirdly, that the lapse of time after the foundation of the college did not take away his right to make such an ordinance. *Regina v. The Master, &c. of God's Gift in Dulwich*, viii. 385.

10. *Deputies of usage—By-laws—Power of appointment bound by usage.* Where a corporation has from time immemorial exercised certain functions by its officers, who have appointed deputies, and those deputies by custom are entitled to the monopoly of the employment, the office of deputy being salable, but, if not sold on the death of the occupant reverting to the corporation—the plaintiffs, who are a part of the deputies, must show the immemorial existence of the body of which they form a part, in order to maintain an action for the infringement of the by-laws of their body by two of the deputies appointed by the corporation. *Thompson v. Daniel*, xxi. 93.

11. Such a body may have the power to make by-laws to regulate the rights and duties of its members, but whether the body of deputies has that power or not must depend on usage. And on proof that they have regulated their own affairs without interruption for sixty years, they will be deemed to have the right of self-government, although they may be, in a sense, the servants of the corporation, and the corporation cannot appoint deputies to hold their office upon terms different from those prescribed by the general regulations of the body. *Ib.*

12. One of several persons interested in a common purse will not be justified in refusing a payment, when proffered according to usage, though it cannot be demanded as a right, where it is not so improper as that it is illegal to accept it. *Ib.*

VI. Shareholders; Registry of Shares.

1. *Primâ facie evidence that party is shareholder.* An affidavit in support of an application under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, for a *scire facias* for execution against a shareholder on a judgment against a railway company, stated that the deponent "having been foiled in his attempts to obtain a sight of the register, and to obtain authentic and official information on the subject, deponent instituted inquiries *aliunde* as to who really were the shareholders of the company, and hath been credibly informed by parties officially connected with the said railway, and which information deponent verily believes to be true, that the said A B, who has been a director of the said company from the commencement, was a duly registered shareholder of seventy shares in the said company, and that 1,085*l.* was due thereon in respect of subscriptions not called up, the shares in the said company being 20*l.* shares, and only 4*l.* 10*s.* per share having been paid up or called." *Held*, that this affidavit, unanswered, was good *primâ facie* evidence of the party being a shareholder of the company. *Rastrick v. The Derbyshire, &c. Railway Co.* xxiv. 405.

2. *Evidence that a party is not a shareholder.* In an action for calls the plaintiffs, to prove that the defendant was a member of the company, produced the register of the

shareholders. To rebut this evidence the defendant proved that he applied for 100 shares, promising to pay the deposit, and sign the necessary deeds; that the company by their letter of allotment, informed him that 50 shares were allotted to him upon which he was required to pay a deposit by a certain day; that scrip certificates would be delivered to him in exchange for the letter of allotment after his execution of the subscribers' agreement; and that the shares would be forfeited if these requisitions were not complied with by a certain day. *Held*, that this evidence rebutted the *prima facie* inference from the register, that the defendant was a shareholder in the company. *The Waterford, Wexford, &c. Railway Co. v. Pidcock*, xviii. 517.

3. *Mandamus to register shares—Want of bona fides in applicant.* A purchaser of shares in a railway company, the construction of whose railway has been deferred, and who have voted a return of 14s. per share of the paid up capital to the shareholders, and have actually returned 10s. thereof, the certificates of the shares purchased having such return indorsed upon them, the time for the compulsory purchase of land by the company having also expired, is not entitled to a writ of *mandamus* to compel the registering of his deed of transfer. As one of the public he has no right to the writ, and the circumstances of his purchase show that he was not proceeding *bona fide* for the purpose of enforcing the rights of a shareholder. *Regina v. The Liverpool, &c. Railway Co.* xi. 408.

VII. *Liability of Shareholders ; Executions against.*

1. *Action against chairman of corporation—Colonial law.* An act enabling the chairman of a company to sue and be sued on behalf of the company, and providing that execution in such action against the chairman might be issued against the goods, lands, &c., of any member of the company, in like manner as if such judgment had been obtained against him personally, is within the authority of a colonial legislature, and contains nothing repugnant to the law of England or to natural justice. The specific mode provided for enforcing the judgment by execution against a member of the company cannot be obtained against a shareholder out of the colony; but the judgment against the chairman may be made the foundation of an action against such shareholder in the same manner as if he had been personally served and the recovery had been against him as a party to the record. *Bank of Australasia v. Nias*, iv. 252.

2. *Scire facias against shareholder.* In order to entitle the judgment creditor of a railway company to a *scire facias* against a shareholder, he must show that he has no means of obtaining satisfaction of his judgment without it. *Hutchins v. The Kilkenny, &c. Railway Co.* xxix. 341.

3. *Liability after elegit issued.* A judgment creditor of a railway company, within the operation of the "Companies Clauses Consolidation Act, 1845," is entitled to issue execution against a shareholder, under sect. 36, although he has before issued an *elegit* against the lands of the company, but such lands are insufficient to satisfy the judgment debt. *Regina v. The Derbyshire, &c. Railway Co.* xxvi. 101.

4. *Quære*, whether the provisions of the 36th section of the Companies Clauses Consolidation Act, 8 Vict. c. 16, whereby shareholders in a joint-stock company are rendered liable for its debts, apply to cases where the company is plaintiff. *The Kilkenny Railway Co. v. Fielden*, ii. 388.

VIII. *Construction of particular Statutes.*

1. *Jail or house of correction, regulation of.* The 7 Will. IV. and 1 Vict. c. 78, s. 38, does not deprive the council of a city or borough of all control over the government and regulation of the jail or house of correction of the city or borough, which was transferred to the council by the 5 & 6 Will. IV. c. 76. Under the proviso in that

section, the council have a discretionary power as to the salary to be paid to the governor of such jail or house of correction, and may refuse to confirm an order made by justices of the city or borough, for the payment of an amount of salary which the council consider excessive. *Regina v. The Mayor, &c. of York*, xviii. 305.

2. *Insurance of shire hall, expense of.* By act of parliament, the county justices were empowered to order the shire hall to be insured, supported, &c., as they should think fit; the town of S. to pay one tenth, and the county the remainder of the expenses. *Held*, that the corporation of the town were bound to pay their proportion of an amount actually expended in pursuance of such an order, though they had had no notice that it was about to be made; and that they were bound to pay their proportion of another amount ordered, though it had not been expended before the action. *Hinckley v. The Mayor, &c. of Stafford*, iii. 598.

3. *Power to lay gas-pipes.* The Dover Gas-light Company held to have power, under the provisions of their act of incorporation, 3 Geo. IV. c. 15, without the consent of the commissioners for executing the paving acts at Dover, but under the conditions in all other respects prescribed by their act, to lay down in the streets of Dover in which gas-pipes had been already laid down by them under the provisions of their act, and were still in use, additional gas-pipes parallel to and to be used with such others for the same purpose of supplying gas-light to the town. Powers given by Local Act, 3 Geo. IV. c. 15. *The Dover Gas-light Co. v. The Mayor, &c. of Dover*, xxxi. 514.

4. *Oldham gas and water act—Supply to Union workhouse.* The Oldham poor-law union comprises eight townships, and the union workhouse is maintained out of the common fund of the union, consisting of the aggregate of the poor-rates within those townships. The Oldham Corporation Gas and Water Act, 1853, extends only to four of those townships, and to two townships not within the union. By sect. 58 of that act, "the corporation shall at all times afford an ample supply of gas and water, without charge, to all hospitals and infirmaries within the limits of the act, and all baths and washhouses, and all buildings within those limits respectively maintained at the expense of the borough-rates or the rates for the relief of the poor, or other rates raised within those limits." *Held*, that the corporation were not bound to supply gas and water gratuitously to the union workhouse, as it was not maintained by rates wholly raised within the limits of the act. *The Guardians, &c. v. Oldham*, xxviii. 149.

5. *Municipal corporation act.* The Hospital of St. John, in the city of Exeter, was incorporated by letters-patent of King Charles I., and the mayor, recorder, aldermen, and common council of the said city, for the time being, were thereby appointed to be governors of the said hospital. The recorder was not, prior to the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, a member of the corporation, but he was an officer elected by the corporation. *Held*, that the circumstance of the recorder being a member of the corporation of St. John, but not of the municipal corporation, did not prevent this case from falling within the 71st section of the Municipal Corporation Act. *The Attorney-General v. The Corporation of Exeter*, xvii. 242.

6. *Application to parliament at expense of borough fund.* A corporation were proposing to obtain an act of parliament for improving a river flowing through their city, and applying money from the borough fund in paying certain expenses,—an information was filed by the Attorney-General, praying an injunction to restrain this application to parliament at the expense of the borough fund, and the same was granted; and on appeal from the decision, the appeal motion was refused, with costs. *The Attorney-General v. The Corporation of Norwich*, ix. 93.

7. *Borough fund.* A borough fund is a trust fund, and is so constituted by the Municipal Corporation Act. *Ib.*

COSTS.

- I. POWER AND DISCRETION OF COURTS AS TO COSTS.
- II. WHERE COURTS HAVE CONCURRENT JURISDICTION.
- III. AS AFFECTED BY AMOUNT OF CLAIM, AND AMOUNT OF DAMAGES.
- IV. SUCCESSFUL PARTY.
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- VII. PROSECUTION OF SUIT TO RECOVER COSTS.
- VIII. WHAT FUNDS, &C., LIABLE FOR COSTS.
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- XXII. ATTORNEYS' AND SOLICITORS' BILLS OF COSTS; THEIR LIABILITY TO PAY COSTS.
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- XXIV. IN RELATION TO COMMISSIONS, AND FEES OF WITNESSES.
- XXV. SECURITY FOR COSTS, WHEN REQUIRED, &C.
- XXVI. TAXATION OF COSTS.
- XXVII. MISCELLANEOUS CASES.

I. *Power and Discretion of Courts as to Costs.*

1. *Petition under Trustee Act, 1850—Jurisdiction of court of chancery.* A petition, under the Trustee Act, 1850, stated that A had mortgaged lands to B in fee; that B had died, having by his will devised the lands to infants, and appointed C his executor, that a contract had been entered into by C with a railway company for the sale of a part of the lands, and that for the purpose of carrying out the contract, it was necessary to get in the legal estate. The petition prayed that the legal estate might be vested in C and that the railway company might pay the costs of the petition. The railway company appeared at the hearing, but objected to pay the costs. *Held*, that the court had no jurisdiction to make any order either in favor of or against the company. *In re Rees' Devises*, xiii. 137.

2. *Jurisdiction of court of appeal.* Where the Master of the Rolls or a vice-chancellor has given substantial relief against a defendant, with costs against him personally, it is competent to this court, in affirming the decree as to relief, to vary as to costs, if its dissent from the decree as to costs is strong, clear, and undoubting. *Reynell v. Sprye*, xiii. 74.

3. *Special cases.* At the hearing of special cases, under the 13 & 14 Vict. c. 35, the court has power to give directions as to costs. *Jackson v. Craig*, iii. 173.

4. *Cases of concurrent jurisdiction.* The 13th section of the 13 & 14 Vict. c. 61, which provides that where less than 20*l.* is recovered in an action in the superior courts, and it shall be made to appear to the satisfaction of the court or a judge at chambers, that the action was of the description therein specified, such court or judge "may thereupon by rule or order direct that the plaintiff shall recover his costs," confers a power upon the court or a judge to grant costs, which is imperative in cases falling within that section. *Macdougall v. Paterson*, vii. 510; *Asplin v. Blackman*, viii. 524; *Crake v. Powell*, x. 329; *contra*, *Jones v. Harrison*, iii. 579; *Palmer v. Richards*, v. 535; see, also, *Norman v. Marchant*, xii. 576; and *Fraser v. Fothergill*, xxv. 277.

5. *Under certain statutes.* Sect. 18 of 12 & 13 Vict. c. 45, does not take away the power of awarding costs given by 17 Geo. II. c. 38, s. 4, but gives an additional remedy for enforcing the order. *Regina v. Huntley*, xxv. 199.

6. *Order to pay, validity of.* Where, by statute, the court in certain cases may order one party to pay costs to the other "recoverable in the manner pointed out by" a preceding statute, which directs costs to be paid to the clerk of the peace—it seems, that an order to pay costs to the party is valid. *Ib.*

7. *Set-off of, application to allow.* The rule of Hil. 2 Will. IV. s. 93, only applies to cases in which the court has a discretion to allow costs or damages of different actions to be set-off against each other, and where there has been an application to allow such set-off. *Dunn v. West*, i. 325.

8. *Awarded by arbitrator—Lien for.* Where an arbitrator has awarded a sum to be paid to A, in respect of matters in difference between him and B, and the costs of the action (a smaller sum) to be paid to B at the same time and place, the court has no jurisdiction to order B to pay the whole sum awarded to A to A's attorney on account of his lien for A's costs. *Ib.*

9. *Costs of motion.* The court can always deal with the costs of a motion as it thinks fit. The court will decline to order the defendant to pay to the plaintiff, the costs of a motion for an injunction restraining a railway company from doing an unauthorized act, decided to be proper having regard to the interests of the plaintiff, though not done in conformity with the statute. *Pearce v. The Wycomb Railway Co.* xxi. 1.

10. *Costs of second suit.* On a motion, to have a second bill on behalf of an infant taken off the file, the court had not made an order in the terms of the motion, but by an order intitled in both suits had retained the second bill, and reserved the costs of it and of that motion. *Held*, that it was not now open to the court to omit all provision for the costs of that second suit. *Ashley v. Allden*, x. 314.

11. *Costs of obtaining writ of mandamus.* Although the costs of obtaining a writ of mandamus, where cause is shown, are in the discretion of the court, yet they ought to be given to the successful party, unless there are strong grounds to the contrary. *Regina v. Harden*, xxiv. 167; see also, *Regina v. Langridge*, xxix. 177.

12. *Arbitration—Certificate for costs.* The court, or a judge at chambers, has the power of certifying to give costs, under the 13th section of the 13 & 14 Vict. c. 61, (the County Courts Extension Act,) notwithstanding the power of certifying as a judge at *Nisi Prius* to give costs, under the 12th section of that act, has, by an order of reference, been given to an arbitrator, who has failed to certify; the certificate under the 13th section being one which a judge at chambers or the court has power to give, and different from that which a judge at *Nisi Prius* is empowered to give under the 12th section. *Sharp v. Eveleigh*, v. 467.

13. *Certificate of judge.* Under the 12th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, a judge has power to certify for costs where the sum recovered in actions of contract is 20*l.* and in tort 5*l.* *Garby v. Harris*, xiv. 479.

14. As to the discretion of taxing-master, see *In re Clarke, an attorney*, viii. 37 see also, *Mackenzie v. Mackenzie*, xi. 41.

II. Where Courts have concurrent Jurisdiction.

1. *Application for costs, within what time to be made.* No time is fixed within which an application for costs is to be made under the 15 & 16 Vict. c. 54, s. 4, in cases where the county courts and the superior courts have concurrent jurisdiction. Where application for costs was not made till a year after judgment rendered, defendant having been out of the jurisdiction during that time, it was *held*, that plaintiff was entitled to costs. *Reed v. Gardner*, xx. 482.

2. *Certificate for costs under County Court Act.* Under the 9 & 10 Vict. c. 95, s. 129, (the County Court Act,) a judge of a superior court may certify for costs at any time before the costs are taxed. *Tharratt v. Trevor*, iv. 407.

3. *Plaintiff primâ facie disentitled to costs.* In an action in the superior courts in which the plaintiffs shall *primâ facie* be disentitled to costs by reason of sect. 11 of the stat. 13 & 14 Vict. c. 61, if there be facts which would take the case out of the prohibition of that section, *semble*, that the Master could not take notice of those circumstances, but that application should be made to the court or a judge, under sect. 4 of the stat. 15 & 16 Vict. c. 54, for an order directing that the plaintiff shall recover his costs before the plaintiff applies to the Master to tax them. *Levi v. M'Rae*, xviii. 419.

4. *Affidavit for suggestion to deprive plaintiff of costs under County Courts Act.* An affidavit for a suggestion to deprive a plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95, ss. 128, 129, stated that at the time, &c., the plaintiff was residing and carrying on his business at A, within the jurisdiction of the county court of B, and the defendant was residing and carrying on his business at C, within the jurisdiction of the county court of D, and that the plaintiff "did not dwell more than twenty miles from the defendant." *Held* insufficient, as not showing that the parties dwelt within twenty miles of each other. *Room v. Cottam*, i. 504. See, *also*, *Fry v. Whittle*, iv. 457.

5. *Action on bill of exchange—Jurisdiction of county court.* An action was brought by a second indorsee of a bill of exchange against the drawer. The bill was drawn and indorsed, and notice of dishonor given, within the jurisdiction of the county court within which the defendant dwelt. On motion to enter a suggestion to deprive the plaintiff of his costs under the County Court Act, it was *held*, that the cause of action arose in some material point within the jurisdiction of the county court, and that that was sufficient to warrant that entry of the suggestion, whether the plaintiff had knowledge of the fact or not. *Hush v. Long*, iv. 199.

6. *Order for allowing costs to plaintiff under County Court Extension Act.* A judge's order for allowing costs to a plaintiff under the County Court Extension Act, 13 & 14 Vict. c. 61, may be made on a statement of the facts necessary to bring the case within the statute, without affidavit, if that statement is not disputed by the opposite party. *Power v. Jones*, i. 512.

7. *Under London Small Debts Act.* *Quære*, whether the 13 & 14 Vict. c. 61, affects the London Small Debts Act, 10 & 11 Vict. c. 71; and, consequently, whether, in order to deprive a plaintiff of costs under the provisions of this latter statute, a suggestion for that purpose must be entered on the roll by the defendant. *Hewitt v. Paterson*, iv. 519.

8. *Amount.* Under the City of London Small Debts Act, 15 Vict. c. 77, ss. 119, 120, 121, in actions on contract, where less than 20*l.* is recovered, the certificate of the judge must be granted at the trial; but where the recovery is of a sum between 20*l.* and 50*l.* the certificate may be granted at any time. *Chaplin v. Levy*, xxv. 500.

III. As affected by amount of Claim and amount of Damages.

1. *When certificate of judge requisite to recovery of costs.* A party who sues in a

superior court for a sum exceeding 20*l.*, but, in consequence of the proof of part payment, recovers a verdict for less than the amount, will be deprived of his costs by the County Court Act, 9 & 10 Vict. c. 95, s. 129, unless the judge by whom the cause is tried certifies that the action was fit to be brought in a superior court. *Turner v. Berry*, i. 501.

2. *City of London Small Debts Act.* The construction of the 119th and 120th sections of the City of London Small Debts Act is, that where a plaintiff in the superior courts recovers less than 20*l.* in an action on contract, or less than 5*l.* in an action on tort, which might have been brought in the city court, he loses his costs, without any suggestion; and if he recovers 20*l.*, and not more than 50*l.*, in an action on contract, (except in certain specified actions,) he will lose his costs, if the defendant enters a suggestion. *Castrique v. Page*, xx. 231.

3. *Amendment to give jurisdiction.* Where a cause is brought before a county court, over which it has no jurisdiction, the court should not allow the plaintiff to reduce his claim in order to bring it within the jurisdiction, without the payment of costs. *Hill v. Swift*, xxix. 482.

4. *Onus of proving right to costs—Title in question.* Where a plaintiff recovers in a superior court a less sum than those mentioned in the 13 & 14 Vict. c. 61, s. 11, in any of the actions there specified, the *onus* of proving that he is entitled to costs under sect. 13, of the same act, is cast upon him; and if he claims his costs upon the ground that title was in question, under the 9 & 10 Vict. c. 95, s. 58, he is bound to establish the fact that the title did really *bonâ fide* come in issue, and not merely that the defendant so pleaded that it might possibly have come in issue. *Latham v. Spedding*, iv. 273.

5. *Concurrent jurisdiction—Residence of one of two plaintiffs.* Where one of several plaintiffs dwells beyond twenty miles from the defendant, the superior courts have concurrent jurisdiction with the county court, under the 9 & 10 Vict. c. 95, s. 128, and the plaintiffs will be, therefore, entitled to costs under the 13 & 14 Vict. c. 61, notwithstanding less than 20*l.* is recovered. *Hickie v. Salomo*, xiv. 358.

6. *Judgment for plaintiff on demurrer—Less than 20*l.* recovered on inquisition of damages.* Where a plaintiff, in an action of contract, after judgment on demurrer, recovers less than 20*l.* on an inquisition of damages, he is deprived of his costs by the 13 & 14 Vict. c. 61, s. 11, the case not coming under the exception as to judgment by default. *Prew v. Squire*, v. 391.

7. *Costs of demurrer and issues in fact.* The 129th section of the 9 & 10 Vict. c. 95, deprives a plaintiff who recovers less than 5*l.* in an action of tort, in a superior court, of the costs of a demurrer on which he has succeeded, as well as the costs of issues in fact. *Abley v. Dale*, ix. 439.

8. *Recovery by verdict of jury, what is.* In an action of trespass, a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to have the powers of a judge at *Nisi Prius*, and to enter the verdict as he thought fit. He entered it for the plaintiff, with less damages than 40*s.*, and did not certify. *Held*, that this was a recovery, by the verdict of a jury, within the meaning of the 3 & 4 Vict. c. 24, s. 2; and the plaintiff was, therefore, entitled to no costs. *Cooper v. Pegg*, xxx. 452.

9. *Recovery of less than 40*s.* in trespass on the case.* If the plaintiff, in an action of trespass on the case, recovers less than 40*s.* and that by verdict of a jury, he is not, under 3 & 4 Vict. c. 24, s. 2, entitled to costs. *Reid v. Ashby*, xxiv. 233.

10. *Less than 20*l.* awarded by arbitrator.* The lower scale of costs given by Reg. Gen. E. T. 4 Will. IV. and Reg. Gen. H. T. 16 Vict., for cases where the amount recovered does not exceed 20*l.*, does not apply where less than that sum has been recovered by the award of an arbitrator. *Holland v. Vincent*, xx. 470.

11. *Sum tendered and recovered together exceeding 20*l.** A plaintiff who recovers in an action of debt a sum which, together with a sum paid into court on a plea of tender, exceeds 20*l.*, is entitled to the costs of the action, notwithstanding the 11th section of

the 13 & 14 Vict. c. 61. *Crosse v. Seaman*, xx. 293. See, also, *Man v. Buckerfield*, ii. 186; *Hush v. Long*, iv. 199.

12. An action was brought in one of the superior courts for a sum exceeding 20*l.*, and the defendant paid 7*l.* 1*s.* into court, which the plaintiff took out in full satisfaction and discharge of his claim. *Held*, that the plaintiff was entitled to the costs of the action. *Chambers v. Wiles*, xxx. 257.

IV. Successful Party.

1. *Suit against several—Issue directed as to one.* In a suit against several persons, A, B, and C, the decree directed an issue as to C, and reserved the costs of A and B, and the "subsequent" costs of all other parties, and further directions. C was successful on the issue. *Held*, that he was entitled to all his costs. *Rice v. Gordon*, xi. 312.

2. *Declaration on common counts—Plea never indebted and payment.* Where the plaintiff declares on the common counts, and the defendant pleads never indebted to the whole, and also, payment (in the common form) to the whole declaration,—the particulars giving credit for an amount as paid,—if plaintiff fails in proving any balance due, although he is entitled to a verdict on the general issue, he is not entitled to any costs, except such as he can show to have been exclusively incurred in proving the amount which has been paid; and the defendant is entitled to such costs as in any degree related to the disproof of a balance. *Way v. Hennett*, xxv. 407.

3. *Plea of never indebted, payment in general, and payment into court.* Debt for work and labor. Plea, first, except as to 10*l.* parcel, &c., never indebted; secondly, as to 10*l.* other parcel, &c., payment; thirdly, as to the 10*l.* above excepted, payment into court of 10*l.* 1*s.* in full satisfaction of the said sum of 10*l.* and damages by reason of its non-payment. Replications, joining issue on the first plea; traversing the payment alleged in the second plea; and to the third plea, that the plaintiff accepted and took out of court the amount paid in, in satisfaction of the causes of action in that plea alleged, and prayed judgment for his costs in that respect. A verdict was found for the plaintiff on the plea of never indebted, for 10*l.* beyond the sum paid into court, and for the defendant on the second plea. *Held*, that the plaintiff was entitled, under Reg. Gen. Trinity term, 1 Vict. to have allowed him, on taxation, all his costs of suit in respect of the cause of action to which the plea of payment into court had been pleaded, including the costs of the replication to that plea. *Rumbelow v. Whalley*, iv. 231.

4. *Feigned issue under General Inclosure Act.* On a feigned issue ordered under the General Inclosure Act, the party failing to make out his claim must pay the costs. *Regina v. Kelsey*, iv. 251.

5. *Special case without pleadings—Succeeding as to part of claim.* Where, in a special case without pleadings under the Common-law Procedure Act, 1852, the plaintiff succeeds as to a part only of his claim, and the defendant, as to the residue, the plaintiff is entitled to the general costs of the action, and the defendant to so much as he can satisfy the Master was exclusively expended upon that part of the case upon which he succeeded. *Elliott v. Bishop*, xxviii. 484.

6. *Successive assignees of term—Action for breach of covenant.* If B, C, and D become successively assignees of a term of years in certain premises, A being the original owner of the term, and A bring an action against B for breach of covenant, the breach having been committed by D, a subsequent assignee, it is the proper course for B to let the judgment go by default, and C and D are successively liable for all such costs, as well as the damages. But if B unsuccessfully defends the suit, he must pay his own costs. It is also proper for B to bring his action against C before he has paid the judgment recovered against him by A. *Smith v. Howell*, vi. 490.

7. *Objection for want of parties.* Where a successful objection for want of parties is taken by answer, the plaintiff pays the costs of the day. *Moodie v. Bannister*, xix. 81.

8. *Execution for costs, injunction to restrain.* A plaintiff at law was unsuccessful in an action, and the defendant at law was about to levy execution for the costs. The plaintiff at law filed a bill to restrain execution, but the court refused the injunction *ex parte*, unless upon the terms of the plaintiff bringing the amount of the taxed costs of the action into court. *Fisher v. Baldwin*, xxi. 439.

9. *Costs of resisting rule of court.* B. was rated for certain premises occupied by him, and was summoned before the magistrates; he showed such objections, that a warrant was refused, and the parish officers applied for a rule of court, which was made absolute, B. showing cause against it. An action was subsequently brought, the result of which showed that the resistance to the rule was well founded. B. applied to the court for the costs of resisting the rule, which were given. *Regina v. The Justices of Great Yarmouth*, xxx. 261.

10. In cases of default, the defendants are entitled to the costs of the day. *Saner v. Deavin*, xi. 338.

11. *Plaintiff in claim making default.* If the plaintiff in a claim make default at the hearing, every defendant who appears is entitled to have the claim dismissed with costs, without producing any affidavit of service of the writ of summons. *Charlton v. Allen*, xv. 476.

12. *Final verdict.* To a declaration on a special contract, the defendant pleaded several pleas going to the whole cause of action, one of which raised an immaterial issue. The cause was referred, on the terms of the costs abiding the event, and of the parties being bound not to sue out a writ of error. The arbitrator found the immaterial issue for the defendant, and the others for the plaintiff, with 5*l.* damages. *Held*, that the final event of the record was in favor of the defendant, and that he was entitled to the costs, as the arbitrator had no power to award judgment *non obstante verdicto*, and no writ of error could be brought. *Linegar v. Pearce*, xxv. 547.

13. "Full costs"—*Replevin—Distress for arrears of rent-charge.* The term "full costs," which occurs in the 17 Car. II. c. 17, s. 3, has the same meaning as ordinary "costs." *Jamieson v. Trevelyan*, xxviii. 535.

14. In an action of replevin, in respect of a distress for arrears of a rent-charge, both the plaintiff and the defendants had taken down the record for trial, and the defendants obtained a verdict;—*held*, that under the 17 Car. II. c. 7, which gives "full costs" to successful defendants in replevin, the defendants were entitled to ordinary costs only, and that they were entitled to the costs of taking down the record, but not to the costs of making the distress, nor to costs as between attorney and client. *Ib.*

15. *Costs as between attorney and client in action of replevin.* The 5 & 6 Will. IV. c. 76, which enacts, that in all actions against any person for any thing done in pursuance of the act, if judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, applies to actions of replevin brought against magistrates to try the validity of a distress for borough rates. *Jones v. Johnson*, iv. 424.

V. Where neither Party will recover.

1. *Doubtful question.* In a case where a doubtful question of great importance was involved and a variation was made from the decision of the lower court, no costs were allowed on either side. *Ferrie v. Atherton*, xxviii. 1.

2. *Points in favor of both sides decided against.* Where, upon a case reserved at the sessions, points are raised in favor of both sides, and this court confirms the order of sessions and decides against all the points raised, neither party is entitled to costs, under 5 Geo. II. c. 19, s. 2. *Regina v. The Southampton Dock Co.* v. 390.

3. *Application for injunction.* An application for an injunction having partly

failed and partly succeeded, no costs were given on either side. *The Rochdale Canal Co. v. King*, xxi. 177.

4. *Suit becoming nugatory by matters subsequent.* Where a suit becomes nugatory by matters subsequent, the court, upon motion, has jurisdiction to dismiss it without costs. The court cannot go into the merits on a motion to dismiss, nor can it make a defendant pay the costs of a plaintiff where the bill is dismissed. *The Sutton Harbor Improvement Co. v. Hitchens*, xv. 127.

5. *Application to rectify mistake of court.* Costs are not to be given upon an application to rectify a mistake of the court. *Hickling v. Boyer*, xv. 21.

6. *Writ of prohibition.* It is not usual to give costs on issuing a writ of prohibition. *Barnes v. Marshall*, xiv. 45.

7. *Cross-bill, dismissal of.* A cross-bill contained charges of fraud against the plaintiff in the original bill, which were not proved at the hearing, but it brought forward these charges, mixed with matter absolutely necessary in case the original bill had been successful. The original bill failed *in toto* against the defendant, the plaintiff in the cross-bill. The cross-bill was dismissed, but without costs as against the plaintiff in the original bill. *Derbshire v. Home*, xix. 325.

8. *Costs of first trial—Discharge of jury—Consent of counsel.* Where a jury, being unable to agree, are discharged with the consent of counsel, the party who obtains the verdict on the second trial is not entitled to the costs of the first trial. In such case the discharge of the jury is as much the act of the judge alone as if the counsel had given no consent. *Bostock v. The North Staffordshire Railway Co.* xi. 450.

9. *Costs of special jury.* A declaration in trespass contained five counts, to all of which the defendant pleaded not guilty and not possessed. A rule for a special jury was then obtained by the plaintiff; but the defendant, before the trial, amended his pleas, and suffered judgment by default as to the last two counts. At the trial the plaintiff had a verdict upon the plea of not guilty, and the defendant upon the plea of not possessed. The damages were assessed at 40s. as to the last two counts. The judge certified for special jury. *Held*, that the plaintiff was not entitled to the costs of the special jury. *Walters v. Howells*, xvi. 561.

See, also, *Leslie v. Thompson*, v. 166. *Mant v. Leith*, x. 123.

VI. *As affected by Conduct of Parties, and improper Allegations, &c.*

1. *Issue devisavit vel non—Destruction of will by heir at law.* An heir at law of a testator obtained possession of the will by force, and tore it up. The pieces were, however, collected and put together, and proved. The will contained no devise of the real estate, and a claim was filed against the heir to enforce a sale. On the heir's request, the court directed an issue *devisavit vel non*, when the will was established. *Held*, that the heir had so misconducted himself that, although his misconduct had not increased the costs of the issue, he must pay the costs of it. *Middleton v. Middleton*, xix. 340.

2. *Establishing will—Incompetency and fraud of testator alleged by heir at law.* Where a will is sought to be established against an heir at law, if the heir at law is guilty of litigious and vexatious conduct, such as alleging incompetency on the part of a testator, and fraud and improper practices on the part of a devisee, and produces no proof of his charges, but confines himself to a cross-examination of the devisee's witnesses; and the result of the case is a verdict for the devisee, the court will not hold the heir at law entitled to any of the costs of the suit or issues, but will hold him bound to pay so much of the costs of the suit and issues as were occasioned by his raising the questions of incompetency and fraud. *Grove v. Young*, ix. 47.

3. *Several grounds of defence—Vexatious conduct of defendant.* Although there is no rule that in every instance in which a defendant takes several grounds of defence, one tenable and successful, the rest doubtful or invalid, that circumstance ought to avail the plaintiff on the subject of costs, yet where, upon the evidence, the plaintiff's

case failed absolutely and wholly as a case for equitable relief, but the defendant had in the suit endeavored to support claims without any just foundation, and had vexatiously disputed the legal title of the plaintiff, it was *held*, that the bill ought to be dismissed without costs. *Clowes v. Beck*, xxi. 592.

4. *Suit in consequence of one party not carrying agreement into effect.* Where a suit has been rendered necessary by the conduct of one of the parties in not carrying an agreement into effect, he will not be fixed with the costs of that suit unless it is shown that all requisite and proper steps were taken by the other parties to the agreement, and that the party sought to be charged had notice of their intent to institute the suit, and to seek to fix him with the costs of it. *Harwood v. Burstall*, xiii. 323.

5. *Refusal of money tendered.* A plaintiff refused a sum of money tendered through the medium of a judge's summons, in satisfaction of his claim, and afterwards took out of court a sum very slightly exceeding the amount so tendered, making affidavit that when he refused the sum offered he *bonâ fide* claimed more, and had subsequently abandoned the rest of his claim because of the difficulty and expense of proving it. *Held*, that there was no evidence of oppression on the part of the plaintiff, and that he was entitled to his costs. *Shaw v. Hughes*, xxviii. 334.

6. *Costs incurred from improper conduct of case.* A party not allowed costs incurred from not having his case properly conducted by counsel. *Hall v. Hall*, iii. 191.

7. *Misconduct.* Trustees may be entitled to their usual costs of suit, as between solicitor and client, out of the trust estate, notwithstanding they have been guilty of a breach of trust. *Knott v. Cottee*, xiii. 304.

8. *Charges of fraud in bill as affecting costs.* Where a bill contains charges of fraud, which are neither supported nor repelled by evidence, and the costs are not increased by such charges, the costs of the suit ought not to be affected thereby. *Staniland v. Willott*, xii. 42.

9. *Irrelevant matter.* If an unopposed petition contains statements which are immaterial to the prayer, costs should be allowed only for those which are material. *Hyder v. Coleman*, xiii. 54. *Hutchins v. Hutchins*, vi. 91.

10. *Notice of trial—Neglect to try.* A defendant is entitled to enter a suggestion on the record, and sign judgment for his costs, under the 101st section of the Common-law Procedure Act, 15 & 16 Vict. c. 76, where a plaintiff neglects to try a cause at the times mentioned in the section, and to proceed to trial at the assizes or sittings, occurring immediately after the expiration of the twenty days' notice to try, which by the section the defendant is enabled to give. *Judkins v. Atherton*, xxvi. 104.

See, also, *The Grand Trunk, &c. Railway Co. v. Brodie*, xiii. 1; *Taylor v. Warrington*, xiv. 166; *Mawhood v. Milbanke*, xv. 73; *Preece and Evans's Case*, xix. 168; *Pulsford v. Richards*, xix. 387; *Ewart v. Ewart*, xxi. 192; *Dufaur v. Sigel*, xxi. 313; *Mill v. Hill*, xxii. 20. See, also, *Loder v. Arnold*, ii. 87; *Deeks v. Stanhope*, v. 97; *Stilwell v. Mellersh*, v. 185; *Trye v. Trye*, v. 193; *Regina v. The Justices of Middlesex*, vi. 267; *Moore v. Prance*, vii. 17; *Wright v. Barlow*, viii. 125; *The Attorney-General v. The Bishop of Worcester*, ix. 1; *Cooke v. Lamotte*, xi. 26; *Shedden v. Patrick*, xxviii. 56.

VII. Prosecution of Suit to Recover Costs.

1. *Demand in suit satisfied—Costs out of pocket.* The defendant having satisfied the demand for which the suit was instituted, the court refused to allow it to be proceeded with for the costs; but upon the terms of an agreement, to which the plaintiff had consented, but which the defendant had not strictly observed, ordered the defendant to pay the costs of the plaintiff out of pocket in the suit and on this notice of motion. *Tapp v. Tanner*, vii. 57.

2. *Appeal for costs alone.* As a general rule where a plaintiff's title to equitable relief depends on a legal right, on the establishment of such right, either by an action or an issue, he will be entitled to the cost, both at law and in equity. After an issue

had been directed and found in favor of the defendant, the plaintiff applied for a new trial, which was refused; the cause was then brought to a hearing, when the bill was dismissed with costs. The plaintiff then appealed from the decree, as well as the order refusing the new trial. On that appeal the bill was retained for a year, with liberty for the plaintiff to bring an action. An action was accordingly brought, and a verdict was found in the plaintiff's favor; but a new trial of the action was subsequently granted, on the ground of misdirection of the judge. The plaintiff having been successful in the second action, the cause was brought before the Vice-Chancellor, Knight Bruce, on the equity reserved, when he made a decree in conformity with the result of the trial at law, but did not think fit to make any order as to costs. *Held*, on an appeal from that decree, that the appeal involved so much of principle as to render it an exception to the ordinary rule, which prohibits an appeal for costs alone. *The Corporation of Rochester v. Lee*, xix. 202.

3. Under the circumstances of this case, it was *held*, that the plaintiff was not entitled to the costs of the issue, nor of the first trial of the action, nor of so much of the costs of the suit as was occasioned by his having brought the cause to a hearing, without appealing from the order refusing the new trial of the issue, but that he was entitled to all the other costs. *Id.*

VIII. What Funds, &c., liable for Costs.

1. *Creditors' suit against testator's estate.* In a creditors' suit against a testator's estate, for misappropriation of trust funds, although the assets were insufficient to satisfy the specialty debts, one of the plaintiffs who was a simple contract creditor, was held entitled to his costs out of the estate, as between solicitor and client. *Jenkins v. Robertson*, xix. 547.

2. *Town clerk's costs for counsel fees chargeable on borough fund.* Where a town council, having laid a borough rate, proceeded to enforce its payment, but were threatened with litigation if they persevered, and in consequence directed their town clerk to consult counsel, and take measures to insure them against the threat, it was *held*, that the costs occasioned thereby were properly chargeable upon the borough fund under 5 & 6 Will. IV. c. 76, s. 92. *Regina v. Prest*, i. 250.

3. *Married woman living apart from husband—Separate estate.* A, *ex necessitate*, became a creditor in respect to the funeral expenses of a married woman, who had lived apart from her husband, and who possessed separate estate. *Held*, that A was not bound to proceed against the husband, and that he should have his costs out of the estate of the deceased. *In the goods of Spitty*, ix. 571.

4. *Appointment of new trustee.* Under a power in a settlement of real estate, a new trustee was duly appointed in the place of a sole trustee deceased. The heir of the deceased trustee could not be found, and, on petition, an order was made to vest the estate in the new trustee, and that upon consent he might pay the costs of the proceedings, and that such costs, with interest at 4l. per cent., might form a charge on the inheritance. *Ex parte Davies*, xiii. 380.

5. *Suit against executor for legacy, abandonment of.* A suit was instituted by husband and wife, against the personal representative of the executor of a testator, for the wife's share of a specific legacy bequeathed to four persons. The personal representative of the executor died, and thereby the suit became abated. This suit was abandoned, and another against other parties was instituted. The costs of the representative of the executor of this abandoned suit were allowed in the accounts, as against the original testator's general personal estate. *Trail v. Bull*, xvii. 1.

6. *Contract to sell—Death before completion of contract.* J. S. contracted to sell hereditaments to H., but, at the request of H., (who intended to build, and sell in lots,) the conveyance was delayed. In the mean time J. S. died intestate, and a bill became necessary for the completion of the contract. *Held*, that the costs of the suit,

which was rendered necessary by the intestacy of J. S., ought not to be thrown on his estate. *Hinder v. Streeter*, xii. 345.

7. *Enfranchisement of copyhold lands—Payment into court.* If the consideration money of the enfranchisement of certain copyhold lands by the lord of the manor be paid into court, and a petition be presented by the lord for an investment of the money, the copyhold commissioners have a right to appear at the hearing, and the costs of the petition and the lord are payable out of the money. *Ex parte The Bishop of Hereford*, xiii. 55.

8. *Suit respecting infants' estate.* The costs of a suit instituted to obtain the opinion of the court upon a specific devise of real estate, in which infants were interested, were directed to be raised by sale or mortgage of a sufficient part of the estate. *Mandeno v. Mandeno*, xxiii. 617.

9. *Application for income of trust fund.* The costs of all parties of and incident to an application by the tenant for life for the payment to her of the income of a trust fund, which has been paid into court under the Trustee Relief Act, will be ordered to be paid out of the corpus of the fund, notwithstanding the parties entitled in remainder oppose such payment. *In re Field's Settlement*, xiii. 11; see also, *Re Buller's Trust*, x. 157; *Ross's Trust*, ii. 148.

10. *Suit against officer of court.* Order made for the payment out of the suitors fee fund account of costs incurred by an officer of the court in defending legal proceedings instituted against him in consequence of the performance of his duties. *Allen, ex parte*, vii. 34.

11. *Tenant for life—Costs as between solicitor and client, incident to arbitration.* Where a tenant for life, acting under advice, refused to take the amount offered by a railway company for lands in settlement which the company required, and the price was referred to arbitration, and a less sum awarded than the company had offered; on petition of the tenant for life, the court ordered that his costs as between solicitor and client, incident to the arbitration, should be paid out of the purchase-money. *In re Aubrey's Estate*, and *In re The South Wales Railway Act*, xxi. 119.

12. *Proceedings to obtain reconveyance of premises mortgaged to lunatic.* The costs of the proceedings for obtaining from the committee of a lunatic a reconveyance of premises mortgaged to the lunatic will be ordered to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage-money, and the petition is presented by the committee. This rule will not, however, be acted on if the mortgagor presents the petition, unless in cases where the committee has declined to take that step. *In re Wheeler*, xii. 169.

13. As to payment of expenses of foreign commission out of testator's property, see *Heath v. Chapman*, xiii. 56.

For cases in which costs were given against particular estates, see, *Quennell v. Turner*, iv. 84; *In re Strachan's Estate*, iv. 145; *Hale v. Tokelove*, v. 574; *Bryan v. White*, v. 579; *Trye v. The Corporation of Gloucester*, vi. 73; *Early v. Middleton*, vi. 86; *In re Hall's Charity*, vi. 150; *Bell v. Jackson*, vii. 92; *Ham's Will*, viii. 99; *Stainton v. Chadwick*, viii. 105; *Ex parte Carter*, viii. 112; *Baxter v. Losh*, viii. 274; *In re Holthouse*, viii. 277; *In re Spooner's Trust*, ix. 101; *Paterson v. Scott*, ix. 261; *Ex parte Bates*, x. 310; *Bagshaw v. Winter*, xi. 272; *Ex parte Pugh*, xii. 350; *Attorney-General v. Haberdashers Co.* xiii. 273; *Ex parte Cape*, xiii. 325; *Ex parte Gay*, xiii. 337; *O'Brien v. Osborn*, xiii. 420; *Ex parte MacBirnie's Trustees*, xiii. 479; *Bannatyne v. Bannatyne*, xiv. 581; *Ex parte The Incumbents of Brompton*, xv. 509; *Chapple's Case*, xvii. 516; *In re Manchester College*, xix. 404.

IX. Upon Amendments.

1. *Costs of amendments—Review of taxation.* Where a plaintiff, after notice of trial (on an issue of not guilty) and shortly before trial had leave to amend on pay-

ment of costs, and the declaration, as amended, was redelivered and a demurrer was then delivered, and afterwards the costs of the amendment had been taxed, and the Master allowed all the costs of preparing for trial, which included almost all the costs of the cause, and the plaintiff had obtained another order for leave to amend upon payment of costs upon both amendments,—the court allowed the plaintiff to amend on paying the costs of the latter, and paying into court the costs of the former; reserving the question of review of taxation until it were seen whether, on the pleadings to the declaration as re-amended, the costs of preparing for trial would become thrown away; and if they were not, *semble*, that there would be a review of taxation, and that they would not be allowed as costs of the first amendment. *Alleson v. The Midland Railway Co.* xxv. 411.

2. *Order for leave to amend, abandoned.* If an order for leave to amend be abandoned after service, the opposite party has no right to costs incurred before the abandonment, on the supposition that the order would be acted upon by the party obtaining it. *Brown v. Millington*, xx. 383.

3. *Insufficient declaration.* In a case where the plaintiff's declaration was insufficient, and an amendment was allowed, it was *held*, that the defendant was not to pay the costs of a rule nisi or of the trial. *Bodger v. Arch*, xxviii. 464.

X. On Demurrer.

1. *Bringing cause to hearing instead of demurring.* When the point in contest was sufficiently raised by the bill, the court gave no costs to a successful defendant, who brought the cause to a hearing, instead of demurring. *Hollingsworth v. Shakeshaft*, xi. 308.

2. *Demurrer on record and ore tenus for want of parties.* The demurrer on the record having been allowed, and a demurrer *ore tenus* for want of parties having been overruled, the court ordered the defendants to pay the costs of the former, but made no order as to the costs of the latter; and gave the plaintiff leave to amend either by adding parties, or striking out the passages which made the new parties necessary. *Macintyre v. Connell*, iii. 249.

3. *Three counts—Issues of fact on two for plaintiff—On third, judgment on demurrer for defendant.* Where a declaration contains three counts, and on two counts issues of fact are found for the plaintiff, and on the third, which is for a distinct cause of action, judgment on demurrer is given for the defendant, the defendant's costs of the demurrer must be deducted from the costs of the plaintiff; and the defendant's attorney has no lien, the costs of the judgment on demurrer being interlocutory costs within the proviso of the 93d rule of Hilary term, 2 Will. IV. *Scott v. De Richebourg*, vi. 374.

4. *Party successful on demurrer—Waiver.* Under the 3 & 4 Will. IV. c. 42, s. 84, the party who is successful upon a demurrer is entitled to a judgment for his costs irrespective of the termination of the suit; and where such judgment had been given for the plaintiff prior to the trial of the issues in fact, the withdrawal of a juror, with an agreement that no further action was to be brought was *held*, to be no waiver of the plaintiff's right to these costs. *Bentley v. Dawes*, xxvi. 500.

5. *Issue on fifteen pleas and demurrer to sixteenth.* To a declaration in *assumpsit* the defendant pleaded sixteen pleas; the plaintiff took issue on fifteen, and demurred to the sixteenth, which went to the whole cause of action. The fifteen issues were tried, and found for the plaintiff; but judgment was afterwards given for the defendant on the demurrer. *Held*, that the plaintiff was entitled, under the 4 Ann. c. 16, s. 5, to the costs of those issues. *Callander v. Howard*, i. 388.

6. *Issues of fact and in law.* To a count in *formedon*, the tenant pleaded three pleas, upon two of which issues of fact were joined, and upon the third an issue in law. All the issues, as well of law as of fact, were found for the demandant. *Held*, that he was not entitled to the costs of the issues of fact, under the 4 & 5 Anne, c. 16,

s. 5, that section not applying to real actions; but that he was entitled to the costs of the demurrer, under the 3 & 4 Will. IV. c. 42, s. 34, the words being general, and comprehending all actions. *Cannon v. Rimington*, xxii. 416.

7. *Several issues—Verdict on one.* The declaration contained three counts, to the first and third of which the defendant demurred, paying 25s. into court on the second, and pleading *non assumpsit* to the fourth. The plaintiff joined in the demurrer, took out the 25s. in satisfaction as to the second count, and joined issue on the plea to the fourth count. At the trial, there was a verdict for the defendant on the issue upon the fourth count, and a contingent assessment of damages for the plaintiff on the demurrers to the first and third counts; and the plaintiff afterwards obtained judgment on the demurrers. *Held*, that the defendant, having succeeded upon the only issue of fact, was entitled to the costs of the trial,—deducting the costs which the plaintiff would have been entitled to upon a writ of inquiry as to the first and third counts. *Smith v. Hartley*, xx. 297.

8. *Plaintiff's right to costs when his declaration is bad.* To a declaration in *assumpsit* the defendant pleaded several pleas, upon which issues were joined, and two pleas to which the plaintiff demurred; all the issues of fact were found for the plaintiff, but he afterwards failed on the demurrers, upon the ground that the declaration was insufficient. *Held*, that the plaintiff was not entitled, under the 4 Ann. c. 16, to the costs of the issues found for him. *Partridge v. Gardner*, v. 476.

9. *Construction of will.* Notwithstanding the general rule as to costs, where questions arise on the construction of a will in suits where the estate is to be administered, yet, where the sole question in a suit is one respecting the construction of a will, if the defendant demurs, and succeeds in such demurrer, the bill must be dismissed with costs. But if he do not demur, but, at the hearing of the cause, ask and obtain a declaration of the rights of the parties, no costs will be given on either side. *Semble, secus*, if he do not ask for such declaration, but only the dismissal of the bill. *Wilson v. Eden*, xxiii. 574. See, also *Brown v. The Monmouthshire Railway and Canal Co.* iv. 113; *The Mayor, &c. of Basingstoke v. Bolton*, xv. 539.

XI. Of New Trial; On Motion to Dismiss, Discontinuance, &c.

1. *New trial—Court equally divided.* Where the court are equally divided in opinion upon a rule for a new trial, and it consequently drops, neither party is entitled to any costs of the rule. *Dansey v. Richardson*, xxvi. 138.

2. *Granted for fresh matter.* The 17 & 18 Vict. c. 125, s. 44, does not extend to cases where a new trial is granted for no fault of the jury, but on fresh matter disclosed by affidavit. *Abbott v. Bult*, xxix. 481.

3. *Verdict against evidence—Affidavits.* Where, since the 17 & 18 Vict. c. 125, s. 44, a new trial was granted on the ground of the verdict being against the weight of evidence, and was also moved on affidavits, the court directed the costs to abide the event, excepting those of the affidavits, which the party who succeeded on the rule ought to pay in any event. *Ib.*

4. *Verdict set aside as against evidence.* Where a verdict is set aside as perverse and against evidence, and a new trial is ordered, the party moving for the new trial will not be required to pay costs. *Saunders v. Davies*, xiv. 532.

5. *Interpleader issue.* The rule as to costs, upon granting a new trial on the ground of the verdict being against the evidence, applies to interpleader issues equally with other cases. *Janes v. Whitbread*, v. 431.

6. *Party failing on first trial and succeeding on second.* The effect of the 44th section of the second Common-law Procedure Act, 1854, is, that where a verdict is set aside on the ground of its being against evidence, a party who fails on the first trial but succeeds on the second has to pay his own costs of the first trial. *Evans v. Robinson*, xxx. 573.

7. *Parties examined as witnesses.* The plaintiff and defendant in a cause were examined as witnesses at the trial, and gave contradictory testimony. There was, however, other evidence, and the jury found for the plaintiff. The judge declaring that in his opinion the verdict was grossly wrong, the court granted a rule for a new trial, without costs; and, after argument, made it absolute, costs to be costs in the cause. *Skiffington v. Clark*, xx. 356.

8. *Motion to dismiss.* With respect to the costs of suit on a motion to dismiss, the court will not inquire into the merits of the case. *Quere*, as to the costs, when the plaintiff has relied on a decision afterwards overruled? *The South Staffordshire Railway Co. v. Hall*, x. 55.

9. *Attendances.* Where a motion to dismiss stood over for a space of time, including fifty-three motion days, the defendant's solicitor being unable to swear that he actually attended in court upon such motion days, the taxing master allowed him costs for ten attendances only, and the Vice-Chancellor, on petition, confirmed this order. *Hollocombe v. Hollocombe*, xix. 5.

10. *Dismissal of bill against one defendant.* Where a bill was filed against several defendants, and one of them, being a quaker, claimed the benefit of the stat. 3 & 4 Will. IV. c. 74, and proceedings were taken accordingly, and the plaintiff now moved to dismiss the bill against this defendant, without costs, and that the defendant might pay the costs of the motion:—His honor made an order, dismissing the bill, without costs, but refused to give any costs of the motion. *Wright v. Barlow*, viii. 125.

11. *Two defendants parting with interest after bill filed.* In a case in which, after the bill was filed, two of the defendants, having parted with their interest in the subject-matter of the suit to two co-defendants, without acquainting the plaintiffs therewith, joined in an answer disclaiming and claiming to be dismissed with costs, and the plaintiffs then amended their bill, omitting the names of the two disclaiming defendants, and afterwards served them with a notice of motion to dismiss the bill without costs, an order was made pursuant to the notice of motion. *Hawkins v. Gardiner*, xvii. 34.

12. *Decree directing accounts to be taken—Clerk's certificate.* Where, under a decree directing accounts to be taken, no order was obtained under the 54th section of the stat. 15 & 16 Vict. c. 86, that the books of account should be taken as *prima facie* evidence, but the judge's chief clerk so admitted them and granted his certificate, the court of appeal, upon a motion to discharge the certificate, refused the same, but without costs. *Newberry v. Benson*, xxvii. 401.

13. Where a suit becomes nugatory by matters subsequent, the court, upon motion, has jurisdiction to dismiss it without costs. *The Sutton Harbor Improvement Co. v. Hitchens*, xv. 127.

14. *Discontinuance of ejectment—What costs allowed.* In case of a discontinuance of an action of ejectment, by reversioner against an under lessee, on a forfeiture in the original lease, the discontinuance being four days before the day of trial, it was held, that advice on evidence, preparing case for counsel to advise on evidence, copy of case and attending counsel's reasonable fees were items to be allowed the defendant; and along with them a copy of the original lease. But perusing particulars of breaches was held a fit item only for taxation between attorney and client. Costs of abstract of title and advice on title (the property being copyhold) were also disallowed. *Cheshire v. Mumford*, xxviii. 410.

15. *Administratrix of defendant.* The 138th section of the Common-law Procedure Act puts the administratrix of a defendant in the same position as if she had been the original defendant in an action, and she is therefore entitled to full costs on the plaintiff's discontinuing by leave of court, and not only to the costs of the pleas to the suggestion of the defendant's death. *Benge v. Swaine*, xxvi. 308.

16. *Suit at law and in equity—Withdrawal of record at Nisi Prius.* The plaintiff, having sued at law and in equity for the same cause of action, was, after issue joined

at law, ordered by the court of equity to elect in which suit he would proceed, and he elected to proceed in equity, and withdrew the record at *Nisi Prius*. A judge's order having been made for the plaintiff to pay the defendant's costs in the action, it was *held*, that this order was wrong, for the plaintiff's election to proceed in equity did not amount to a discontinuance, and the defendant, if entitled to his costs at all, must apply to the court of equity. *Simpson v. Sadd*, xxx. 445.

17. *Costs of suit and of particular motion—Waiver.* Where a party is ordered to pay the general costs of a suit, and also the costs of a particular motion, and then files a bill against the party entitled to all those costs, if the latter moves to stay all proceedings in the new suit until the costs of the particular motion are paid, that is a waiver of any right he may have to stay proceedings until the general costs of the suit are paid, and the court will only stay the proceedings until payment of the costs of the particular motion. *Sprye v. Reynell*, xiii. 115.

See, also, *Regina v. Newman*, xviii. 113; *The Southeastern Railway Co. v. The Submarine Telegraph Co.* xxiii. 14; *Knaggs v. Knaggs*, vi. 238; *Abley v. Dale*, vi. 422; *Lowe v. Carpenter*, vi. 450; *Hope v. Beadon*, viii. 326; *Arnold v. Goodered*, viii. 332; *Bellamy v. Majoribanks*, viii. 513; *Townley v. Bedwell*, xv. 92.

XII. On Appeal and in Error.

1. *Appeal—Married woman suing in formâ pauperis—Dives costs.* The court of chancery having given a married lady leave to sue in *formâ pauperis*, on evidence that she could not procure a next friend, made a decree in her favor. One of the defendants appealed, but the appeal was dismissed with costs. *Held*, that the appellant defendant must pay the lady herself *dives costs*. *Wellesley v. Wellesley*, xiii. 148.

2. *Order of court below varied and cause heard on further directions.* Where upon an appeal, the order of the court below was varied, and, by inadvertence, the cause was heard on further directions by the court of appeal, it was *held*, that this circumstance ought not to affect the right of the successful party to those costs which he would otherwise have been entitled to. *Malcolm v. Scott*, i. 72.

3. *Appeal against order of quarter sessions—Erroneous procedure—Certiorari.* The 11 & 12 Vict. c. 43, s. 27, provides that where quarter sessions, upon an appeal against an order, direct either party to pay costs, "such order shall direct such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled." *Held*, that a mistake in ordering costs to be paid directly to the party to the appeal instead of to the clerk of the peace, was not a defect of jurisdiction, but merely erroneous procedure; and, therefore, where such an order had been made under an act taking away the *certiorari*, the court refused to set it aside when brought before them by *certiorari*. *Regina v. Binney*, xviii. 318.

4. *Suit for divorce.* In a suit for a divorce *a mensâ et thoro* the wife obtained judgment in the court below, with costs. That judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one; but the interlocutor was allowed to stand so far as it gave the wife the costs in the court below. The wife, however, was not allowed the costs of appeal. *Paterson v. Paterson*, xii. 19.

5. *New trial on appeal.* On an appeal from a judgment of the county court to the court of common pleas, a new trial was ordered. The court first ordered the costs of the appeal to abide the event of the new trial, but afterwards directed that the appellant should have the costs of the appeal, considering that they had no power to direct payment conditionally. *Gibbon v. Gibbon*, xx. 214.

6. *Appeal to court of exchequer.* In appeal from the county courts into the court of exchequer, the appellant will have costs, if the decision below be reversed. *Hunt v. Wray*, vii. 598. See also, *Robinson v. Lawrence*, vii. 596.

7. *Court of quarter sessions.* The justices of the court of quarter sessions ought to consider the merits of each particular case of appeal before allowing costs. And

if the justices lay down an arbitrary rule as to costs, without considering the merits of individual cases, a *mandamus* may be granted remanding any case to them for full consideration. *Regina v. The Justices of Glamorganshire*, v. 357.

8. *Verifying accounts before master—Exceptions—Dismissal of portion of bill.* Where the plaintiff, instead of appealing against the decree directing an account, went in before the Master, and proceeded a certain length in verifying the accounts, but, on the Master making a separate report, stopped short and took exceptions, which being overruled, he appealed against both the original decree and the order overruling the exception, and succeeded in reversing the decree, it was *held*, he must, nevertheless, pay the costs of the proceedings in the Master's office, with respect to that portion of the bill ordered to be dismissed. *Mackellar v. Wallace*, xxvi. 62.

9. *Judgment affirmed on appeal to court of chancery.* *Semble*, where, on appeal to the court of chancery, the judgment below is affirmed, in consequence of a difference of opinion between the judges, the costs will follow the result. *In re Clarke*, viii. 37.

10. *Costs on appeal motion.* The costs of the defendants, who succeeded upon appeal motion, were not mentioned in the judgment upon the motion, but the order delivered out gave costs against the plaintiff. *Held*, that the costs ought to have been made costs in the cause. *Evans v. Protheroe*, ii. 88.

11. *Examination of witnesses on appeal.* Where witnesses are examined *viâ voce* on an appeal, whose evidence was not before the court below, and the appeal is successful, the appellant is entitled to the costs of the appeal. *Langford v. May*, xxi. 443.

12. *Appeal under winding-up acts.* In appeals under the Joint-stock Companies Winding-up Acts, the Lord Chancellor's court is not bound by the existing practice in chancery, of not giving a successful appellant the costs of the appeal; but has, under the 104th section of the 11 & 12 Vict. c. 45, a discretion as to the costs of the appeal, and also as to all previous costs. *Ex parte Hall*, viii. 51.

13. *Court of appeal agreeing with court below.* Where a court of appeal agrees with the main part of the relief granted in the court below, it will not depart from its adjudication of the costs, excepting in a very strong and clear case. *Blenkinsopp v. Blenkinsopp*, xi. 57.

14. *Case stated on appeal to quarter sessions.* Where, upon an appeal to the quarter sessions, a case is stated for the opinion of a superior court, under the 12 & 13 Vict. c. 45, s. 11, the practice is to give costs as between party and party. *Clarendon v. The Rector, &c. of St. James's, Westminster*, v. 393.

15. Where the judge before whom a matter is originally heard, recommends an appeal, such appeal, if dismissed, will be dismissed without costs. *Re Colquhoun*, xxiii. 527.

16. *Particular costs—House of Lords.* Particular costs given in a case in which cases had been sent to two courts of common law, who had returned certificates totally differing from each other in opinion on the question submitted to them, and the late Master of the Rolls had decided in conformity with the opinion of the court to which the second case had been sent, but which decision had been reversed by the House of Lords. Costs of proceedings by the plaintiff in the Master's office, pending appeal to the House of Lords, given to the plaintiff, though the decree was adverse to her right. Costs of defendants in the same interest with the plaintiff, not to be paid by the defendant who was successful. *Wilson v. Eden*, xxiii. 574.

17. *Decision of intermediate appellate court reversed in House of Lords.* The decision of a court of inferior jurisdiction was reversed by an intermediate court of appeal, principally on the ground that the court was bound by an earlier decided case, and costs were allowed to the appellant. This last decision was overruled in the House of Lords, and the party successful there asked for the costs of the intermediate court. Under these circumstances they were refused. *Adamson v. Barbour*, xxviii. 38.

18. *Alteration of decree upon appeal.* An appeal was dismissed with costs, although the decree appealed from was altered upon a point as to costs which had not been discussed in the court below. *Smith v. Pincombe*, x. 50.

19. *Appeal justified by conflict of authorities.* Where an appeal is dismissed and the judgment below sustained, costs may nevertheless be disallowed if there is a conflict of authorities which justifies the appeal. *In re Browne*, xi. 102.

20. *Error—Judgment by default below affirmed.* If the plaintiff below recovers judgment by default, and the defendant below, after payment of the debt, and costs, sues out a writ of error on which the former judgment is affirmed in the court of exchequer chamber, the plaintiff below is not entitled to his costs in error under the stat. 3 Hen. VII. c. 10, as he has not been delayed in the execution of his judgment. *Sutherland v. Mills*, i. 469.

21. *Costs of reversing judgment.* A party is not entitled to the costs of reversing a judgment, inasmuch as the law as to costs in error is not altered by sect. 148 of the Common-law Procedure Act, 1852, which makes "proceeding to error a step in the cause," nor by rule 69 of the Practice Rules, or rule 25 of the Pleading Rules, framed in pursuance of sect. 233. *Fisher v. Bridges*, xxx. 106. See, also, *Marshall v. Jackson*, xxx. 153.

22. *No appearance for plaintiff in error.* In a writ of error, where no one appeared for the plaintiff in error, the counsel for the defendant in error, was required to state the nature of the case, and the judgment of the court below was then affirmed, with costs. *Jones v. Cannock*, xviii. 81.

See, also, *In re Belson*, iii. 49; *Regina v. Helier*, vi. 253; *Regina v. The Justices of Middlesex*, vi. 267; *Daniels v. Charsley*, vii. 524; *Attorney-General v. Norwich*, ix. 93; *Cuthbertson v. Parsons*, x. 521; *Kent v. Jackson*, xi. 95; *Templeman v. Haydon*, xxii. 412.

XIII. In Administration Suits.

1. *Administration—Executors—Indemnity fund asked for.* Before paying over the residue of a testator's estate, the executors, who had reason to believe that some liabilities of the testator were still outstanding, asked to have a large portion of the residue impounded for twenty years. In a bill by the widow for administration and payment over, it was held, that though this period was too long, yet that the executors were entitled to their costs. *Cambray v. Draper*, xiii. 291.

2. *Legatee's suit—Insufficient funds.* Where the fund is insufficient, a legatee filing a bill on behalf of himself and all the other legatees to have the estate administered, is entitled to costs as between solicitor and client. *Waldron v. Frances*, xvii. 37.

3. *Bill against trustees and mortgagees of fund.* Bill by the owner against the trustees and mortgagees of a fund, to compel payment. Held, to be a suit for administration, and the costs of all parties to be paid out of the fund in the first instance. *Bryant v. Blackwell*, xv. 78.

4. *Mortgagee a party.* In a suit for the administration of an estate a mortgagee was made a party, his title being impeached by the bill. After a series of law proceedings a report was brought in declaring the said mortgagee to be the first incumbrancer. He applied to have the receiver discharged, and to be let into possession, which application was granted; and it was held that the property was not, as against the mortgagee, liable to the costs. *Langton v. Langton*, xxxi. 422.

5. *Contract creditor—Costs as between solicitor and client.* A simple contract creditor filing his bill for the administration of the testator's assets, is entitled to his costs of the suit as between solicitor and client, though the specialty creditors exhaust the assets. *Richardson v. Jenkins*, xix. 37.

6. *Creditor's bill—Appeal for costs.* A creditor's bill was filed after notice of a decree in a simple administration suit by one of the next of kin of the intestate, but the decree was at that time imperfect, in not containing the usual preliminary inquiries; the frame of the creditor's suit was also different in making the heir at law a party, and in containing charges as to real estate, and as to the destruction of documents. The creditor's suit having been brought to a hearing, the Vice-Chancellor made an order, directing the plaintiff to pay a stated sum to the heir at law in lieu of costs, and ordered the

administratrix to pay the plaintiff's costs of suit. *Held*, that inasmuch as the creditor might have obtained all the relief to which she was entitled in the former suit, the bill ought to have been dismissed with costs; and that, under the circumstances, the appeal to the Lord Chancellor did not fall within the rule precluding an appeal for costs. *Menzies v. Connor*, xii. 39.

7. *Nominee of crown*. The solicitor for the affairs of the treasury, as nominee of the crown, having taken out letters of administration to the goods of an intestate, on the assumption that he had died without next of kin, was *held*, not entitled to the costs of a suit instituted by a person rightfully claiming as next of kin. *Kane v. Reynolds*, xxxi. 128.

8. *Taking objection to chief clerk's certificate*. The nominee of the crown had successfully resisted, in a previous suit, an unfounded claim by a person wrongfully asserting a title as next of kin, and in the suit of the rightful claimant there had been the usual decree for an account, with all just allowances. *Held*, without deciding that the costs of the previous suit might have been included under just allowances, that inasmuch as no objection had been taken to the chief clerk's certificate by the nominee of the crown, he was precluded from raising the question as to his right to the costs of defending the previous suit, when the cause came on before the court for further consideration. *Ib.*

9. *Costs of executor*. In a suit to administer the estate of a testator, an executor had retained balances in his hands, and had subsequently become bankrupt. *Held*, that he was entitled to his costs, although he was charged with interest on the balances in his hands from time to time. *Held*, also, that he was entitled to have his costs out of the estate, and that they were not to be set off against what should be found due from him in respect of interest on the balances in his hands. *Cotton v. Clark*, xiii. 379.

10. *Neglect to render accounts*. The mere fact that an executor neglected to render accounts when asked, is not of itself sufficient to make him liable to the costs of a suit for administering the estate. *White v. Jackson*, xv. 138.

11. *Costs of executors incurred in resisting claim*. In a suit for the administration of the estate of a testator, A brought in a claim upon the estate before the chief clerk. The claim was resisted by the executors, and disallowed. *Held*, that the costs of the executors incurred in resisting the claim were payable by A. *Hatch v. Searles*, xxiii. 414.

For cases in which costs were allowed or disallowed, see, also, *Griffith v. Vanheythuyssen*, iv. 25; *Paterson v. Scott*, ix. 261; *In re Spitty*, ix. 571; *Blacket v. Lamb*, x. 5; *Long v. Watkinson*, x. 70; *Taylor v. Frobisher*, x. 116; *Blackwell v. Pennant*, x. 270; *Rose v. Gould*, xi. 10; *Nedby v. Nedby*, xi. 106; *Murray v. Glasse*, xxi. 51; *Edwards v. Tuck*, xxi. 138; *Gauntlett v. Carter*, xxi. 160; *Millican v. Vanderplank*, xxi. 171; *Wells v. Wells*, xxiii. 4; *Cookson v. Bingham*, xxiii. 27; *Lethbridge v. Thurlow*, xi. 193; *Coulthurst v. Carter*, xi. 243; *Cator v. Cator*, xi. 306; *Blundell v. Gladstone*, xii. 52; *Golder v. Golder*, xii. 211; *Jones v. Morrall*, xiii. 69; *Heward v. Wheatley*, xv. 271; *Cole v. Miles*, xvii. 582; *Mason v. Clarke*, xix. 58; *Milne v. Gilbert*, xix. 228.

XIV. In Foreclosure Suits.

1. *Foreclosure—Mortgagee's costs—Counsel's fees*. Counsel's fees for settling a mortgage deed, on behalf of a mortgagee advancing money ordered to be raised in a suit, were directed to be allowed, in taxing the mortgagee's costs. *Nicholson v. Jeyes*, xvii. 21.

2. *Devisee of mortgaged estate made party to bill to foreclose*. A devisee of a mortgaged estate, who has never accepted the devise or claimed any benefits under the will, on being made a party to a bill to foreclose, was held entitled to his costs. *Higgins v. Francis*, i. 71.

3. *Assignees disclaiming by answer*. The assignees of a tenant for life, who had joined in a mortgage deed, stated in their answer to a bill for foreclosure, that they

had offered to the plaintiffs to disclaim by deed, and they disclaimed by their answer. *Held*, that the assignees were entitled to their costs. *Lock v. Iomas*, ii. 95.

4. In a foreclosure suit, the bill alleged that the plaintiff, the first mortgagee, had applied to the defendants, who were subsequent mortgagees, to pay his mortgage debt and interest, and that they had refused so to do. The defendants, by their answer, stated that the plaintiff had not made any application to them, and that, if he had, they would have released and disclaimed all interest, and they then disclaimed. *Held*, that the plaintiff was bound to pay the defendants their costs. *Gurney v. Jackson*, xvii. 419.

5. A defendant, who had been a mortgagee of the equity of redemption of the property, disclaimed by his answer, stating that his mortgage had been satisfied before the bill was filed, and that, if any application had been made to him before making him a party, he would then have disclaimed. *Held*, that he was entitled to his costs. *Hidons v. Holtom*, xiii. 596.

6. *Disclaimer by judgment creditor.* In a foreclosure suit, a creditor by judgment, subsequent to the plaintiff, put in his answer, disclaiming all interest, stating at the same time that no application had been made to him to release his interest previous to the filing of the bill. To this answer the plaintiff filed a replication. *Held*, that the plaintiff was entitled to a decree of foreclosure, but that the defendant was not entitled to any costs from the plaintiff. *Ford v. Chesterfield*, xix. 434.

7. *Disclaimer by creditors—Costs of evidence.* In a suit instituted for the redemption of prior and the foreclosure of subsequent incumbrancers, creditors by judgment and by deposit of title-deeds, who had parted with their interest in the securities before they were made parties to the suit, put in their respective answers disclaiming all interest in the estates mortgaged. *Held*, that they were entitled not only to the general costs of the suit, but also to the costs of the evidence which one of them had gone into in support of the statements in his answer, which had been replied to. *Hurst v. Hurst*, xix. 385.

8. *Sale by mortgagee—Bill for specific performance.* A mortgagee had a power of sale, and of retaining his costs, charges, and expenses. He sold; but the purchaser resisted the completion on the ground of misdescription. Being advised by counsel that the objection was untenable, he filed a bill for specific performance, which was dismissed with costs. *Held*, upon a redemption, that he could not charge the costs of the suit. *Peers v. Ceeley*, xix. 269.

9. *Bill for foreclosure and general administration.* Where a mortgagee, instead of simply filing a bill to enforce his securities, institutes or adopts a suit for a general administration, and the estate proves deficient, the costs of the suit are to be paid, in the first instance, out of the estate. *Armstrong v. Storer*, xi. 313.

10. *Against infant devisee—Guardian—Practice.* On a claim for foreclosure against the devisees of the mortgagor, one of whom was an infant, it was *held*, that the plaintiff had a right to have the common decree of foreclosure, with a day for the infant to show cause. The infant not having appeared, the plaintiff obtained an order appointing the solicitor to the fee fund his guardian. *Held*, that the costs of the solicitor to the fee fund might be taxed and paid by the plaintiff, and added to the debt. *Newbury v. Marten*, ii. 106.

11. *Equitable mortgage—Decree, expense of.* On a decree for foreclosure, at the suit of an equitable mortgagee by deposit, the decree simply directs the mortgagor to surrender, without declaring at whose expense it is to be done. *Pryce v. Bury*, xxiii. 75.

12. *Semble*, in such case the mortgagor must bear the expense of all prior necessary admittances. *Ib.*

See, also, *Thornhill v. Manning*, vii. 97; *Coombe v. Stewart*, vii. 167; *Watkins v. Williams*, x. 23; *Shaw v. Hackray*, xxiii. 18; *Harmer v. Priestley*, xxi. 496.

XV. In Suits for Specific Performance.

1. Bill for foreclosure by mortgagee, dismissal of—Redemption—Power of sale. A

mortgagee had a power of sale, and of retaining his costs, charges, and expenses. He sold; but the purchaser resisted the completion on the ground of misdescription. Being advised by counsel that the objection was untenable, he filed a bill for specific performance, which was dismissed with costs. *Held*, upon a redemption, that he could not charge the costs of the suit. *Peers v. Ceeley*, xix. 269.

2. *Contract of sale—To what costs purchaser liable.* Where a purchaser objects to specific performance of a contract for sale upon other grounds than those of title, and fails, and the vendor does not make out his title until after decree, the purchaser is liable to the costs of the vendor's suit for specific performance, except the costs of making out the vendor's title. *Abbott v. Calton*, xix. 601.

3. *Vendor plaintiff, defective title of.* Where the court has declared, in a suit for specific performance by a vendor, that the concurrence of judgment creditors was necessary, that being the substantial ground of the litigation, although a question of conveyance and not of title, the vendor plaintiff failing must pay the costs of the suit. It is the duty of a vendor plaintiff who has a defective title, when the objection is removed, to offer to the purchaser the costs up to that time, and to give him a conveyance. *Freer v. Hesse*, xxiii. 525.

4. The rule, that the costs of a suit for specific performance depend upon when the title was first shown, is to be strictly adhered to. *Wilkinson v. Hartley*, xv. 135.

5. *Compensation—Defect in title to land.* A defect in the title to a small piece of land, over which lay the approach to a house and other land, the main subject of a purchase, was a matter for compensation, where the contract contained a condition for compensation, if any mistake or omission should be discovered in the description of the property. In a suit for specific performance, by a vendor against a purchaser, the Master reported that a good title was first shown, pending the reference to him, except as to a small portion, which the court considered a subject of compensation. Costs were given to the defendant up to the date of amending the bill, and to the plaintiff afterwards. *Freer v. Hesse*, xvii. 154.

6. *Alleged defect of title—Acceptance of title.* The vendee of a colliery refused to complete the contract of purchase because of alleged defects in the title. The vendor filed a claim for specific performance, and afterwards furnished copies of certain deeds, upon the receipt of which the vendee accepted the title. Upon the hearing of the claim, the court held that these deeds were not essential to the title, and decreed performance with costs. *Litchfield v. Brown*, xxiii. 198.

See, also, *Salmon v. Cutts*, v. 93; *Newman v. Warner*, vii. 182; *Price v. Griffith*, viii. 72; *Emmet v. Dewhirst*, viii. 83; *Crosse v. Lawrence*, x. 7; *Gregory v. Wilson*, x. 133; *Bennett v. Smith*, x. 272; *Martin v. Pycroft*, xi. 110; *Money v. Jorden*, xi. 182; *Monro v. Taylor*, xi. 175; *Crosse v. Beaufort*, xi. 295; *Grove v. Bastard*, xii. 76; *Chesterman v. Mann*, xii. 192; *Cutts v. Salmon*, xii. 316; *Flint v. Woodin*, xiii. 278; *White v. Bradshaw*, xiii. 296; *Parkin v. Thorold*, xiii. 416; *Tathom v. Platt*, xv. 190; *Glass v. Richardson*, xv. 198; *Hawkes v. The Eastern Counties Railway Co.* xv. 358; *The Shrewsbury, &c. Railway Co. v. The London, &c. Railway Co.* xxi. 319.

XVI. In Admiralty.

1. *Neutral's right to costs.* Where neutral property is on board a belligerent ship which is seized and condemned, the neutral is not entitled to costs on the restoration of the property. *The Primus*, xxix. 589.

2. *Vendors of shares in ship—Cause of possession.* Vendors of shares in a ship, availing themselves of the want of a legal transfer, and bringing a cause of possession against the purchaser, who had paid a large portion of the purchase-money, and was the owner of the remaining shares, not allowed their costs against the purchaser. *The Virtue*, xxv. 592.

3. *References to registrar and merchants.* Costs of references to registrar and mer-

chants ordered to be paid by the party making the claim unsupported by evidence. *The Cynthia Ann*, xxiv. 579.

4. From the evidence in a cause of salvage it appeared that before a tender of 30*l.* was made, the salvors had refused an offer of 80*l.* for their services. The court, awarding 50*l.*, and overruling the tender, gave no costs. *The Hædwig*, xxiv. 582.

5. The claim made in a damage cause was 3,121*l.* The report allowed 1,736*l.* A tender was made before the reference of 1,685*l.* The four principal items disallowed amounted to 1,109*l.* The claimants were condemned in the cost of the reference as to these four items. *The Nimrod*, xxiv. 589.

6. *Bottomry on ship, freight, and cargo—Bail by owners of cargo—Deficiency of proceeds.* In a cause of bottomry on ship, freight, and cargo, the owners of the cargo admitted the validity of the bond and gave bail. Expenses necessarily incurred reduced the value received for the ship and freight, and the amount of bail given by the owners of the cargo, to a sum total less than the bond and costs. Held, that the owners of the cargo were not liable for the deficiency either of the bond or costs. *The Nostra Senora del Carmine*, xxix. 572.

See, also, *The Wave*, iv. 589; *The Kalamazoo*, ix. 557.

XVII. In Proceedings in Cases of Lunacy.

1. *Petition of lunatic's committee.* Where it appeared upon the petition of the committees of a lunatic, that their solicitor had received and misapplied part of the lunatic's estate, and died insolvent, the court, though holding the committees responsible, yet made a declaration that, as the lunatic, if he recovered, would not probably, under the circumstances, enforce the liability, they were not to be charged with the loss, but refused to allow them the costs of the proceeding out of the estate. *In re Moore*, xxiii. 219.

2. *Lunatic mortgagee—Petition, under 13 & 14 Vict. c. 60—Next of kin.* Where, through the lunacy of a mortgagee, not found a lunatic by inquisition, a petition, under 13 & 14 Vict. c. 60, is necessary to enable the mortgagor to pay off the mortgage debt, the costs must be paid out of such debt; and there being no committee, but merely a receiver of the mortgagee's estate, under 8 & 9 Vict. c. 100, and the appearance of the heir at law and next of kin having been thought necessary, their costs were allowed out of the estate. *In re Biddle*, xxiii. 179.

3. *Traverse of the finding of the commissioners—Costs of party suing out commission.* On a successful traverse by a person found lunatic by inquisition, the costs of the parties who sued out the commission will not be allowed as a matter of course out of the property of the alleged lunatic; but, on the contrary, unless a grant has actually been made under the inquisition, or unless there is property of the alleged lunatic in the hands of the court, the court has no jurisdiction to allow such costs, either under 6 Geo. IV. c. 53, or otherwise. *Ex parte Loveday*, viii. 235.

4. *Petition by lunatic to be admitted to prosecute claim.* Upon a petition by a lunatic and his committee to be admitted to prosecute a claim, no prospective order will be made as to the costs to be incurred. *In re Manson*, ix. 184.

5. *Costs of a vesting order.* Upon a petition of the committee of a lunatic mortgagee, an order was made vesting the estate in the mortgagor, the costs of the order to be paid out of the lunatic's estate, with the exception of the stamp, which was to be paid by the mortgagor. *In re Thomas*, xxi. 351.

See, also, *In re Ramshay*, i. 200; *In re Saunders*, vii. 105; *Bannatyne v. Bannatyne*, xiv. 581; *Chester v. Rolfe*, xxiii. 100; *In re Biddle*, xxiii. 179; *In re Moore*, xxiii. 219.

XVIII. In Pauper Suits.

1. *Application to compel attorney to repay costs of the day.* A plaintiff who applies

to the court to compel his attorney to repay him the amount of the costs of the day which he had been forced to pay, as he alleged, by reason of the misconduct of the attorney, is not privileged by reason of his suing in *formâ pauperis*, from having to pay the costs of the motion, if the rule is discharged. *Bell v. The Port of London Assurance Co.* ii. 193.

2. *Suing in formâ pauperis—Fees to counsel or attorney.* A plaintiff, suing in *formâ pauperis*, who recovers a verdict exceeding 5*l.* and obtains a certificate for his costs, is only entitled to recover from the defendant such costs as he has paid or is liable to pay; he cannot be allowed in taxation any fees to counsel or attorney, as he is not liable to pay such fees, under the 11 Hen. VII. c. 12, and the 121st of the General Rules of Hilary term, 1853. *Dewley v. The Great Northern Railway Co.* xxviii. 227.

XIX. In Criminal Cases; Mandamus, and Quo Warranto.

1. *Prosecution for assault, costs of.* An indictment for an assault was preferred by order of the Lord Mayor of London, and removed into this court by a *certiorari* obtained by the defendant, who was afterwards found guilty. The city solicitor had the conduct of the prosecution, and the costs, it appeared, would be defrayed out of a fund provided for such purposes by the corporation. *Held*, that the costs of the prosecution could not be recovered, under the 5 Will. & Mary, c. 11, s. 3, that section being intended to indemnify a prosecutor against costs which he would otherwise be liable to pay. *Regina v. Wilson*, xvi. 389.

2. *Indictment for perjury—Prosecutor's costs.* Where a defendant was convicted on an indictment for perjury, removed by himself by *certiorari* into the court of queen's bench, the prosecutors were held entitled to costs, under the stat. 5 & 6 Will. & Mary, c. 11, as "parties aggrieved or injured," although the false swearing failed of its effect, and the prosecutors were only interested as executors in the suit in which the false affidavit was made. *Regina v. Major*, xiv. 144.

3. *Costs under sect. 3 of stat. 5 & 6 Will. & Mary, c. 11.* In order to entitle a prosecutor to costs under sect. 3 of stat. 5 & 6 Will. & Mary, c. 11, it is sufficient to show that he prosecuted in pursuance of some moral obligation, and was not a mere volunteer. *Regina v. Kenealey*, ii. 180.

4. *Bonâ fide prosecutor entitled to costs.* In case of an indictment for non-repair of a highway, it is imperative on the quarter sessions to grant a *bonâ fide* prosecutor his costs. *Regina v. The Justices of Surrey*, xi. 436.

5. *Indictment for non-repair of highway—Costs paid out of parish rates.* By stat. 5 & 6 Will. IV. c. 50, s. 95, in case of an indictment for non-repair of a highway, preferred by order of justices, "the costs of such prosecution shall be directed by the judge, &c., to be paid out of the rate made and levied, in pursuance of this act, in the parish in which such highway shall be situate; provided that it shall be lawful for the party against whom the indictment is preferred to remove it by *certiorari*." On an indictment removed into the queen's bench by *certiorari* at the instance of the prosecutor, and tried at *Nisi Prius*, the judge made an order that "the costs of the prosecution should be paid out of the rate made and levied in the parish of E." *Held*, first, that such order might be made, though the indictment was removed at the instance of the prosecutor. Secondly, that it was no objection that the costs were ordered to be paid out of the rate made and levied, instead of out of the rate to be made and levied. Thirdly, by Lord Campbell, C. J., and Erle, J., (Crompton, J., dissenting,) that the order need not state the amount of the costs. *Regina v. The Inhabitants of Eardisland*, xxvi. 223.

6. *Criminal information for libel.* Where, in a criminal information for a libel, the defendant recovers a verdict and judgment, he is entitled to recover from the prosecutor the costs sustained by reason of the information, under the 6 & 7 Vict. c. 96, s. 4, although the only plea upon the record is not guilty, and the judge at the trial

certifies, under the 4 & 5 Will. & Mary, c. 18, s. 2, that there was reasonable cause for exhibiting such information. *Regina v. Latimer*, ii. 226.

7. *Mandamus to revise list of burgesses.* The mayor, &c., of a municipal corporation made an error in the burgess list. After they had gone out of office a rule *nisi* for *mandamus* to the mayor, &c., to revise the list was obtained, and served on the succeeding mayor, who showed cause and opposed the rule, and supported the erroneous proceeding. The rule was made absolute on the 23d January, but not served until February 20. *Held*, that the party showing cause was liable to costs, under 1 Will. IV. c. 21, s. 6, and that the prosecutors were not deprived thereof by the delay. *Regina v. Burrows*, xxx. 238.

8. *Costs of mandamus to sessions.* The right to the costs of a *mandamus* to sessions to hear an appeal does not depend upon whether or not cause has been vexatiously shown against the rule for the writ, but whether cause has been unsuccessfully shown. *Regina v. The Justices of Middlesex*, vi. 267.

9. *Mandamus, rule for.* No cause having been shown against a rule for a *mandamus*, and it appearing that the litigation was substantially at an end, the rule was made absolute, and costs allowed without a separate application therefor. *Regina v. The East Anglian Railway Co.* xxii. 274.

10. *Councillor of borough, information against—Disclaimer.* Where a person has been elected to the office of councillor of a borough for which he was a candidate, and has acted in such office, and afterwards, upon a rule *nisi* for a *quo warranto*, information being obtained against him, declined to show cause and submitted to resign, and, if necessary, formally to disclaim, the court will make the rule absolute without imposing any terms upon the relator as to the costs of any subsequent proceedings. *Regina v. Earnshaw*, xvi. 283. See, also, *Regina v. Hartley*, xxv. 175; *Regina v. Sidney*, iv. 234.

11. *Costs of application for a quo warranto.* M., an unqualified person, was elected a town councillor of the borough of B., without having taken any part in the election; but on being informed by the town clerk, that if he did not accept the office he would be liable to a fine, he signed the usual declaration. Upon application for a *quo warranto*, he sent in a written resignation to the town clerk, which was accepted. *Held*, that the relator was not entitled to the costs of the application. *Regina v. May*, ii. 284.

12. *Side-bar rule—Attachment—Affidavit.* Where a side-bar rule has issued, under the 5 & 6 Will. & Mary, c. 11, s. 3, and an attachment is moved for by the prosecutor for non-payment of the costs, it is not necessary to have an affidavit that the prosecutors are the parties grieved. *Regina v. Hills*, xx. 100.

13. For other cases in which costs were allowed see, *Regina v. Ingham*, x. 378 *Regina v. The Overseers of Salford*, xiv. 145.

XX. In Proceedings as to Compensation for Land taken by Public Companies.

1. *Jury to assess damages for lands taken by railway company—Action of debt.* The defendants, a railway company, by their works injuriously affected the lands of the plaintiff. They offered him 60*l.* compensation. A jury, summoned pursuant to the stat. 8 & 9 Vict. c. 18, (the Lands Clauses Consolidation Act,) assessed the compensation at 215*l.* *Held*, that the plaintiff was entitled to recover in an action of debt against the company the costs of the inquiry as well as the amount of the compensation; for, although the proceeding was under sect. 68, which makes no provision as to the costs of the inquiry, yet that section, by reference, embodies into itself sect. 51, which provides for giving the claimant the costs of the inquiry where the jury assess a larger sum for compensation than the sum offered by the promoters of the undertaking. *The Southeastern Railway Co. v. Richardson*, ix. 464.

2. *Land in trust taken by railway company—Costs of procuring new trustee.* A

railway company took some copyhold land, which had been vested in a trustee, who had died leaving an infant heir. A new trustee and tenant having been procured in order to make the conveyance, it was *held*, that the costs of procuring him were not to be allowed as against the company. *The South Wales Co., in re*, vii. 48.

3. *Jury summoned to assess damages against railway company.* Where a jury has been summoned by a railway company, in compliance with a notice from the claimant of compensation for land taken by the company, if the verdict of the jury is for a greater sum than that previously offered by the company, then the claimant is entitled to his costs of such inquiry. *Richardson v. The Southeastern Railway Co. v.* 421.

4. *Petition under Lands Clauses Consolidation Act in general.* Where one of several persons entitled to the proceeds of an estate directed to be sold, petitions under the Lands Clauses Consolidation Act, and serves the other persons, it is not of course that the company should pay the costs of such respondents. *Melling v. Bird*, xvii. 130.

5. *Second reinvestment of part of purchase-money—Abortive attempt.* The costs of a second reinvestment of a part of the purchase-money paid into court by a railway company, being a matter in the discretion of the court, will be ordered to be paid by the company, where nothing appears unreasonable in the circumstance of the investment being made by piecemeal. And a *bonâ fide*, but abortive, attempt to reinvest a part of the money ought also to be paid by the company. *In re Woolley's Estate*, xxi. 77.

6. *Voluntary agreement respecting costs.* When a railway company has paid money into court, and the person whose lands were taken, wishes to reinvest the money, the company cannot be called on to pay such costs as by a voluntary agreement on the part of the person so investing were to be paid by him. *Ex parte Incumbent of Church of Alsager*, xxiii. 532.

7. *Costs of investment of purchase-money.* A railway company is liable to pay the costs of the investment of the purchase-money of the land of a charitable institution taken for their railway. *Eton College, ex parte*, i. 51.

8. *Metropolitan Improvement Acts—Costs occasioned to tenant for life.* Under the Metropolitan Improvement Act, 3 & 4 Vict. c. 87, s. 49, authorizing the court to order the expenses of all purchases made in pursuance of the act to be paid by the commissioners of woods and forests, the court declined to make an order for payment, either by the commissioners, or out of the corpus of the compensation-money paid in under the act, of the costs occasioned to a tenant for life of settled estates purchased under the act, by making out her title or otherwise, in consequence of the land being taken. *In re Strachan's Estate*, iv. 145.

9. *Application respecting purchase-money paid into court.* Costs of an abortive application and reference, with regard to the appropriation of purchase-money paid into court by a railway company, under the Lands Clauses Consolidation Act, ordered to come out of the fund. *Stevens, ex parte*, ii. 152.

10. *Payment of brokerage.* Upon a petition for an investment of money paid into court by a railway company for the purchase of settled land, brokerage charged by the accountant-general was ordered to be paid by the petitioner, and allowed to her in her costs against the company. *In re Braithwaite's Trusts*, xxi. 20.

11. As to other cases of costs where a railway company has paid into court the purchase-money for land taken, see *In re The Buckinghamshire Railway Co.* i. 99; *In re Walker*, ii. 91; *Railston, ex parte*, vii. 293; *Tooke's Trusts*, xiii. 44; *Ex parte The Vicar of Creech St. Michael*, xiii. 132; *In re The Southampton, &c. Railway Co.* xix. 317. See, also, COMPENSATION AND RAILWAYS.

XXI. *In Winding up Cases.*

1. *Official manager.* Proceedings were taken in the Master's office by the official manager, upon which he obtained the order of the Master for the production of an account of certain payments. The parties ordered to produce this account appealed, and the court discharged the order. *Held*, that the proceedings being, in the opinion of the court of appeal, improper, the official manager must pay the costs before the Master, but that the costs of supporting the order of the Master, in the court of appeal, must be paid out of the estate; the former being without prejudice to any order the Master might make as to indemnity out of the estate. *Woolmer, ex parte*, xvii. 483.

2. Where a suit, originally commenced by one on behalf of the other shareholders and scripholders of an abortive railway company, (except the defendants,) and afterwards ordered by the Master to be prosecuted by the official manager, under the Winding-up Act, was, upon the hearing, dismissed, on the ground that it had been improperly instituted, and ought not to have been adopted by the official manager, it was *held*, that the court had jurisdiction to direct the costs to be paid personally by the official manager, and that the words of the order "dismiss the bill with costs, to be paid by W. T., the official manager," were sufficient to support a subpoena and attachment for costs against W. T. personally. *The Official Manager of the Grand Trunk Railway Co. v. Brodie*, xvii. 283 and 158.

3. *Lands Clauses Consolidation Act—Arbitration—Promoters of undertaking.* If an undivided claim to compensation by a landowner, referred to arbitration under the Lands Clauses Consolidation Act, be wholly disallowed by the administrators, the promoters of the undertaking, to whom such claim was sent, although they made no offer in respect of such claim, are not, of necessity, by sect. 34 of the act, to bear all the costs of the arbitration, and the costs incident thereto. Neither are they, under the like circumstances, to bear the like costs, the consequence of distinct claims similarly disallowed, though such claims were joined with others which are allowed. *Regina v. Byrom*, xi. 433.

See, also, *Ex parte James*, iii. 218; *Ex parte Robertson*, iv. 38; *Ex parte Bagge*, iv. 72; *Ex parte Crosfield*, iv. 125; *Ex parte Upfill*, iv. 128; *Ex parte Besley*, iv. 149; *Hunter's case*, iv. 164; *Cooper's case*, v. 1; *Ex parte Walker*, vi. 51; *Bright's case*, vii. 133; *Ex parte Woolmer*, viii. 128; *Ex parte Slattery*, viii. 133; *Ex parte Gay*, viii. 173; *Conway's case*, viii. 250; *Ex parte Cropper*, x. 29; *Ex parte Gay*, x. 34; *Manwaring's case*, x. 109; *Ex parte Straffon's Executors*, x. 275; *Ex parte Croxton*, xi. 227; *Ex parte Greenshields*, xi. 240; *Ex parte Chepstow*, §c. xi. 281; *Robert's case*, xiii. 7; *Ex parte Wryghte*, xiii. 182; *Ex parte Talbot*, xiii. 205; *Ex parte Woolmer*, xiii. 236; *Ex parte Crosfield*, xiii. 284.

XXII. *Attorneys' and Solicitors' Bills of Costs; their Liability to pay Costs.*

1. *Attorney acting for several plaintiffs.* If the same attorney is employed by different plaintiffs to bring separate actions against the same defendant for similar injuries received from the same cause, he is entitled to full costs; and the Master has no right to give costs for one brief as a brief, and the others as draft briefs, though the briefs are to a certain extent similar, unless the actions were consolidated. *Mucklone v. Whitehead*, xxiv. 501.

2. *Solicitor acting for several defendants.* Where the bill of costs of a solicitor, who is separately retained by several defendants to a suit, is taxed on the application of one of them, only a proportionate part of the charges for proceedings common to all such defendants will be allowed, as against such one defendant, though such charges have not been increased by the proceedings having been taken on behalf of several defendants at once. *Re Colquhoun*, xxiii. 527.

3. *Appearances.* The solicitor is entitled to 6s. 8d. for every three defendants, though the appearances are all entered on the same day, and whether proceeding be by bill or summons. *Morrill v. Walton*, xxvii. 400.

4. *Name of court not stated in bill—Bill defective in part.* Where an attorney's bill of costs, delivered under the 6 & 7 Vict. c. 73, s. 37, contains items applicable to proceedings in the superior courts of law, but does not contain any statement from which it can be inferred in which of those courts the business was transacted, the bill is to be presumed to be a compliance with that act, unless the party charged thereby proves that any further information was practically required for the purpose of taxation, or shows that the name of the court in which the business was done would have been of use to him. The reason for requiring the name of the court to be stated, which prevailed under the 2 Geo. III. c. 23, does not exist since the 6 & 7 Vict. c. 73, and since the scale of allowances has become uniform in all the superior courts of law. *Semble*, that a bill of costs which is defective as to part of the items contained in it, may be good as to the residue, so as to entitle the attorney to recover the amount as to which a sufficient bill of costs has been delivered. *Cooke v. Gillard*, xvi. 188.

5. *Right to tax after judgment in action for costs.* After final judgment, signed by an attorney and solicitor, in an action upon his bills of costs, there can be no reference for taxation, under stat. 6 & 7 Vict. c. 73, except under special circumstances although there has been no verdict nor writ of inquiry executed in the action. *Semble*, per Lord Cranworth, L. J., that after the question of taxation of a solicitor's bill of costs has been adjudicated upon in an action, a special petition to the court of chancery to tax the costs, under the stat. 6 & 7 Vict. c. 73, s. 37, cannot be entertained. And *semble, per eundem*, that, after judgment in an action for costs, the special jurisdiction to direct taxation, given by stat. 6 & 7 Vict. c. 73, is gone. *In re Bernard*, xv. 298.

6. *Fees of arbitrator's attorney.* Where a separate charge is made for an attorney's fees for putting an award in proper form, &c., and the arbitrator has charged a sufficient sum for the award, the attorney's bill is not to be included in the taxable costs. *Galloway v. Keyworth*, xxvi. 360.

7. *Contract to divide profits of business introduced by writer to Signet to a solicitor.* J. F., a writer to the Signet in Edinburgh, employed P., a solicitor, as his agent in London, and introduced to him business of some importance, which a client of his had in England. P., by a letter promised to allow J. F. one half of the profits of all such business, so long as he should retain the same, directly or indirectly. Upon the discovery of this by the client, who had obtained an order for the taxation of P.'s bills of costs, he presented a petition, asking that the taxing master might disallow all such share of the charges as P. had promised to pay to J. F. *Held*, that if the agreement was illegal, it could not be enforced by J. F., that the 22 Geo. II. c. 46, s. 11, being a penal act, must be construed strictly; that the business having been done, the solicitor was entitled to payment, and that the client could not avail himself of the letters to refuse payment, or insist upon deducting from the bills of costs what P. had promised to allow to J. F., and that the production of the documents relating to the bills of costs ought to be left to the discretion of the taxing master; and the petition was dismissed with costs. *Gordon v. Datzell*, ix. 154.

8. *Security given to solicitor, claim to enforce.* A married woman gave her solicitors a written paper, charging her separate estate with former and future bills of costs incurred in respect of her separate estate. She afterwards discharged them, and upon her applying that they might deliver their bills, she was opposed and ordered to give further security for payment of what should be found due on taxation. Upon delivery of one of the bills, she obtained an order to tax it, but before the amount was ascertained the solicitors filed a claim to enforce generally the security she had given to

them. *Held*, that the claim must be dismissed, and that it could not be retained until the amount of the costs was ascertained. *Waugh v. Waddell*, xix. 429.

9. *What is payment of bill—Security for—Taxation.* A solicitor delivered his bill to his client, and by letter informed him that payment might be postponed if taxation were intended; the client gave the solicitor security for the bill, but no money was paid in respect of it. *Held*, that this was payment within the meaning of the 41st section of the 6 & 7 Vict. c. 73, (the Attorneys and Solicitors Act.) The client joined in the transfer of the security so given, and in the commencement of other matters employed the same solicitor, and in their completion employed another solicitor, and paid the record bill of costs. *Held*, that these were not special circumstances to justify the taxation of the bill of costs. Unless the overcharge amount to fraud, the court will not refer bills of costs for taxation after payment. *Ex parte Turner*, xxvii. 555.

10. *Lien of solicitor for costs in a suit instituted by an infant's next friend.* Where a suit instituted on behalf of an infant by his next friend, is repudiated before the hearing by the infant, on his attaining his majority, the repudiation has relation to the commencement of the suit, and deeds deposited in court for inspection, by an order in the suit, will be ordered to be returned to the party by whom they were deposited, notwithstanding the existence of a claim of lien for costs incurred for the infant plaintiff in the suit, put in by the next friend and his solicitor. *Dunn v. Dunn*, xxxi. 212.

11. *Set-off of costs—Lien of solicitor.* A, in an action, became entitled to recover costs from B, and in a suit respecting the same matters, he became liable to pay costs to B. A being unable to obtain payment asked by petition that the costs might be set off, but the application was refused, on the ground that it would interfere with the solicitor's lien. *Collett v. Preston*, xxi. 546.

12. *Money due from, to client.* A sum of money having on taxation been found due from a solicitor to his client, the solicitor was ordered to pay the costs of the application for the second order for payment. *In re Bainbrigge*, xi. 337.

13. Upon a motion, after taxation, for an order on a solicitor to pay the amount found due from him, he was also ordered to pay the costs of the application. *Bainbridge, in re*, vii. 166.

14. *Affidavit of and against solicitor as to authority to file claim.* Where there is a conflict as to the authority to file a claim, between the solicitor and the client, without further evidence, weight must be given to the affidavit against, rather than to the affidavit of the solicitor, in determining the liability for costs. *Crossley v. Crowther*, xii. 245.

15. *Motion on behalf of married woman—No next friend named.* Where a motion is made on behalf of a married woman, without a next friend being named, the court has jurisdiction to make the solicitor who gave the instructions for the motion pay the costs of it. *Pearse v. Cole*, x. 69.

16. *Change of solicitor—Order for payment of costs—Set-off.* By an order of the court, the costs to be incurred by a married woman suing by her next friend in a future proceeding, were ordered to be paid to A B, her solicitor. Pending the proceedings, A B was discharged, and C D appointed solicitor. A B received the whole costs. *Held*, that the court had jurisdiction, on petition, to order A B to pay over to C D his share of such costs; and, secondly, that A B could not set off, as against the amount, a debt due to him from the next friend. *Bailey and Hope, ex parte*, vii. 203.

17. *Appeal from adjudication.* A bankrupt appealed from the adjudication, and the court gave leave to try the question in an action, upon the undertaking of the solicitor to abide the order of this court as to costs; adjudication being sustained, the appeal was dismissed, solicitors to pay costs. *Ex parte Castelli*, xxvii. 334.

18. *Solicitor continuing to conduct suit after selling business—Taxation under special*

circumstances. A solicitor who sold his business, but who continued to conduct a suit in chancery in the office as the agent of one of the plaintiffs, independently of the solicitor who had purchased the business, will not be allowed to deny his agency, or to strike from the bills of costs of such solicitor the costs of proceedings which had been incurred by a mistake made in conducting the cause; and a petition for the taxation of the bills of costs under special circumstances was dismissed with costs. *In re Gedye*, vi. 53.

19. *Suit by wife against husband—Additional articles brought in.* In a suit against the husband, the wife returned to cohabitation after the cause was set down for hearing, but the cause was not dismissed. The proctor corrected his bills for costs, and subsequently the wife, on alleged fresh misconduct of the husband, again left him, and instructed her proctor to bring in additional articles pleading such misconduct. *Held*, that the proctor was entitled to have the bill taxed, and the additional articles might be brought in. *Hampden v. Hampden*, ii. 597.

20. *Improperly indorsing a writ with interest.* Where a party not entitled to interest makes a claim for it by special indorsement to gain an improper advantage, a judgment in his favor will be set aside, and the attorney making such indorsement will be compelled to pay the costs. *Rodway v. Lucas*, xxix. 398.

21. *Mistake as to time of trial—Attorney's affidavit and new trial on his paying costs.* A cause was set down for trial at the first sittings in the term, and no one appearing for the defendant, a verdict was entered for the plaintiff. Upon affidavit by the defendant's attorney, that he was under the impression that the cause would be tried at the second sittings, and had so entered it in his note-book, a rule for a new trial was granted on payment of costs by the attorney. *Neave v. Milns*, xxix. 306.

22. *Order for taxation after previous order charging the attorney.* An order for the taxation and payment of an attorney's bill (after a previous order to charge the attorney,) cannot be made upon an *ex parte* application. *Gillow v. Rider*, xxx. 538.

XXIII. Trustees; their Rights and Liabilities, as to Costs.

1. *Rule of court of chancery respecting.* The rule of the court of chancery is, that a trustee ought to be indemnified personally against all the costs of what is done by him for the *cestui que trust* who appointed him a trustee. *Dyke v. Rendall*, xiii. 404.

2. *Costs against trustees—Money lent on technically insufficient security.* Trustees had lent money on a technically insufficient security. In the Master's office, they entered into evidence to prove its sufficiency, but failed; and they afterwards presented a petition for calling in and investing the money. This was done, and no loss occurred. *Held*, that the trustees were entitled to their costs of both proceedings. *Royds v. Royds*, vii. 251.

3. *Suit to have trust fund replaced in proper state of investment—Parties in remainder.* Where a trustee, at the request of the *cestui que trust*, a married woman, and tenant for life of the fund for her separate use, sold out the trust fund, and invested it on an improper security, it was *held*, in a suit by such tenant for life against the trustees, to have the trust fund replaced in a proper state of investment, that no costs ought to be given as between the plaintiff and the defendant, on either side. Also, that the costs of the parties entitled in remainder were to be paid by the plaintiff. *Mant v. Leith*, x. 123.

4. *Trustee Relief Act—Executors—Payment into court.* Executors, being informed that a bill was about to be filed against them by a person entitled to a share of residue, charging them with breaches of trust, paid a sum of money into court, under the Trustee Relief Act, as the share of that person. The bill was afterwards filed, and on

an application for payment out of court by the person entitled, the trustees were not allowed their costs. *In re Waring*, xii. 351.

5. *Solicitor trustees only entitled to costs out of pocket.* A solicitor trustee, though he has acted as trustee out of court in the administration of the trust estate, at the request of his co-trustee; and though in a suit against him by his co-trustee his partner has conducted the defence, whether beneficially for all parties or not, is only entitled to costs out of pocket. *Broughton v. Broughton*, xxxi. 587; *Lyon v. Baker*, xix. 318; *Lincoln v. Winsor*, v. 230.

6. *Trustee seeking aid of court to be discharged.* A trustee desiring to be discharged from his trust, without any changes as to the position of the trust property, or the persons with whom he was associated, and seeking the aid of the court for that purpose, will not be allowed any costs, but will not be compelled to pay any. *Porter v. Watts*, ix. 161.

7. *Breach of trust and costs of suit, charging for.* In charging trustees for breaches of trust, and the costs of suit, it is immaterial how the trust was created, and whether for valuable consideration or by the voluntary gift of the trustees themselves. *Drosier v. Brereton*, xix. 276.

8. Generally, where trustees are guilty of a breach of trust, they must pay the costs of a suit to repair it. *Byrne v. Norcott*, xvii. 495.

9. *Refusal by trustee to reconvey trust property.* A trustee cannot refuse to reconvey trust property merely because the *cestui que trust* declines to apologize for an alleged imputation on the trustee; and if a suit for a reconveyance of the property is occasioned by such refusal and upon such grounds, the trustee will be saddled with all the costs. *Moore v. Prance*, vii. 17.

10. See also, *In re Hodgson's Settlement*, iv. 182; *Devey v. Thornton*, xii. 197; *In re Waring*, xii. 351; *Lewis v. Hillman*, xviii. 34; *In re Buckley's Trust*, xvii. 9; *Carter v. Hind*, xxiii. 614; *Boulton v. Beard*, xxvii. 421; *Crape v. The General Reversionary Investment Co.* xxvii. 424.

11. *Matrimonial suit adopted by wife on coming of age.* The guardian of a minor, a married woman, in a matrimonial suit, is bound to exercise due caution before instituting proceedings against the husband, and is not exempt from liability to condemnation in costs if the suit proves a mere fishing suit. But the wife, on coming of age and adopting such suit, will not be condemned in the costs incurred by her. *Brown v. Brown*, v. 567.

12. *Liability of next friend substituted for one who has died.* A next friend, substituted for one who has died, is liable for all the costs from the commencement of the suit, and not only for such as have been incurred during the time his name has been on the record. *Semble*, a next friend, appointed without his own knowledge, is liable, as between himself and the defendants, to all the costs of the suit, and has a remedy against the solicitor who appointed him. *Bligh v. Tredgett*, viii. 79.

XXIV. *In Relation to Commissions, and Fees of Witnesses.*

1. *Commission—When both parties to bear expense of.* A commission for the examination of witnesses being issued, witnesses were examined under it, both by the plaintiff and the defendant. The court held, that the defendant was liable to pay his proportion of the expenses of the execution of the commission. *Grove v. Young*, i. 217.

2. *Omission to state time and place both in the order and in the commission.* The omission to state time and place, both in the order for a commission to examine a witness under the 1 Will. IV. c. 22, and in the commission itself, amounts, at most, to no more than an irregularity. The defendant having cross-examined the witness at the examination, and having allowed certain letters proved under the commission to be put in evidence at the trial without objection, was not allowed to take advantage

of the defect in the proceedings, so as to deprive the plaintiff of the costs of such commission allowed him upon taxation. *Hawkins v. Baldwin*, iii. 452.

3. *Fresh commission granted on payment of costs of former one.* Where a former commission to an English commissioner became abortive by reason of the witness, in accordance with the foreign law, refusing to be examined except by a judge of the foreign court, the court granted a fresh commission to the judges of that court, upon payment of the costs of the first one. *Lumley v. Gye*, xxii. 367.

4. *Costs of search for documents.* At the trial much old documentary evidence was adduced by the defendants, and they obtained the verdict. A new trial was subsequently granted for the improper reception of one of these documents, and a fresh notice of trial was then given by the plaintiff; but before the trial he discontinued the action. *Held*, that the defendants were entitled to the costs of the search for all the documents properly admitted at the trial, and also of the briefs then used; and that the search, having been made by an officer of the crown, did not alter the right to the costs of such search. *Daniel v. Wilkin*, xvi. 526.

5. *Costs of plaintiff as witness—Pleas of never indebted, set-off, payment, and payment into court.* To debt for work and labor the defendant pleaded, except as to 59l., never indebted, set-off, and payment, and as to 59l., payment into court. The cause was referred, and the plaintiff gave evidence before the arbitrator, who found the first issue for him, and the other two for the defendant. *Held*, that the plaintiff was not entitled to his costs as a witness, unless called to give evidence exclusively applicable to the first issue, and that evidence that a larger debt ever existed than was covered by the pleas of payment and set-off, was not exclusively applicable to the first issue. *Clothier v. Gann*, xvi. 460.

6. *Costs of party to action attending as witness.* The simple fact of a successful party to an action being examined as a witness is not sufficient to entitle him to recover his expenses as a witness against the opposite party, and if it appear that his attendance was unnecessary, or for the purpose of superintending the conduct of the cause, such costs will not be allowed. A plaintiff whose evidence is necessary in his own case, may be allowed the costs of his maintenance in awaiting an action in which he is successful. *Howes v. Barber*, x. 465.

7. *Maintenance of plaintiff, a seafaring man.* In an action by a seafaring man, for wrongful dismissal from the service of a steam-packet company, plaintiff having obtained a verdict, a rule nisi for a new trial obtained by defendants, was, after argument, discharged. On taxation of costs, the Master allowed plaintiff maintenance from the time of granting the rule to the time of discharging it, on the ground that plaintiff was a necessary witness, and that he could not be ready to give evidence on the second trial, unless he had remained in London, and that he had no means of earning his subsistence in London. The court, under the peculiar circumstances of the case, declined to disturb the conclusion of the Master, but *held*, that, as a general rule, such costs ought not to be allowed. *Dowdell v. The Royal Australian Mail Steam Navigation Co.* xxvi. 197. See also, *Ansett v. Marshall*, xvi. 224.

8. *Costs of witness arriving after cause referred to arbitration.* If a witness does not arrive at an assize town until after the cause for which he has been subpoenaed has been referred to arbitration, his expenses will not be allowed as costs in the cause. If he attends at the reference, his expenses will be costs of the reference, and of the cause. The court allowed witnesses who came from a distance their expenses of one day to come to, and of one day to return from, the assize town. *Fryer v. Sturt*, xxx. 441.

9. *Expenses of witnesses employed to seek defendant.* The expenses of witnesses employed by the plaintiff to seek for the defendant, in order to identify him as the party who had committed the wrong of which the plaintiff complains in an action on the case, cannot be allowed as costs of the cause for the plaintiff after verdict in his

favor, as they are not costs incidental to the trial, but merely expenses of qualifying the witnesses to give evidence. *Small v. Batho*, x. 464.

10. *Fees to witnesses for travel.* Under the directions to taxing officers of Hil. Vac. 4 Will. IV., the allowance to witnesses for travelling is to be the expenses actually paid, not exceeding 1s. per mile, unless under special circumstances. *Held*, that the Masters are bound to allow only what has been reasonably expended by the witnesses, not exceeding 1s. a mile, and that they cannot look to what has been paid by the party to the witnesses for their travelling expenses. *Hunter v. Liddell*, iii. 454.

11. *Costs for attendance of witness in an arbitration.* *Semble*, a party is not entitled to costs for the attendance of a witness in an arbitration after he has been examined and cross-examined, provided he is not recalled, and was easily accessible if it had been desired to recall him. *Way v. Hennett*, xxv. 407.

12. *Expenses of witness rejected at trial.* On taxation of costs, it is a general rule to disallow the expenses of a witness rejected by the judge at the trial, as between party and party. The same rule applies to a witness rejected by an arbitrator. The materiality of a witness is *primâ facie* a question for the Master in taxing costs, but the court may review it. *Galloway v. Keyworth*, xxvi. 360.

13. *Costs of cross-examining—Expenses of preparing witnesses to give evidence.* *Assumpsit* for making surveys and plans for a railway. Pleas, general issue and payment. On the trial the cause was referred. The plaintiff relied on the evidence of H., to prove that the plans and surveys were correct. The defendant sent engineers to examine the ground, and call them as his witnesses, to prove that the work was badly done. The arbitrator found for the plaintiff on the first, and for the defendant on the second issue. The Master disallowed the defendant the costs of cross-examining H., and the costs of the journeys and surveys of his engineers, though he allowed the costs of their attendance before the arbitrator. *Held*, that the Master was right in both points, with regard to H., as his evidence related only to the first issue, and with regard to the cost of the engineers, that expenses of preparing witnesses to give evidence are not costs of litigation chargeable to the losing party. *Gravatt v. Attwood*, x. 404.

14. *Attachment against witness for disobedience to subpoena.* Upon discharging a rule *nisi* for an attachment against a witness for disobedience to a subpoena, a copy of which had been tendered to him inclosed in an envelope, the court refused to allow the costs of showing cause, though the witness swore that the original writ of subpoena was not shown, or the nature of the document explained to him at the time of the alleged service, there appearing to have been some "approximation" to the offence imputed to the witness. *Marshall v. The York, &c. Railway Co.* xviii. 500.

15. As to payment of expenses of foreign commission out of testator's property, see *Heath v. Chapman*, xiii. 56.

XXV. Security for Costs, when required, &c.

1. *Sailor—Affidavit not showing domicil abroad.* A sailor born abroad, having a lodging in this country, will not be required to give security for costs upon an affidavit stating, that after his wages were exhausted he would be obliged to go to sea again, but not showing a domicil abroad. *Drummond v. Tillinghurst*, iii. 477.

2. *Plaintiff going out of jurisdiction pending suit.* Where a plaintiff goes out of the jurisdiction, pending a suit, for a purpose which is likely to keep him abroad for such a length of time that there is no reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs, the court will direct him to give security for costs. *Blakeney v. Dufaur*, xvii. 387.

3. *Plaintiff a foreigner, but in the country.* Security for costs will not be required from a plaintiff who is a foreigner, if he is actually in this country. *Tambisco v. Pacifico*, xiv. 332.

4. *Plaintiff residing out of jurisdiction.* The plaintiff was described in the bill as "of Fort William, Inverness, in the kingdom of Scotland, but now residing at 8 Edmund Place, Aldersgate street, London." The defendant's affidavits stated that the plaintiff's residence and business were in Scotland, and that he had recently taken furnished lodgings in London, but not for any stated time. No affidavit was filed in reply to this part of the case. *Held*, on motion for that purpose, that the plaintiff must give security for costs. *Ainslie v. Sims*, xvii. 8.

5. *Plaintiff residing out of jurisdiction—Affidavit of defendant.* The court will compel the plaintiff to give security for costs, on an affidavit of the defendant's attorney, stating that he believes that the plaintiff resides out of the jurisdiction of the court, and that, in a letter relating to the subject-matter of the action, and purporting to come from the plaintiff, he described himself as of a place without the jurisdiction. *Cardwell v. Baynes*, xxviii. 164.

6. *Foreigner residing abroad—Proceedings in error.* Plaintiff in error, a foreigner residing abroad, had given security for costs in the court below. The court of exchequer chamber, after joinder in error, stayed proceedings until security was given for the costs of the proceedings in error. *Bougleaux v. Swayne*, xxvi. 193.

7. *Plaintiff resident abroad in service of East India Company.* A plaintiff resident abroad, in the civil service of the East India Company, is not exempt from the rule requiring security for costs. *Plowden v. Campbell*, xxvi. 157.

8. *Plaintiff a convicted felon.* The plaintiff being a convicted felon, undergoing his sentence in prison in this country, is a ground for requiring him to give security for the defendant's costs. *Barrett v. Power*, xxv. 524.

9. *Insolvent plaintiff.* The court will require security for costs to be given by a plaintiff who is insolvent and who sues not for his own benefit but for that of the person to whom he has assigned the debt. *Goatley v. Enmart*, xxviii. 375.

10. *Plaintiff possessed of land within jurisdiction.* Where a plaintiff seeks to bring himself within the exceptions to the rule as to giving security for costs, by showing that he is possessed of land within the jurisdiction of the court, he must also make it appear that such property is available. *Swinburne v. Carter*, xxii. 258.

11. *Appeal by husband against wife.* In an appeal by husband against wife, the court will not make an order for security for costs against the husband. *In re Belson*, iii. 49.

12. *Action by company incorporated to make railroad in Ireland.* In an action brought by a company incorporated for making a railroad in Ireland, the court compelled the plaintiffs to give security for costs, although it was sworn that the company had no property in Ireland, and that the greatest part of the shareholders were permanently resident in England. *The Kilkenny Railway Co. v. Fielden*, ii. 388.

13. *Application to stay proceedings till security be given—Action in name of bankrupt.* An application to the court to stay proceedings in an action in the name of a bankrupt, for the benefit of a third person, until security be given for costs, must be made promptly, and the plaintiff is not to be allowed, before the application is made, to go on incurring costs. *James v. Isaac*, xxii. 516.

14. *Bill by next friend—Next friend in needy circumstances.* In case of a bill by a *feme covert* by her next friend, an objection, stated in the answer, that the next friend is in needy circumstances and that security for costs ought to be given, cannot be taken at the hearing. *Monday v. Waghorn*, xi. 1.

15. *Married woman plaintiff by next friend.* Security for costs ordered to be given in a suit in which a married woman was plaintiff by her next friend, the next friend being a laborer. *Stevens v. Williams*, vii. 91.

16. *New next friend.* A new next friend of a *feme covert* plaintiff being appointed, it was ordered, that the former next friend should give security for the costs up to that time, and the proceedings were stayed in the mean while. No security having been given, an application, that in default of the security being completed within a

given time, the bill should be dismissed with costs, was refused. *Payne v. Little*, xi. 339, and xxi. 491.

17. *Action against auctioneer to recover deposit—Interpleader.* Where an auctioneer, against whom an action was brought to recover the deposit on a sale by auction of real estate, upon the ground that the vendor's title was defective, applied for an interpleader rule, and it appeared that the vendor had no other property except that of which the title was disputed, the court refused the application, unless the defendant gave security for costs; and refused to allow the defendant his costs of the application out of the deposit. *Deller v. Prickett*, ii. 232.

18. *Action by married woman as executrix without the husband's consent—Stay of proceedings.* An action having been brought by a married woman as executrix, in which her husband, who was living separate from her, was made co-plaintiff against his will, the court ordered a stay of proceedings until security was given to the husband by the attorney against the costs of the action. *Proctor v. Brotherton*, xxiv. 518.

19. *Bastardy—Duty of justice to accept security for costs, when.* By sect. 4 of 7 & 8 Vict. c. 101, an appeal is permitted against bastardy orders, if notice of appeal is given to the mother within twenty-four hours after the adjudication, and sufficient security for the payment of costs is offered, to the satisfaction of a justice of the peace, within seven days. An order having been made, the putative father, within seven days, attended before a justice to give security for costs, but it being doubtful whether a valid notice of appeal had been given to the mother, and the justice entertaining an opinion against the validity of the notice, refused to take the security. *Held*, that the justice was not to decide upon the validity of the notice, and that he was bound to take the security for the costs offered, if satisfactory. *Regina v. Ginner*, xxx. 396.

20. *Removal of indictment by certiorari—Sureties in recognizance.* Upon removal of an indictment by *certiorari* from the sessions to the queen's bench, the sureties in the recognizance become bound as sureties for the payment of the costs in the event of a verdict being found for the crown, although there are no words to that effect in the conditions to the recognizance. *Regina v. Hodgson*, xiv. 456.

XXVI. Taxation of Costs.



1. *Order of course.* An order of course was obtained for the taxation of two bills of costs. One had been paid, and the fact had been suppressed. The court discharged the order altogether. *In re Hinton*, xv. 139.

2. *Petition by cestui que trust—Party.* A trustee is not a proper party to a petition presented by a *cestui que trust* for the delivery and taxation of bills of costs paid by a trustee. *In re Mole*, xvii. 454.

3. *If made by officer of court of chancery, not reviewed by court of common pleas.* If an action be brought on a solicitor's bill of costs for business done in the court of chancery, and the defendant has liberty, under a judge's order, to have the bill taxed, which is done by an officer of the court of chancery, the court of common pleas will not review the taxation. *Borrodaile v. Nelson*, xxv. 360.

4. *Reviewing solicitor's bill.* An allegation of excessive charges is no good ground for reviewing a solicitor's bill for costs, (under the 6 & 7 Vict. c. 73,) in a case where judgment has been obtained by the solicitor. *In re The Shrewsbury and Leicester Railway Co.* v. 41.

5. *Of attorney's bill—Question reserved—Costs of taxation.* A judge's order, referring an attorney's bill to taxation, reserved to the client the right of disputing his liability to the whole or any part of it, on certain specified grounds. The order did not contain any direction to the Master to tax the costs of the reference, as required by the stat. 6 & 7 Vict. c. 73, s. 37. The Master taxed off less than a sixth of the

whole bill, and taxed the attorney the costs of the reference. *Held*, that the client was liable to pay the costs of the taxation, whatever might be the event of the questions reserved. *In re Shaw*, iv. 247.

6. *Taxation of bill paid under protest.* Taxation of a bill paid under protest, on the ground of overcharges, and that the solicitor had refused to part with the title deeds until payment, refused with costs, it not appearing how long the bill had been delivered before payment. *Re Mash*, xv. 96.

7. After payment, an order of course for taxation is irregular. *Re Winterbottom*, xv. 94. See, also, *Re Mash*, xv. 96.

8. *Costs of indictment for libel, review of, by court of queen's bench.* The court of queen's bench has no jurisdiction to review the taxation, by the clerk of assize, of the costs of an indictment for libel tried on the crown side at the assizes. *Regina v. Newhouse*, xvi. 179.

9. *Review of taxation made without notice.* Where judgment has been signed, costs taxed, and execution issued for the amount of debt and costs without notice of taxation, the court will not set aside the judgment or execution, but will direct a review of the taxation. *Field v. Partridge*, xiv. 356.

10. *Solicitors of assignees, costs of, relaxed.* Solicitors to the assignees of a bankrupt had their bills of costs taxed *ex parte*, without notice to the assignees, but in the presence of the official manager, who soon after died. On the application of the assignees and some of the creditors the costs were ordered to be retaxed. *Ex parte Bateman*, xxvii. 261.

11. *Commissioner of insolvency when to review taxation of registrar.* It is the duty of the Commissioner of Insolvency to review the taxation of a registrar in a case where the bills contain items *prima facie* unreasonable, if it is not his duty to review it as a matter of course, without any proof of objectionable items. *Ib.*

12. *Costs of solicitor for several defendants.* A was retained by four persons, B, C, D, and E, defendants to a suit in chancery, to act for them in the suit. A took some steps for B and C jointly, and other steps for B, C, and D, jointly, and so on. A delivered his bill of costs to B, which, at the instance of B, was referred to the Master for taxation. The Master taxed the bill on the principle that, for the joint costs of B and C, B was liable for half only; for the joint costs of B, C, and D, B was liable to a third only, and so on. *Held*, that, according to the practice of the court, this method of taxation was right. *In re Colquhoun*, xvii. 453.

13. *Several defendants.* Where there are several defendants who defend separately and obtain a verdict generally, the costs of all need not be taxed at the same time. *Brueford v. Griffin*, v. 474.

14. *Order for taxation to date, same costs having been already taxed and received.* Two solicitors, A and B, dissolved partnership, and it was agreed, that B should be entitled to half the profits of a suit instituted by them. After some time, an order was made, by consent of both, for the taxation of the costs down to the date. Some of the costs had, unknown to B, been already taxed and received by A. *Held*, under the circumstances, that the order comprised all such costs, and the previous costs having been omitted in the Master's certificate, the court, upon a petition to review the taxation, referred the matter back to the Master. *Greenwood v. Churchill*, vii. 296.

15. *Agency charges—Uncertificated solicitor.* Messrs. S., solicitors, promised, by letter, to conduct the professional business in which F. might be concerned "personally or otherwise," upon the terms of receiving agency charges. F. was a solicitor, but he had omitted to take out his certificate; at that time he was personally interested in a suit. *Held*, that the letter was a valid agreement; that Messrs. S. were not entitled to higher charges because F. was uncertificated; that such an agreement was legal if made with any client; that the transaction was such that it could not be taxed under the common order; and that the bill of costs must be taxed as between principal and agent. *Foley v. Smith*, vii. 117.

16. *Bill of mortgagee's solicitor taxed on petition of mortgagor.* Order made upon the petition of the personal representative of a mortgagor, for the taxation of the bill of a solicitor acting on behalf of the mortgagees with regard to a sale of the premises. *Steele, in re*, vii. 59.

17. *Payment of costs under protest.* A party who has paid from pressure a bill of costs under protest, may preclude himself by unnecessary delay from having the bill taxed. And the petition for the taxation of the bill should state specifically wherein the extravagance of the bill consists. *In re Browne*, xi. 102.

18. *Order of course to tax solicitor's bill of costs in equity.* The non-compliance with an order, made on terms at law, to tax a solicitor's bill of costs, and the failure of other proceedings at law to obtain renewed orders, are facts which ought to have been stated when applying for an order of course to tax a solicitor's bills of costs in equity; and the omission to state those facts is a ground for discharging the order, though the party might be entitled to an order, upon a special application. *In re Gedye*, xi. 85.

19. *Costs of order of course for taxation.* An order of course for taxation being refused at the secretary's office was granted by the court on a special application. *Held*, that the costs ought to follow the result of taxation. *Re Taylor*, xv. 117.

20. *Action by attorney on his bills of costs, final judgment in.* After final judgment, signed by an attorney and solicitor, in an action upon his bills of costs, there can be no reference for taxation, under stat. 6 & 7 Vict. c. 73, except under special circumstances. *In re Barnard*, xv. 298.

21. *Delivery and taxation of costs of solicitor refused on account of lapse of time.* Where the bills of costs of a solicitor who had acted professionally for a testator, and afterwards for his executors, (of whom the solicitor was himself the chief acting one,) were delivered and paid in the solicitor's lifetime, the court, (in the absence of proof of any imposition or overcharge,) refused to order delivery and taxation of the bills as against the executor of the solicitor, upon a petition presented under stat. 6 & 7 Vict. c. 73, for that purpose, twelve years after the death of the solicitor, and twenty years after the solicitor had ceased to act professionally for the executors of the testator. *In re Vines and Hobbs*, xix. 633.

22. Where more than ten years had elapsed from the delivery and payment of a solicitor's bills of costs for professional business done for the executors of a testator, the circumstances that the chief acting executor was the father of the solicitor, and that the payment of some of the bills had been made by a credit given to the son by the father in certain accounts subsisting between them, were *held*, not to constitute special circumstances, enabling the court to order the delivery and taxation of the bills, upon a petition presented after that interval, under stat. 6 & 7 Vict. c. 73, s. 41. *Ib.*

23. *Action by solicitor for costs—Bill reduced on taxation.* Where a solicitor whose bill on taxation had more than five sixths taken off, but the certificate thereof was not filed in time, brought an action for the whole bill, notwithstanding tender by the representative of the client of payment of what was on taxation shown to be due, he was restrained from proceeding in the action and ordered to deliver up the deeds and papers of the client. *Campbell, in re*, xix. 553.

24. *Non-filing of master's certificate does not invalidate taxation.* A taxation is not rendered invalid by reason of the non-filing of the Master's certificate in the Report Office within the time directed by the Order of 1692. *Ib.*

25. *Contempt.* *Semble*, that it is a high contempt to bring a certificate of taxation made by an officer of this court under the cognizance of a court of law. *Ib.*

26. *Bill not taxable after a year—Special circumstances.* A solicitor to assignees delivered his bill of costs to the register who taxed it, and the same was then paid by the official assignee, and the amount was allowed in his account. After more than a year, the bill was ordered by the commissioner to be taxed by the taxing master, but on appeal, the order was discharged. "Special circumstances" in Lord Langdale's Act, (6 & 7 Vict. c. 73,) mean circumstances of fraud; and if none can be shown, a

bill is not taxable after a year—per Lord Cranworth. *Pemberton, ex parte*, xix. 489.

27. *Taxation eighteen months after delivery.* Taxation ordered of an unpaid bill of costs, eighteen months after its delivery, the "special circumstances" being, that it was delivered long after application for it, on the eve of the client going abroad, and contained substantial overcharges, not acquiesced in. *Re Williams*, xxi. 551.

28. *Taxation petitioned for on ground of pressure and overcharge.* Solicitors for mortgagees delivered their bill of costs to the mortgagor, who was about to pay off the mortgage, the costs amounting to 18*l.* An appointment was made for the completion on the next day but one, on which day the mortgage-money and interest and 10*l.*, part of the costs, were paid, but the solicitors refused to give up the deeds until the remaining 8*l.* was paid. Subsequently, the 8*l.* was paid, and the deeds were delivered up to the mortgagor. The mortgagor, alleging pressure and overcharge, petitioned for taxation, under the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, but the petition was dismissed, with costs, there being no allegation that any of the charges were unjust or improper. *Ex parte Barton; In re Finch*, xix. 497.

29. *Taxation after payment—Overcharge and pressure.* The rule of court is, that to obtain a taxation after payment, there must either be both overcharge and pressure, or overcharge so gross as to amount to fraud. A solicitor is not bound to do that on the undertaking of the opposite solicitor, which the latter is not entitled to as of right. The cases of taxation after payment, on the ground of pressure, are not to be extended. *Re Hubbard*, xix. 285.

30. *Taxation of a bill of costs granted after payment.* *In re Blackmore*, vi. 10.

31. *Taxation by married woman—Next friend.* In every case where a married woman seeks to tax a solicitor's bill, for business in respect of her separate estate, she must apply by her next friend. The next friend will be liable for the costs of the order and taxation, but not for the amount of the bill. A married woman, having obtained an order to tax without the intervention of a next friend, was ordered to give security, and in default the order was to be discharged. *In re Waugh*, xxi. 553.

32. *Costs of third counsel disallowed—Discretion of taxing master.* Where, on the taxation of costs between party and party, the necessity of employing three counsel on one side has been considered, and the costs of the third counsel disallowed, the court will not interfere with the discretion of the taxing master. *The Midland Railway Co. v. Brown*, xxi. 537.

33. *Discretion of taxing master—Replevin.* *Held*, confirming the decision of the Master of the Rolls, that the taxing master has, under the Solicitors Act, 6 & 7 Vict. c. 73, a discretion to disallow costs he may think unduly claimed. The disallowance of the whole costs of an action of replevin, where replevin was clearly the wrong remedy, is a proper exercise of that discretion. *In re Clarke*, viii. 37.

34. *Scale of costs in county courts.* The 15 & 16 Vict. c. 54, s. 1, empowers five county court judges, appointed by the chancellor, to make a scale of costs, to be in force in the county courts, between attorney and client, and between party and party, and enacts that all costs shall be taxed by the clerk of the court, and allowed according to such scale, and that no attorney shall have any right to recover any costs from his client not so allowed on taxation. *Held*, that after the passing of the act, but before a scale of costs had been made, an attorney might recover his costs, without taxation, under the act. *Levenson v. Shaw*, xxviii. 367.

35. *Scale of costs for sales by tender in the country.* Where the stock of a bankrupt had been sold in the country by tender, the court directed that the taxation of the scale of charges for such sale should be the same as adopted in London, namely, a scale between the charges for sales by auction and sales by valuation. *Ex parte Hunt*, xxvii. 336.

36. *General principles respecting taxation—New rules.* As a general principle, it is desirable, in the taxation of costs, as much as possible to do away with the distinction

between costs as between party and party, and costs as between attorney and client. The new rules, as to taxation of costs, were not designed to be restrictive, but rather enlarging, in their effect as to costs between party and party. *Cheshire v. Mumford*, xxviii. 410.

37. *Order to tax before hearing on plea of set-off.* In a plaint in the county court, the defendant pleaded a set-off for work and labor, &c., as an attorney. Before the day of hearing, the plaintiff obtained a judge's order to tax the defendant's bill. The judge of the county court, on the hearing, allowed the set-off. This court refused to rescind the order for taxation. *Ex parte Cooper*, xxviii. 428.

38. *Distributive issue.* Where one party is entitled to a verdict on an entire issue, the issue cannot be considered distributive in the taxation of costs, though some of the allegations in the plea are true, and others untrue. *Biddulph v. Chamberlayne*, xxiv. 204.

39. *Adding costs in bankruptcy to costs in action.* The Master may add costs in bankruptcy to the costs in an action against the bankrupt, and plaintiff may sign judgment for the amount. *Webb v. Hewlett*, iii. 539.

XXVII. Miscellaneous Cases.

1. *Judgment by default in county courts—County Courts Extension Act.* The exception in the 11th section of the County Courts Extension Act, 19 & 14 Vict. c. 91, as to costs in case of judgment by default, applies to interlocutory as well as to final judgments by default. *Glynne v. Roberts*, xxiv. 456.

2. *Contempt, costs of.* Affidavits that were filed originally to obtain an injunction to restrain a person from having any intercourse with a ward of chancery were subsequently used upon an application to commit the party for contempt. *Held*, that the costs of those affidavits were properly "costs occasioned by the contempt." *Thornhill v. Thornhill*, xxxi. 364.

3. *Action against security—Recovery of costs of.* Plaintiff guaranteed A that defendant would, upon demand, pay him a certain sum. A made a demand upon the defendant, and, in default of payment, issued a writ against the plaintiff for the sum due, the writ being the first notice to him of the amount being unpaid. He allowed judgment to go by default, and an execution was levied upon his goods. *Held*, that he might recover the costs of the writ at the suit of A, but not the costs of the subsequent proceedings. *Pierce v. Williams*, xxvi. 538.

4. *Apportionment of costs of attendances to settle special case upon several heads of claim.* In an action by a carrier against a railway company, to recover back excessive and unequal charges made upon him for the conveyance of his goods, a verdict was entered for the plaintiff, for 10,000*l.*, subject to a special case to be settled by a barrister, who, in the event of the court deciding in favor of the plaintiff, was by the order of reference empowered to direct for what amount the verdict should be entered, and to whom the cause and all matters in difference between the parties were referred, subject to the special case,—the costs "of the action" to abide the event of the award, and the costs "of and incident to the reference and award," to be in the discretion of the arbitrator. The special case, as settled by the referee, divided the plaintiff's claim into six several heads. *Held*, that the costs of the attendances before the referee, to settle the special case, were costs in the cause; and, therefore, that the Master was justified in apportioning them according to the decision of the court upon the several heads of claim in the special case. *Edwards v. The Great Western Railway Co.* xxii. 453.

5. *Costs of notice of action in fraud of rule of court.* The company's act of incorporation, 5 & 6 Will. IV. c. 107, s. 223, requiring that they should have a notice of action, the plaintiff, at great labor and expense, prepared and delivered a notice, accompanied by voluminous accounts of the several packages upon which the over-

charges were alleged to have been made, together with the dates and other particulars, and charged large sums therefor as costs, a large part of which the Master disallowed. *Held*, that the Master had exercised a sound discretion in so doing,—the notice, though apparently in strict compliance with, being virtually in fraud of, the rule of court. *Ib.*

6. *Costs become fruitless by change of venue.* The defendants obtained a judge's order, that the venue be changed to Middlesex, on payment of costs, become fruitless by such change of venue. The venue not having been changed by the defendants, was afterwards changed by the plaintiff. *Held*, that the defendants were liable to pay the costs, which had become fruitless by the change of venue, the words, "upon payment of costs," being words of agreement and not words of condition. *Horton v. The Westminster Improvement Commissioners*, xiv. 401.

7. "*Full costs and expenses.*" The expression, "full costs and expenses," in the 126th section of the 8 & 9 Vict. c. 18, means costs as between attorney and client. *Hyde v. The Mayor, &c. of Manchester*, xxii. 472.

8. *Persons not on record, but conducting the defence.* After the verdict for the plaintiffs in an action of ejectment against the tenants in possession of the premises, it appeared upon affidavit that the appearance to the action in the names of the tenants in possession had been entered, and the defence of the action conducted by an attorney employed by H. and S., who had themselves no interest in the premises, but had conducted the defence solely for the benefit of another person whom they reasonably believed to be the person really entitled to the premises. *Held*, (Erle, J., differing in opinion,) that H. and S. would have been, before the passing of the Common-law Procedure Act, 1852, liable to pay the plaintiffs' costs in the action, and that act had made no difference in the former practice, and, therefore, that the plaintiffs were entitled to a rule for the purpose of enforcing the payment of such costs. And, per Erle, J., that the application was to be considered as against strangers, so far as jurisdiction was concerned, and, therefore, that the court had no power to make the rule absolute for enforcing payment of the costs; the proper proceeding on the part of the plaintiffs for any injury occasioned by the conduct of the defence being (if at all) by action. *Hutchinson v. Greenwood*, xxviii. 196.

9. *Mistake in pleadings—Amendment.* Where a clerical mistake in the pleadings or particulars is discovered at *Nisi Prius*, when the cause is called on, and the judge offers to allow an amendment on payment of costs, which is declined, and the record is withdrawn, the defendant is not deprived of his right to costs of the day, by the fact that there is some reason to suppose he may have misled the plaintiff into imagining the mistake would not be taken advantage of, there being nothing amounting to fraud or breach of faith. *Greenaway v. Holmes*, xxviii. 408.

10. *Certificate to deprive plaintiff of costs.* A certificate to deprive the plaintiff of costs, under the 43 Eliz. c. 6, s. 2, is inoperative if granted after final judgment, and it makes no difference that at the time of granting the certificate the amount of costs has not been inserted in the judgment book. *Lyons v. Hyman*, i. 407.

11. *Action against debtor's executor—Notice of decree for administration.* A creditor, who had brought an action against the executor of a debtor, received notice of a decree for the administration of his estates. After this notice, and before any application was made to stay his proceedings, he went on with the action, and obtained judgment. *Held*, that he was entitled to the costs of his proceedings after notice of the decree. *Bear v. Smith*, ix. 135.

12. *Setting aside warrant of attorney, &c.* The court setting aside a warrant of attorney, the judgment signed thereon, and subsequent proceedings, on the ground that one attorney had attested the execution of the warrant for both the plaintiff and defendant, refused to deprive the defendant of the costs of the rule, unless he would undertake not to bring an action. *Cooper v. Grant*, xii. 478.

13. *Remanet—Notice that plaintiff will not proceed to trial.* A remanet cannot be countermanded; therefore where a cause was made a remanet from one sitting to

another, and four days before the last-mentioned sittings, the plaintiff gave the defendant notice that he had withdrawn the record and should not proceed to trial, it was held, that he was liable to pay costs. *Tempany v. Rigby*, xxviii. 483.

14. *Ejectment—Perfected title.* A corporation empowered by special acts to take certain lands, purchased land of A, but, owing to a mistake in the boundary line, took some land belonging to B. B brought an ejectment against the corporation for this slip of land, and recovered a verdict, (which the corporation unsuccessfully attempted to set aside,) and issued and lodged with the sheriff a writ of *habere facias possessionem*. The corporation having, since judgment in the ejectment, perfected their title to the land in question, under the 124th section of the 8 & 9 Vict. c. 18, the court stayed the proceedings upon the judgment, upon the terms of the corporation paying to the lessor of the plaintiff his "full costs and expenses" of the action, and costs of the application. *Hyde v. The Mayor, &c. of Manchester*, xxii. 472.

15. *Inspection of documents.* Where inspection is granted under the 14 & 15 Vict. c. 99, s. 6, of documents in the custody or under the control of an opposite party, the costs of such inspection must be paid by the party seeking it. *Hill v. Philp*, vii. 591.

16. *Costs of the day, objection to allowance of.* An objection to the allowance of costs of the day ought to be raised before the Master on the taxation, and if then omitted by laches, it cannot afterwards be brought before the court. *Rainforth v. Hamer*, xxx. 398.

17. *Taxation by clerk of the peace, objection to.* Where the parties attend and proceed with the taxation of costs by the clerk of the peace, under an order of sessions, without making objection to his jurisdiction, they are estopped from moving to quash the order for payment. *Regina v. The Shrewsbury and Hereford Railway Co.* xxx. 366.

18. *Exceptions allowed and disallowed.* Exceptions for insufficiency were heard before the court in the first instance, under Sir G. Turner's Act, the costs of those allowed were set off against those disallowed. *Willis v. Childe*, xvii. 512.

19. *Arbitration—Laches.* A cause was, on the 2d of April, 1852, referred to arbitration, the costs to abide the event. On the 9th of the following June, the arbitrator certified that the plaintiff was entitled to 6l. 18s. 6d., in addition to the sum of 10l. which the defendant had paid into court. No steps were taken to obtain costs until the 7th of February, 1853, when an application, under the 13 & 14 Vict. c. 61, s. 13, was made. Held, that the application was not too late. *Morris v. Bosworth*, xviii. 370.

20. *Costs of abandoned motion.* The costs of an abandoned motion must be applied for, on the next seal after that for which notice of motion was given. *Woodcock v. The Oxford, &c. Railway Co.* xvii. 54.

21. *Decision of judge at chambers—Application to reverse.* An application to the court of queen's bench to reverse the decision of a judge at chambers, on a question of costs, must be made speedily. *Orchard v. Moxsy*, viii. 349.

22. If a defendant disclaim by answer, he has no right to ask for his costs. *Long v. Storie*, x. 182.

23. *Semble*, if a defendant execute a release before appearing, and the plaintiff still require an answer from him, the court will give such a defendant his costs. *Id.*

24. *Costs of town clerk.* As to the recovery of costs by a town clerk, acting as solicitor to a municipal corporation, see *Regina v. Prest*, i. 250; *Regina v. The Governor, &c. of the Poor of Kingston-on-Hull*, xx. 149.

25. *Costs of bailiff on interpleader process.* The 148th interpleader rule of practice of the county court provides that where the claim to any goods taken in execution is dismissed, the costs of the bailiff, on the interpleader process, shall be retained by him out of the amount levied, unless the judge shall otherwise order. The high bailiff having taken goods under a *fi. fa.* against B, at the suit of A, which were claimed by C, the bailiff

got an interpleader summons, and on the hearing, C's claim was dismissed; the bailiff then paid into the court the amount of the levy, without deducting his costs. *Held*, that even if he were entitled to deduct the costs of the interpleader proceedings from the proceeds in his hands, he could not, after paying them over, recover the amount of them from A, the execution creditor. *Quære*, whether the 148th rule entitles the bailiff to deduct the costs of the interpleader, as against the execution creditor, where the claimant fails to make out his claim. *Bloor v. Huston*, xxviii. 358.

26. *Motion for an injunction to restrain a railway company from constructing on a deviation.* Where a railway was constructed on a deviation beyond the authorized limits, but it had been decided by the board of trade, that such deviation was proper, having regard to the interests of the landowner, it was *held*, that the landowner was not entitled to the costs of moving for an injunction to restrain the railway company from so constructing their railway. *Pearce v. The Wycombe Railway Co.* xxi. 1.

27. *Right of treasurer of borough to expenses incurred in the recovery of half of a qui tam penalty.* An action for money had and received lies at the suit of a treasurer of a borough fund for half a penalty recovered by a *qui tam* informer, under the 5 & 6 Will. IV. c. 76, s. 48. It is for the defendant to show, if he can, that deductions are to be made of costs and expenses incurred in the recovery of the penalty. *The Mayor of Harwich v. Gaunt*, xxx. 354.

COUNTERFEITING.

See FORGERY AND COUNTERFEITING.

COUNTY.

1. *Brecknockshire—Non-repair of bridge, indictment for.* Under the statutes with reference to isolated parts of counties, and on the special finding of a jury, it was *held*, that a certain tract of 470 acres of the parish of G. had been transferred to Brecknockshire. The inhabitants of Brecknockshire were held liable on indictment for non-repair of half a bridge running between this tract and Radnorshire. And *held*, further, that the acts transferred to Brecknockshire not only the 470 acres, but also half the river, where it abutted upon them, so as to make the boundary between the counties of Radnor and Brecon run, there as elsewhere, *per medium filum aquæ*. *Regina v. The Inhabitants of Brecknockshire*, iii. 402.

2. *Compensation to coroner—Assessment for.* By the 7 & 8 Vict. c. 92, power was given to her Majesty to direct the assessment of compensation to coroners for the loss of emoluments from a re-division of counties into districts. *Held*, that the power to direct compensation to be assessed extended only to those cases where a county had been customarily divided into districts for seven years before the passing of the act, and where a different division is ordered under the act. *Regina v. Lechmere*, iii. 419.

3. *County treasurer, when bound to pay police constable for conveying prisoner to jail.* The treasurer of a county partly included within the metropolitan police district is, under the 11 & 12 Vict. c. 42, s. 26, liable to pay, out of the county rate, expenses, (which the prisoner has no means of defraying,) incurred by a metropolitan police constable in conveying prisoners to the county jail, under warrants of commitment made by justices of the county within the district, directed to the parish constable, and delivered for execution to the police constable, under the 2 & 3 Vict. c. 47, s. 12, the orders upon the treasurer for payment of the expenses being made by county justices within the district; whether such committals are for trial upon charges of felony or misdemeanor, or upon remand followed by a committal or discharge, or upon summary convictions in penalty, with an adjudication of imprisonment in case of non-payment. *Leverick v. Mercer*, xviii. 276.

4. The county treasurer is also liable to pay, out of the county rate, like expenses incurred by a metropolitan police constable under warrants of committal made by metropolitan police magistrates, sitting at police courts, and directed and delivered to

such metropolitan police constable, the orders for payment on the defendant being also made by metropolitan police magistrates, sitting at the police courts, whether such committals are for trial on charges of felony or misdemeanour, or upon remand, or on summary convictions, or for refusing to enter into recognizances to keep the peace. *Ib.*

5. But the county treasurer is not liable to pay to a police constable the expenses of reconveying to a police court from the county jail a prisoner who had been previously committed there for reëxamination, when the warrant to bring the prisoner up again was made, not on the police constable, but upon the jailer who had employed the police constable to reconvey the prisoner. *Ib.*

6. *Seem*, that such expenses would be payable, if the magistrate made his order to the constable to bring up the prisoner, at the same time as he ordered the jailer to deliver him to the constable. *Ib.*

COUNTY COURT.

I. JURISDICTION.

II. JUDGE.

III. NONSUIT.

IV. REMOVAL OF SUITS; BY APPEAL, CERTIORARI, ETC.

V. PROHIBITION.

VI. EXECUTION.

VII. COMMITMENT ON JUDGE'S ORDER; JUDGMENT SUMMONS.

VIII. CLAIM FOR GOODS TAKEN UNDER COUNTY COURT PROCESS.

IX. COSTS.

X. MISCELLANEOUS CASES.

I. Jurisdiction.

1. Title to land cannot be tried in a county court. *Mountney v. Collier*, xvi. 232.

2. *Title to land, what is.* It is declared by statute that the county court shall have no jurisdiction in cases where the title to any real estate is in question. In an action of trespass, in that court, plaintiff claimed title under A, and defendant set up a title under B. The judge having heard the case, thought there was no evidence on which a jury could properly find in favor of the defendant, and that there was, in fact, no *bonâ fide* question of title to be tried, and proceeded to try the cause. The court of exchequer thereupon issued a prohibition. *In re Marsh v. Dewes*, xx. 356.

3. *Corporeal hereditament.* A plaint having been brought in a county court for a trespass in removing the plaintiff's goods from two rooms of a house which the defendant occupied, it appeared that the question in dispute was, whether the plaintiff had let the whole house to the defendant, or had reserved to himself two rooms in which the alleged trespass was committed. *Held*, that this was a question of title to a corporeal hereditament, and, that, therefore, the county court judge had no jurisdiction to hear the plaint. *Chew v. Holroyd*, xvi. 560.

4. *Replevin—Illegal distress—Title.* Under the 119th and 121st sections of the 9 & 10 Vict. c. 95, a county court has jurisdiction to try an action of replevin for an alleged illegal distress for rent, although the title to the premises, in respect of which the rent distrained for was due, appears to be in dispute, the steps necessary for the removal of the action under the 121st section not having been taken. *Regina v. Raines*, xviii. 196.

5. *Nuisance—Cost of removal.* The Nuisances Removal and Diseases Prevention Act, 1848, 11 & 12 Vict. c. 123, gives power to justices to order the owner or occupier of premises to remove any nuisance therein, and if such order be not complied with by such owner or occupier, the guardians of the poor may enter the premises to

remove the nuisance. By sect. 3, all costs and expenses incurred in obtaining such order or in carrying the same into effect, may be recovered by the guardians as such in any county court. *Held*, that this provision overrides sect. 58 of the 9 & 10 Vict. c. 95, and that the county court has jurisdiction to hear a plaint for such costs and expenses, notwithstanding that a question of title to land arises in it. *Regina v. Harden*, xviii. 403.

6. *Disclaimer of ownership of land*. A disclaimer of the ownership of land raises a question of title within the 9 & 10 Vict. c. 95, s. 58. *Id.*

7. *Chapel clerk—Incorporeal hereditament*. Plaintiff sued in the county court, as chapel clerk of a parochial chapelry, for the arrears of an ancient customary yearly sum of 4*d.*, due from each inhabitant householder of the chapelry. Defendant disputed the title of plaintiff to the office of chapel clerk, and also his right to the customary payment. *Held*, that the title to an incorporeal hereditament was in question within the meaning of the proviso in sect. 58 of stat. 8 & 9 Vict. c. 95, and therefore the county court had not jurisdiction to try the action. *Stephenson v. Raine*, xxii. 283.

8. *Ramsgate Harbor Act—Tolls, title to*. The Ramsgate Harbor Act, 32 Geo. III. c. 76, imposed certain "rates and duties" on the owners of vessels entering or passing the harbor. A vessel passed the harbor on her outward and also on her homeward voyage; and her owner, upon claim made, paid, under protest, duties in respect of each voyage, and sued in the county court for the money paid in respect of the last voyage. *Held*, that these rates and duties were tolls, and that the title to a toll was in question within the meaning of the 9 & 10 Vict. c. 95, s. 58. *Adey v. The Deputy Master of the Trinity House*, xvi. 124.

9. *Tolls, title to*. A question whether certain tolls, claimed under an act of parliament, should be paid in advance or not, does not involve the title to tolls, so as to oust the jurisdiction of a judge of a county court, under the stat. 9 & 10 Vict. c. 95, s. 58. *Hunt v. The Great Northern Railway Co.* iii. 491.

10. *Trespass—Plea of "not possessed"—Title*. To an action of trespass *qu. cl. fr.* the defendant pleaded "not possessed," but no question of title in fact came in question. *Held*, that the jurisdiction of the county court was not ousted. *Latham v. Spedding*, iv. 273.

11. *Leasehold premises—Proviso in 9 & 10 Vict. c. 95, s. 58*. The proviso in sect. 58 of 9 & 10 Vict. c. 95, excluding the county court from cognizance of any action in which the title to corporeal hereditaments is in question, applies to the plaint for the recovery of leasehold premises under sect. 122. *Kerkin v. Kerkin*, xxviii. 114.

12. *One cause of action—Carrier—Wharfinger—When cause of action arises*. A carrier and wharfinger agreed with M. to barge timber from Swindon Wharf to London. It was necessary to haul the timber from the place where it lay to be loaded on board the barges, and at times when the horses of M. were not on the spot, the carrier provided horses, and hauled the timber. *Held*, that the hauling of the timber and the carriage of it to London constituted but one cause of action; and, that as such cause of action did not arise until the delivery of the timber in London, the judge of the Swindon county court had no jurisdiction to try the plaint under the 9 & 10 Vict. c. 95, s. 60. *Barnes v. Marshall*, xiv. 45.

13. *Conviction part of cause of action*. In an action in the county court, to recover a reward for the apprehension of a felon apprehended by the plaintiff in G., but convicted in H., it was *held*, that as in order to give the county court judge jurisdiction it was necessary that the whole cause of action should arise within his jurisdiction, and the conviction formed part of the cause of action, the county court judge had no jurisdiction, and a prohibition ought to issue. *Hernaman v. Smith*, xxix. 426.

14. *Letters of administration part of cause of action—Will*. A testator made the following bequest: "Likewise, should my executors think proper, to my man servant, whom I call Sam, I give 20*l.*, conditional on his continuing to conduct himself faithfully in all respects." At the time of the making of his will, and at his death,

the testator resided at Margate, within the jurisdiction of the county court of Kent. The executors renounced probate, and administration was granted to the defendant by the prerogative court of the Archbishop of Canterbury in London. A plaint was brought in the county court of Kent, against the defendant, as administrator, to recover the amount of the legacy. *Held*, that the letters of administration were an essential part of the cause of action, and as, therefore, the whole cause of action did not arise within the district of the county court of Kent, that court had no jurisdiction to hear the plaint under the 60th section of the 9 & 10 Vict. c. 95. *Quære*, whether the bequest was one in respect of which the 65th section of the 9 & 10 Vict. c. 95, gave a county court jurisdiction. *Fuller v. Mackay*, xxii. 148.

15. *Surgeon residing and practising in different counties.* A surgeon having his residence in the county of A., but visiting patients in the county of L., carries on his business in L. so as to come within the jurisdiction of its county court. *Mitchell v. Hender*, xxvi. 194.

16. *Goods ordered in one county of a manufacturer in another.* Where goods were ordered in O., by a tradesman residing there, of the traveller of a manufacturer residing at M., who delivered the goods in M. to the tradesman's agent, it was *held*, that an action for the price of the goods could not be brought in the M. county court, as sect. 60 of the 9 & 10 Vict. c. 95, which empowers a county court judge to issue a summons where the cause of action arises in his district, applies only to cases where the whole cause of action arises there, and consequently did not give the judge of the M. district any jurisdiction, as the order for the goods, a material part of the cause of action, was given in O. *Borthwick v. Walton*, xxix. 269.

17. *Residence—Place of business—Concurrent jurisdiction.* Where the plaintiff in an action in a superior court resided at Inverness, more than twenty miles from the defendant, but had been in the habit for some years of coming to London and residing for some months in Golden Square, for the purposes of his business, within the jurisdiction of a county court, and less than twenty miles from the defendant, and was residing there during the whole time of the action, it was *held*, that the plaintiff did not "dwell" in Golden Square within the meaning of the 128th section of the 9 & 10 Vict. c. 95, but at Inverness; and that therefore the superior court had concurrent jurisdiction with the county court under that section. *Semble*, that if the plaintiff dwells at two places, one of them less and the other more than twenty miles from the defendant, the superior courts have concurrent jurisdiction. *Macdougall v. Paterson*, vii. 510.

18. *Defendant residing in one county and doing business in another.* As to the jurisdiction of a county court where the defendant resides within the jurisdiction of one, and does a business within the jurisdiction of another, see *Whiley v. Stiff*, xxv. 455.

19. *Quasi corporation.* A quasi corporation under the 7 & 8 Vict. c. 110, may be sued in a county court constituted under the 9 & 10 Vict. c. 95. *Taylor v. The Crowland Gas and Coke Co.* xxix. 516.

20. In such an action the quasi corporation may, for the purpose of the 128th section of the latter statute, be deemed to "dwell" at the place where they carry on their business. *Ib.*

21. *Semble*, that the judgment of a county court against such quasi corporation cannot be enforced by the county court against the actual or former shareholders in the company, under the 7 & 8 Vict. c. 110, s. 66; and this inability of the county court might afford a good reason for allowing, under the 15 & 16 Vict. c. 54, s. 4, the costs of an action brought in a superior court. *Ib.*

22. *Detinue.* The county courts, under the 9 & 10 Vict. c. 95, and the 13 & 14 Vict. c. 61, have jurisdiction in detinue. *Taylor v. Addyman*, xvi. 454.

23. *Disputed custom.* The exception in the 58th section of the 9 & 10 Vict. c. 95, does not prevent the county court from trying a disputed custom; as, for instance, a

custom on a public navigable river for the owner of a wharf to overlap with his vessels an adjoining wharf belonging to another person. *Davis v. Walton*, xvi. 504.

24. *Rent 50l. a year, and the value of premises exceeding that sum.* Sect. 122 of 9 & 10 Vict. c. 95, gave a county court jurisdiction to try a plaintiff by a landlord against his tenant to recover in certain cases possession of the demised premises, "where the value of the premises or the rent payable in respect of such tenancy did not exceed 50l. by the year." Premises had been let at the annual rent of 50l. and no fine paid, but it appeared that the value of the premises exceeded 50l. a year. *Held*, overruling *Crowley v. Vitty*, ix. 501, that the county court had jurisdiction to try the plaintiff. *Harrington v. Ramsay*, xx. 163; s. c. xxii. 564.

25. *122d section of County Courts Act.* The cases contemplated by the above section are only those in which the relation of landlord and tenant exists. *In re Banks v. Rebbeck*, v. 298.

26. *Offer to abandon excess of claim above 50l.—Admission of set-off.* Where the plaintiff stated a debt of 57l., and admitted a set-off of 15l., but no evidence was offered to show that the parties had agreed to treat the amount of the set-off as a part payment, it was *held*, that the county court had no jurisdiction, nor could the plaintiff give that court jurisdiction by offering at the trial to abandon the excess of his claim above 50l. *Avards v. Rhodes*, xviii. 541.

27. *Abandonment of excess above 50l.—How made.* Where a plaintiff is brought in a county court to recover 50l. in respect of a cause of action to a greater amount, the excess being abandoned, pursuant to 9 & 10 Vict. c. 95, s. 63, the abandonment need not appear upon the plaint or particulars of demand, although such is the most reasonable course, but it is sufficient to abandon the excess at the hearing, the judge making a minute thereof. *Isaacs v. Wyld*, viii. 491.

28. *An abandonment in order to give jurisdiction, must be the act of the plaintiff himself, or of some person authorized by him, and not the act of the judge, and the defendant's costs up to the time must be paid or the abandonment will not be allowed.* *Hill v. Swift*, xxix. 482.

29. *Parties dwelling within twenty miles of each other—Affidavit.* An affidavit for a suggestion to deprive a plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95, s. 128, 129, stated that at the time *R.*, the plaintiff, was residing and carrying on his business at *A*, within the jurisdiction of the county court of *B*, and the defendant was residing and carrying on his business at *C*, within the jurisdiction of the county court of *D*, and that the plaintiff "did not dwell more than twenty miles from the defendant." *Held* insufficient, as not showing that the parties dwelt within twenty miles of each other. *Room v. Cottam*, i. 504. See, also, *Fry v. Whittle*, iv. 457.

30. *Concurrent jurisdiction—Mode of measurement of distance between parties' dwellings.* By the County Court Act, 9 & 10 Vict. c. 95, s. 128, all actions which, before its passage, might have been brought in any superior court of record, "where the plaintiff dwells more than twenty miles from the defendant," may be brought in any such court at the election of the plaintiff. *Held*, that the twenty miles were to be measured in a straight line on the horizontal plane, and not by the nearest public mode of access. *Lake v. Butler*, xxx. 264. See, also, *Stokes v. Grissell*, xxv. 336.

31. *Bill of exchange—Action by indorsee.* If a bill of exchange is drawn and indorsed within the jurisdiction of the county court, an indorsee is not at liberty to sue in the superior courts, by reason of his not knowing where the bill was drawn and indorsed. *Hush v. Long*, iv. 199.

32. *Derastavit.* In an action in the county court to recover a legacy, under the 9 & 10 Vict. c. 95, s. 65, as extended by the 13 & 14 Vict. c. 61, s. 1, the judge has jurisdiction to try a question of *derastavit*. *Winch v. Winch*, xiv. 292.

33. By virtue of sect. 58 of stat. 9 & 10 Vict. c. 95, the county court has jurisdiction over a suit founded on sect. 18 of stat. 1 Vict. c. 83. *In re Stewart v. Jones*, xiv. 163.

34. *Court Baron—Replevin.* The jurisdiction of the Court Baron of the Honor of Pontefract, including, among other things, the right to try plaintiffs in replevin, was transferred by statute to the Court of the Honor of Pontefract. The powers of this court were afterwards transferred by statute to a county court established for the district within its jurisdiction. There was no evidence to show any franchise in the Court Baron of the Honor of Pontefract to grant replevins, independently of the right to try them. This last was put an end to by the first statute, and was not revived by the last. *Held*, that after the constitution of the county court no replevin could be issued from the Court Baron. *Hellawell v. Eastwood*, iii. 562.

35. *Commitment for an assault—Justices of the liberty.* Defendants, justices of the peace of the county of H., and liberty of A., summoned plaintiff, who resided within the county, but without the liberty, to answer for an assault committed within the liberty. Plaintiff did not appear, was convicted and imprisoned in the liberty jail. Edward IV. granted to the abbot and convent the right to appoint their own justices, with exclusive jurisdiction and a common jail. The 27 Hen. VIII. c. 24, gave to the king the exclusive power of making justices. By a later statute the courts, &c., of all abbeys, &c., were vested in the crown, and their temporal power given to the Court of Augmentation. James I. conveyed by charter to W. the liberty and its rights as amply as any abbot, &c., had ever held them. The commissions of the peace for the county run "as well within the liberties as without." The latter run only as within the liberty. *Held*, first, that the justices of the liberty had not exclusive jurisdiction within the liberty. Secondly, that the county justices had jurisdiction over an offence committed within the liberty; and, lastly, that they had power to commit the plaintiff to the liberty house of correction. *Arnold v. Gaussen*, xx. 402.

36. *Insolvency—Rehearing.* The judge of a county court, by whom an insolvent has been discharged, has jurisdiction to order a rehearing, and to issue a warrant under 1 & 2 Vict. c. 110, s. 96, to bring up the insolvent for the purpose of the rehearing. *Regina v. Dowling*, xviii. 397.

37. *Quære*, whether such a warrant can be executed out of the district of the county courts. *1b.*

38. *Malicious prosecution—Husband and Wife v. Husband and Wife.* A summons was issued from a county court in the following terms: "For that your wife assaulted the wife of the plaintiff, on the day specified in the writ above mentioned, &c., and maliciously caused the plaintiff to be wrongfully charged with stealing a shawl, &c., and to be detained in custody, &c., whereby the plaintiff was put to expenses in producing witnesses and other persons in clearing the plaintiff's said wife from the said malicious assault and charge," &c.; particulars in similar terms were annexed to the summons, claiming 10*l.* damages. *Held*, that this was an action for a malicious prosecution, and that by stat. 9 & 10 Vict. c. 95, s. 58, the county court had no jurisdiction. *Jones and Wife v. Curry and Wife, in re*, iv. 325.

For other cases as to concurrent jurisdiction, see division IX. of this title.

II. Judge.

1. *Judge of—Information against—Removal.* An applicant who has unsuccessfully addressed a memorial to the Lord Chancellor to remove from his office the judge of a county court, is disqualified to apply for a criminal information against the judge for the same misconduct. *Regina v. Marshall*, xxx. 204.

2. *Summons against judgment debtor—Criminal information against judge.* A summons was issued against a judgment debtor under 9 & 10 Vict. c. 95, s. 98, in the usual form, calling upon him to appear and be examined touching the manner of contracting the debt, and the means and expectations he then had, and the property he still had, to discharge the debt. Upon the defendant being sworn, the county

judge asked him if he was prepared to pay; he answered in the negative, and was about to explain when he was stopped by the judge, who ordered his immediate committal to prison. *Held*, that there was no ground for a criminal information against the judge, there being no imputation of a corrupt motive on his part. *In re* —, xiv. 151.

III. *Nonsuit*.

1. *Nonsuit—Power to grant*. On trial in a county court, the defendant applied to the county court judge to nonsuit the plaintiff, which the judge refused to do, as the plaintiff declined to be nonsuited. The jury found for the plaintiff, and the defendant appealed. *Held*, that the county court judge had no power of nonsuiting the plaintiff without his consent. *Stancliffe v. Clarke*, ix. 492.

2. *Right of party to*. In an action in a county court the plaintiff retains the common-law privilege of electing to be nonsuited, at any time before the judge gives his verdict. *Robinson v. Lawrence*, vii. 596.

IV. *Removal of Suits; by Appeal, Certiorari, &c.*

1. *Appeal, grounds of, must be taken below*. It seems that, on an appeal from a county court, the court will not entertain an objection as a ground of appeal which has not been taken in the court below. *Watson v. The Ambergate, &c. Railway Co.* iii. 497; *Yorke v. Smith*, ix. 342.

2. *Signing imperfect case—Refusal to sign a fair copy*. A county court judge, in settling a case for an appeal, directed that a certain document should be inserted, and he signed the rough draft upon the understanding that the document was to be set forth in the fair copy. The draft was also sealed with the seal of the county court. The judge afterwards refused to sign the fair copy containing the document, he then considering that he was *functus officio* by having signed the improper draft. *Held*, that the judge was not *functus officio*, but that he ought to sign and send up the perfect case. *Figg v. Wilkinson*, xxiv. 411.

3. The court of exchequer has jurisdiction to hear an appeal in the above case, the county judge still refusing to sign the fair copy. *Ib.* See, also, *Figg v. Wilkinson*, xxiv. 585.

4. *County court—New notice of appeal containing different grounds*. An appeal from the county court may be heard in the common pleas, although the first notice of appeal be withdrawn, and a new notice, containing additional grounds of appeal, be given, without a renewal of the bond for costs made in the first instance. *Daniels v. Charsley*, vii. 524.

5. *Determination in point of law—In what cases appeal lies*. Where an appeal is made against the determination of a county court in point of law, the case stated for the opinion of the court of appeal should separate the facts and law. Though questions as to fact, as well as of law, are in contest before the judge of the county court without a jury, an appeal will lie if the court of appeal can see from the facts of the case, as stated, that the judge, in order to arrive at his judgment, must have decided a question of law in a particular way. *Semble*, that no appeal will lie if the decision of the county court judge can be supported by any view of the facts stated in the case, which does not render it necessary to conclude that he has determined the particular point of law in the way complained of as erroneous. *Cawley v. Furnell*, vi. 397.

6. *Whole case left to judge*. *Semble*, that where the whole case, involving law and fact, is left to the county judge, his decision is conclusive, and no appeal will lie therefrom. *Templeman v. Haydon*, xxii. 412.

7. *Verdict for less than 20l.* An appeal lies from the county court if the claim be

for above 20*l.* and does not exceed 50*l.*, though the verdict be for less than 20*l.* *Harris v. Dreesman*, xxv. 526.

8. *Question of fact.* On appeal, the court above will not review the judgment of the county court judge on a question of fact; nor, if his judgment be sustainable, consider the observations made by him in giving it. *The East Anglian Railways Co. v. Lythgoe*, ii. 331.

9. *Quære*, whether an appeal will lie from the decision of the county court, except in cases in which a jury has been summoned to try the facts. *Ib.*

10. *Plaint for above 20*l.*—Unliquidated damages.* No appeal lies from a county court, though the plaintiff be for above 20*l.* and for unliquidated damages, if the cause of action be such that the judge cannot lawfully give damages to the amount of 20*l.* *Mayer v. Burgess*, xxix. 81.

11. *Action for above 50*l.* by consent.* No appeal lies from the decision of the county court judge in an action for an amount exceeding 50*l.*, brought before him by consent, under 13 & 14 Vict. c. 61, s. 17. *Groves v. Janssens*, xxiv. 481.

12. *Appeal to court of common pleas—Interpleader.* An appeal from the decision of a judge of a county court, on an interpleader proceeding in respect of goods taken in execution to satisfy a judgment of that court, will not lie to the court of common pleas. *Fraser v. Fothergill*, xxv. 277; *Beswick v. Boffey*, xxiv. 477.

13. *Power of appellate court to set aside verdict—Admission of improper evidence—Appeal—New trial.* A verdict was found for the plaintiff in a county court, founded upon improper evidence. *Held*, that, under 13 & 14 Vict. c. 61, s. 14, the appellate court had no power to set aside the verdict and enter judgment for the defendant, and that they could do no more than direct a new trial. *Jonas v. Adams*, vi. 188.

14. *Removal by certiorari—Service of writ.* The power given by the 9 & 10 Vict. c. 95, s. 90, to remove a cause from a county court by *certiorari*, is not taken away by the 13 & 14 Vict. c. 61, s. 16. And if the *certiorari* be left with one of the clerks at the county court office, it is a good service upon the judge. *Semble*, however, the more proper course would be to rule the judge to return the writ, if the cause does not come on for hearing until after the return day. *Brookman v. Wenham*, ii. 269.

15. *Application for certiorari must state all material facts.* All the material facts relative to the state of the cause should be brought before the judge upon the application for the writ of *certiorari*, or it will be set aside as having been issued improvidently. *Parker v. The Bristol and Exeter Railway Co.* ii. 416; *g. c. i.* 514.

16. *To prevent a removal by certiorari, plaintiff must show a want of jurisdiction in superior court.* In order to prevent the removal of a plaintiff from the county court by *certiorari*, on the ground of want of jurisdiction in the superior court to entertain the action after removal, the plaintiff ought to be so framed as to disclose a cause of action over which the superior court has no jurisdiction. *Rees v. Williams*, vii. 567.

17. *Questions of law.* Where a plaintiff was removed from the county court by *certiorari* on the affidavit of the defendant's attorney, that difficult questions of law would arise, the court refused to quash the *certiorari*, though the affidavit of the plaintiff's attorney averred that no such difficult questions of law would arise. *Ib.*

18. *Bailiff—Two plaintiffs.* The bailiff of a county court entered two plaintiffs, one for 5*l.* for an assault, and the other for 5*l.* as a fine under the 9 & 10 Vict. c. 95, s. 114, for assaulting him in the execution of his duty, both plaintiffs referring to the same assault. *Held*, that they were two distinct plaintiffs, the latter being only an informal mode of claiming the fine; and that, therefore, the plaintiffs were not removable by *certiorari*, as neither exceeded 5*l.* *In re Boz v. Green*, xxv. 538.

19. As to the removal of suits in replevin by *certiorari*, under the 12th section of the County Court Act, 9 & 10 Vict. c. 95, see *Mungeam v. Wheatley*, i. 516, *ante* 110.

20. *Removal by rule after party has been examined and imprisoned.* The judgment of a county court may be removed by rule into a superior court, under the 1 & 2 Vict. c. 110, s. 22, although the party against whom it was obtained has already been exam-

ined by the county court, and committed to jail under the 9 & 10 Vict. c. 95, s. 99. *Copeman v. Gladden*, i. 528.

21. *Removal for execution.* A judgment of the county court cannot be removed into the superior courts for the purpose of issuing execution thereon. *Moreton v. Holt*, xxix. 418.

V. *Prohibition to.*

1. *After sentence—Jurisdiction.* The 13 & 14 Vict. c. 61, ss. 14, 16, does not take away the writ of prohibition in cases where the county court is acting without jurisdiction. *Quære*, whether prohibition lies to a county court after sentence where no defect appears on the face of the proceedings. When an objection is taken to the jurisdiction of the judge of a county court, he ought to enter it on the proceedings, in order that a superior court may see if there is ground for a prohibition. *Pears v. Wilson*, vi. 445.

2. *Where officer seized too much property.* It is no ground of a prohibition to a county court that, under process from that court to levy a sum within its jurisdiction, the officer has seized property to a greater amount. *M'Killar v. Summers*, xxvi. 429.

3. *Partial prohibition.* If a county court deals with matter over which it has no jurisdiction, mixed with matter over which it has jurisdiction, a partial prohibition may be granted. *Walsh v. Ionides*, xvi. 248.

4. *Erroneous judgment—Administrator—Executor.* A county court issued a single summons against the defendant as administrator of A, and executor of B. The defendant was A's administrator, but was not and had not acted as B's executor. The attorney for the plaintiff (a corporation) did not produce the authority required by 5 & 6 Vict. c. 57, s. 17. *Held*, that though the judgment given by the plaintiff might be erroneous, there was no ground for a prohibition. *The Guardians of the Lezden Union v. Southgate*, xxvi. 530.

5. *Reduction of bill of particulars by judge.* Where the judge of a county court has, of his own motion, amended a bill of particulars so as to reduce the plaintiff's claim to 50*l.*, a prohibition will be issued. *Hill v. Swift*, xxix. 482.

6. *Latent excess of jurisdiction.* Prohibition may issue, after judgment in a county court, for an excess of jurisdiction not appearing on the face of the proceedings there. *Marsden v. Wardle*, xxv. 126.

7. *Sufficiency of address in an interpleader summons.* A claimant, in the particulars of a claim in an interpleader summons, made under the County Courts Act, pursuant to rule 145, was described as of 24 E. Street, Islington, whereas his true address was 20 E. Terrace, Islington. The county judge dismissed the summons. *Held*, that the address was sufficiently set forth, and the dismissal of the summons erroneous; and that a prohibition would lie to stay further proceedings under the execution. *Ex parte M'Fee; Hardy v. Walker*, xxiv. 448.

8. *Petition for protection—Discretion of judge.* A petitioner the county court for protection from process under 5 & 6 Vict. c. 116, as a trader owing debts amounting in the whole to less than 300*l.* It appeared that he had previously presented a similar petition and obtained a final order for protection, and that the debts specified in the schedule to the former petition were still unpaid. The whole amount of the debts stated in both schedules exceeded 300*l.* The judge decided that he was entitled to protection as a trader owing debts amounting in the whole to less than 300*l.* *Held*, that (assuming the decision to be erroneous) a prohibition could not be granted, as this was a question which the judge had jurisdiction to determine. *Bowen, in re*, vii. 392.

9. *Objection to arbitrators' jurisdiction—Title to land.* The parties to a plaint in the county court appeared and consented to a reference; during which, one of them objected to the arbitrators' jurisdiction, as title to lands was involved. The reference proceeded under protest. The party applied for a prohibition, which was granted. *In re Knowles v. Holden*, xxx. 588.

VI. *Execution.*

1. *When may issue—Service of judgment.* Where a party duly summoned to answer a plaint in a county court holden under the 9 & 10 Vict. c. 95, fails to appear, on which the cause is heard in his absence and judgment given against him, and drawn up to pay the plaintiff's demand with costs forthwith, execution may issue immediately without previous service of the judgment. *Ely v. Moule*, i. 493.

2. *Right to, for costs—Mandamus.* A plaintiff having recovered a judgment for debt and costs in the county court, and having received the debt out of court, may yet have an execution for the costs; and the court of queen's bench will issue a *mandamus* to the clerk of the county court commanding him to issue such writ of execution. *Regina v. The Clerk of the County Court of Surrey*, xii. 428.

3. *Detinue.* *Semble*, that the machinery for execution in detinue, (none being provided for by the County Court Act,) in the county courts, should be the same as before the passage of the act. *Taylor v. Addyman*, xvi. 454.

VII. *Commitment on Judge's Order; Judgment Summons.*

1. *Warrant of commitment, issued six months after order, good.* A warrant of commitment under the 9 & 10 Vict. c. 95, s. 105, for non-appearance on a judgment summons, issued six months after the order of commitment, is regular, although by the rules of the county court a warrant is current but for two months. *Ex parte O'Neill*, ii. 330.

2. *Date of warrant.* County court rule, 131, made under 12 & 13 Vict. c. 101, s. 12, directs that warrants of commitment shall bear the date of the day of their issue, and continue in force for three calendar months and no longer. *Held*, that if the person be arrested within the three months, he may be detained after their expiration. *Hayes v. Keene*, xii. 526.

3. *Commitment for new default.* Under the 103d section of the 9 & 10 Vict. c. 95, the judge of a county court has power upon a judgment summons, to commit as often as a new default rendering the judgment debtor liable to imprisonment is made, though each default be of the same kind. *In re Boyce*, xxii. 131.

4. *Imprisonment of an insolvent on judgment summons—Application for discharge.* After judgment in the county court against the defendant, he obtained a discharge in insolvency, the judgment debt having been inserted in his schedule. To a judgment summons from the county court, under 9 & 10 Vict. c. 95, ss. 98, 99, he insisted upon his certificate as an answer; but the judge ordered him to be committed for forty days. *Held*, that an application to discharge the defendant out of custody must be made to the judge of the county court; that his decision, refusing to allow the discharge, was final, and that, therefore, the superior courts would not grant a *habeas corpus*. *Ex parte Somers*; *In re George v. Somers*, xxxii. 420. See, also, *Ex parte Christie*, xxx. 175.

5. *Party has a right to a summons to show cause against order of committal.* An order on a judgment summons, by which the county court judge ordered a party to pay a debt (previously recovered) by instalments or be committed to prison, is bad; as the party is entitled to a summons to show cause against the committal. *Abley v. Dale*, i. 359. See, also, *Buchanan v. Kinning*, vii. 455.

6. An order by the judge of a county court, on a judgment summons on a defendant to pay a sum on a future day or to be imprisoned for thirty days, is bad. *Dews v. Ryley*, vii. 469.

VIII. *Claim for Goods taken under County Court Process.*

1. *Notice of claim.* In the case of a claim to goods taken under county court process, the claimant need not, in his particular of the goods, delivered under the 29th

rule for the county courts, show upon its face that the grounds of his claim are valid. *Regina v. Richards*, iii. 410.

2. *Refusal to adjudicate upon claim—Mandamus.* If the judge of a county court refuse to adjudicate upon a claim under sect. 118 of stat. 9 & 10 Vict. c. 95, because of a mistake as to the sufficiency of a notice or other preliminary matter, a *mandamus* will be granted to compel him to hear and determine the claim. *Ib.*

IX. Costs.

1. *County Courts Extension Act—Title in issue—Onus.* Where a plaintiff recovers in a superior court a less sum than is mentioned in the 13 & 14 Vict. c. 61, in any of the actions there specified, the *onus* of proving that he is entitled to costs is cast upon him; and if he claims his costs upon the ground that title was in question, he must establish the fact that the title did really come in issue, and not merely that the defendant so pleaded that it might possibly have come in issue. *Latham v. Spedding*, iv. 273.

2. *Onus of proof of carrying on business—Order for costs.* Where a judge has made an order giving the plaintiff his costs under 15 & 16 Vict. c. 24, s. 4, and 9 & 10 Vict. c. 95, s. 128, on the ground that "the cause of action did not arise wholly or in some material point within the jurisdiction of the county court within which the defendant carried on his business at the time of the action brought," the court has power to review such order, and to rescind it if the judge has drawn a wrong conclusion from the affidavits; and though the *onus* of proof in such a case is upon the plaintiff, it is the *onus* of proving a negative; and, therefore, when the plaintiff states that he is informed and believes, and gives some reason for his belief, that the defendant did not carry on any business at the time of action brought, it lies upon the defendant to satisfy the court that he did carry on some business within the jurisdiction of the county court. *Stokes v. Grissell*, xxv. 336.

3. *Bailiff sued for taking goods under execution of county court.* A bailiff of a county court, who is sued for taking goods under an execution of that court, is within the exception of the 128th section of the 9 & 10 Vict. c. 95; and the plaintiff in such action, unless he recover more than 20*l.*, or the judge certify, is deprived of costs by sect. 139. *Man v. Buckerfield*, ii. 186.

4. *Concurrent jurisdiction of superior and county courts—Less than 20*l.* recovered.* Where one of several plaintiffs dwells beyond twenty miles from the defendant, the superior courts have concurrent jurisdiction with the county court, under the 9 & 10 Vict. c. 95, s. 128, and the plaintiffs will be, therefore, entitled to costs, under the 13 & 14 Vict. c. 61, notwithstanding less than 20*l.* is recovered. *Hickie v. Salomo*, xiv. 358.

5. *Recovery of less than 20*l.* in superior court.* In all cases where the superior courts have a concurrent jurisdiction with the county courts, under the 128th section of the 9 & 10 Vict. c. 95, or where no plaint could have been entered in any county court, or where the cause is removed from the county court by *certiorari*, the court or a judge is bound, by the 13 & 14 Vict. c. 61, s. 13, on being satisfied that the case falls within the 128th section, to make an order that the plaintiff who has recovered less than 20*l.* in a superior court shall recover his costs. *Asplin v. Blackman*, viii. 524.

6. *Some material part of cause of action arising in another jurisdiction.* The defendant contracted to purchase of the plaintiff a large number of bricks, the contract being signed at the defendant's residence and the parties living twenty miles apart. The defendant received a part of the bricks, but refused to fulfil his contract as to the remainder. Whereupon the plaintiff sued for those already delivered, putting in the agreement as a part of his case, and recovered less than 20*l.* Held, that the plaintiff was not entitled to recover his costs, as the cause of action arose in some material point within the jurisdiction of the county court, and the action ought not to have been brought in the superior court. *Norman v. Marchant*, xii. 576.

7. *In case of judgment by default.* Where a plaintiff in an action of contract, after judgment on demurrer, recovers less than 20*l.* on an inquisition of damages, he is deprived of his costs by the 13 & 14 Vict. c. 61, s. 11, the case not coming under the exception as to judgment by default. *Prew v. Squire*, v. 391.

8. *Payment into court.* An action was brought in one of the superior courts for a sum exceeding 20*l.*, and the defendant paid 7*l.* 1*s.* into court, which the plaintiff took out in full satisfaction and discharge of his claim. *Held*, that the plaintiff was entitled to the costs of the action. *Chambers v. Wiles*, xxx. 257.

9. *London Small Debts Act—Costs, suggestion.* *Quære*, whether the 13 & 14 Vict. c. 61, affects the London Small Debts Act, 10 & 11 Vict. c. 71; and, consequently, whether, in order to deprive a plaintiff of costs under the provisions of the latter statute, a suggestion for that purpose must be entered on the roll by the defendant. *Hewitt v. Paterson*, iv. 519.

10. *County Courts Extension Act—Judge's certificate.* Under the 12th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, a judge has power to certify for costs, where the sum recovered in actions of contract is 20*l.* and in tort 5*l.* *Garby v. Harris*, xiv. 479.

11. Under the 13th section of the 13 & 14 Vict. c. 61, (the County Courts Extension Act,) the court, or a judge at chambers, has power to certify for costs. *Sharp v. Eveleigh*, v. 467.

12. *Suit for over 20*l.*—Verdict for less.* A party who sues in a superior court for a sum exceeding 20*l.*, but in consequence of the proof of part payments recovers a verdict for less than that amount, will be deprived of his costs by the County Courts Act, 9 & 10 Vict. c. 95, s. 129, unless the judge by whom the cause is tried certifies that the action was fit to be brought in a superior court. *Turner v. Berry*, i. 501.

13. *Sum paid into court and sum recovered together exceeding 20*l.** A plaintiff who recovers in an action of debt a sum which together with a sum paid into court on a plea of tender, exceeds 20*l.*, is entitled to the costs of the action, notwithstanding the 11th section of the 13 & 14 Vict. c. 61. *Crosse v. Seaman*, v. 399, xx. 293. See, also, *Cooch v. Maltby*, xxviii. 192.

14. *In case of judgment by default.* The exception in the 11th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, as to costs in the case of judgment by default, applies to interlocutory as well as to final judgment by default. *Glynne v. Roberts*, xxiv. 456.

15. *Power of judge to direct allowance of costs.* The provision in the 13 & 14 Vict. c. 61, s. 13, that in cases therein specified "the court or judge may direct that the plaintiff may recover his costs," is permissive, not imperative. *Jones v. Harrison*, iii. 579.

16. *Suggestion as to costs under County Courts Act—Affidavits—Disputed facts.* On a motion for a suggestion under the County Courts Act, 9 & 10 Vict. c. 95, to deprive the plaintiff of costs, the defendant's affidavits stated that the residence of the plaintiff was within twenty miles of that of the defendant, and that the cause of action arose wholly within the jurisdiction of the county court of B., which facts were denied by the affidavit of the plaintiff. The court refused to determine those questions on affidavits, and directed a suggestion to be entered. *Lewis v. Forsyth*, i. 464.

17. *Interpleader—Bailiff's rights to costs.* As to the right of a bailiff to deduct, or recover costs under the 148th interpleader rule of practice of the county court, see *Bloor v. Huston*, xxviii. 358.

18. *Attorney—Order for taxing his bill for costs.* To a plaint in the county court, the defendant pleaded a set-off for services as an attorney. Prior to the day of hearing, the judge ordered the plaintiff's bill to be taxed. On the hearing the county court judge allowed the set-off, and the court of common pleas refused to rescind the order for taxation. *Ex parte Cooper*, xxviii. 423.

19. *Scale of costs—Right of attorney to recover before scale made.* The 15 & 16

Vict. c. 54, s. 1, authorizes five county court judges, appointed by the chancellor, to make a scale of costs, to be in force in the county courts between attorney and client, and party and party; and enacts that all costs shall be taxed by the clerk of the court, and allowed according to such scale, and that no attorney shall recover from his client any costs not so allowed on taxation. *Held*, that between the passing of the act and the making of the scale, an attorney might recover his costs, without taxation under the act. *Levenson v. Shaw*, xxviii. 367.

20. *Order for costs—County Courts Extension Act.* A judge's order for allowing costs to the plaintiff under the County Courts Extension Act, may be made on a statement of facts necessary to bring the case within the statute, without affidavit, if the statement is not disputed by the opposite party. *Power v. Jones*, i. 512.

21. *Appeal to the court of exchequer.* In an appeal from the county courts into the court of exchequer, the appellant will have costs, if the decision below be reversed. *Hunt v. Wray*, vii. 598; *Robinson v. Lawrence*, vii. 596.

X. Miscellaneous Cases.

1. *Interpleader—Duty of officer to hold goods.* The officer of a county court who has seized goods in execution, under process of that court, is not required to retire from possession of them because an interpleader summons has been issued. *M'Killar v. Summers*, xxvi. 429.

2. *Amendment—Variance.* The plaintiff's particulars in a plaint in a county court alleged that the defendant had deepened the bed of a river, whereby the plaintiff had been deprived of his accustomed head of water at his mill. It appeared in evidence that the defendant had formerly deepened the bed of the stream, for which the plaintiff recovered damages; that the defendant then erected on his own land a dam, which kept up the head of water as of old; that the defendant afterwards removed the dam, on which the water fell, and the plaintiff brought the present action. The county court judge, thinking the particulars not full enough to meet the evidence, directed an amendment under rule 104 of the County Court Rules. It was objected that the judge, by rule 104, could only amend in case of a variance between the allegations and proof, that there was no variance here, and that consequently the amendment was improper. The court of appeal, though they deemed the amendment unnecessary, held that the judge who considered that there was a variance, had under the circumstances authority to make the amendment at his discretion. *Cannon v. Johnson*, x. 323.

3. *Payment into court.* *Semble*, that money may be paid into court in detinue in the county courts. *Taylor v. Addyman*, xvi. 454.

4. *Judgment—Action on.* An action is not maintainable in a superior court upon a judgment in a county court established under 9 & 10 Vict. c. 95. *Berkeley v. Elderton*, xviii. 377. See, also, *Austin v. Mills*, xxiv. 491.

5. *Writ of trial.* A writ of trial, under 3 & 4 Will. IV. c. 42, cannot be directed to a judge of a county court established under the 9 & 10 Vict. c. 95. *Owens v. Breese*, iv. 536. See, also, *Breese v. Owens*, iii. 589.

6. *Bill of particulars—Notice of action.* As to the sufficiency of the plaintiff's particulars of demand in a plaint in the county court, and the extent of notice of action therein, see *Howard v. Remer*, xxii. 312.

COVENANT.

1. *Covenant for perpetual renewal.* A clause of renewal "provided lessee, his heirs, &c., should, within six calendar months from the death of the last of the said three lives, nominate or appoint such life or lives as he or they would have inserted in the lease to be made thereof, and paying as well all rent and arrears that should be due for the first half-year after the fall of such life as the sum of 11*l.* 7*s.* 6*d.* for

renewing or adding such life or lives forever" was sufficiently distinct to import a covenant for perpetual renewal. *Sadler v. Biggs*, xxvii. 74.

2. *To stand seised.* A covenant to stand seised is good, though the freehold vests in futuro; and the words "have granted, and by these presents do freely give and grant," the consideration being the love borne by a father toward a son, are sufficient to make a deed operate as such covenant. *Held*, also, by one of the judges, that the word "grant" passed the immediate freehold. *Doe d. Starling v. Prince*, v. 428.

3. *Not to carry on a certain business.* A covenant at the time of sale of a stock in trade not to carry on the same business within described limits is broken if the covenantor solicits and obtains orders within the said limits, though he has no place of business therein—*Dubitante* Lord Cranworth. *Turner v. Evans*, xxi. 598.

4. *Respecting barriers between coal mines.* The lessees of a coal mine covenanted to leave a barrier between that and the adjoining mines, reserving the right to make openings into such mines to bring in coal from those adjoining and convey it away, and to draw it up at any shafts sunk or to be sunk in the demised lands. Various provisos mentioned shafts in the demised mine, and they covenanted to draw up the horse-manure at some of such shafts, provided the coal of such shafts, &c., was not worked by an outstroke. They further covenanted not to allow the mine to be drowned, &c., with water, and to keep the shafts, drifts, &c., clear, and to draw out all the water to come from out of the colliery. *Held*, that the lessees might break the barrier to win coal from the demised or adjoining mines, though it was not brought up a shaft in the former, and though no such shaft existed. That there was no covenant expressed or implied to sink a pit in the mine. *Semble*, that suffering the workings and aircourses of an old seam of the mine which had been partially worked, but which was being worked no longer, to remain full of water, was not a breach of that part of the covenant which required the lessees to keep the drifts, &c., in good repair. *James v. Cochrane*, xx. 424.

5. *Respecting use of house.* A covenant not to carry on any calling in a house, or suffer the same to be used to the annoyance of other houses, extends to keeping a girls' school. The covenantee had allowed schools to be kept in other houses in the same neighborhood, and held under the same covenant. *Held*, nevertheless, that the court would interfere by injunction. *Kemp v. Sober*, iv. 64.

6. *Assignment of patent—Royalties.* In a deed by which A assigned to B, for a term of years, a license to use a certain patent, upon payment of certain sums by way of royalties, it was covenanted that, if, in any year, the royalties should not amount to £2,000, B should pay A enough to make up the amount; "or if he make default" in such payment, that A should be at liberty to put an end to the license. *Held*, that this was not an absolute covenant to B to pay £2,000 a year during the term, but only empowered A to put an end to the grant upon non-payment of that sum. *Tielens v. Hooper*, ii. 352.

7. *Covenant for quiet enjoyment—Mortgage.* A, in 1842, conveyed land to B, and entered into a covenant for quiet enjoyment, but not into any covenants for title. B mortgaged to C in the same year. In 1846, an ejectment was brought, which B defended, but was evicted. B then sued A at law, for damages upon the covenant, who pleaded that at the time of eviction the legal estate was in C, the mortgagee. B submitted to the plea, and afterwards A, the original vendor, paid off the mortgage, and obtained possession of the mortgage deed, whereupon was an acknowledgment of the receipt of the mortgage money, and that the same was in full discharge of the same, and interest, and all right of action or demand of C, the mortgagee, against A in respect of the covenants in the conveyance to B. B filed a bill against A, praying that B might be declared entitled to the benefit of the covenant, and that a reference might be sent to the Master to assess the damages sustained by him by reason of the breach of it. *Held*, that the plaintiff was entitled to have the damages assessed, and leave was given him to bring an action upon the covenant, and A the

defendant, the original vendor, was restrained from setting up the mortgage deed or indorsement by way of defence. *Thornton v. Court*, xvii. 231.

8. *To pay taxes and rates—Demand.* Where a covenant by a tenant to pay all taxes and rates means to "pay on demand," a personal demand is not necessary, but a demand on the premises, of the tenant's son, is sufficient. *Davis v. Burrell*, v. 417.

9. *Incidental and dependent acts, omission to perform.* Where a deed does not contain any express or implied covenant to do a certain thing, but does contain such covenants to perform certain other acts wholly dependent upon and incidental to the performance of the first act, then the omission to perform the first act not being a breach of covenant, neither is it any breach of covenant to omit to perform the incidental and dependent acts. *Rashleigh v. The Southeastern Railway Co.* xii. 504.

10. *Covenant to build—Performance.* A lessee of land covenanted to build thereon two houses, with the approbation and under the inspection of the lessor's surveyor, and to expend in such building 400*l.* With the surveyor's approbation he built five houses on the land, no two of which were worth so much as 400*l.*, though all together were worth much more. *Held*, that the covenant was substantially performed, and that there was no objection, on the ground of the deviation from its terms, under the circumstances, to the lessor's title. *Hume v. Bentley*, xv. 1.

11. *To insure in the joint names of lessor and lessee.* A lessee covenanted to insure the demised premises in the joint names of the lessor and lessee. The premises afterwards became vested in an under lessee, who insured in the name of the lessor alone. *Held*, that this was a sufficient compliance with the covenant to prevent the lessor from entering for breach of covenant. *Havens v. Middleton*, xvii. 263.

12. *To excavate coal—Deficiency of coal.* A covenant to dig and excavate a given quantity of coal, and to pay a rent after a given rate whether it is excavated or not, is not a covenant from which the lessee can be relieved when, after the expiration of the term, it turns out that the coal in the land proves deficient. *Mellers v. The Duke of Devonshire*, xv. 546.

13. *To pay sum certain.* A covenant for payment of a sum certain, although the payment does not accrue until after notice given, cannot be discharged by parol before breach. *Spence v. Hedley*, xx. 337.

DAMAGES.

I. MEASURE OF.

II. SPECIAL.

III. NOMINAL; ASSESSMENT OF.

I. Measure of.

1. *Deed of assignment—Unlawful seizure by assignees.* A assigned all his goods and chattels to secure a debt, subject to a proviso in the deed that every thing therein contained should cease and be void upon payment of the debt on a day named in the deed or at such earlier day as the assignees should appoint for payment, by a notice in writing twenty-four hours before the appointed day, interest in the mean time to be paid at certain periods named. B was to retain possession of the goods until default in payment of the debt or interest. *Held*, in an action of trespass by B, in respect of a seizure of the goods and chattels by the assignees, that the proper measure of damages in the action was not the value of the goods seized, but B's limited interest in the goods at the time. *Brierly v. Kendall*, x. 319.

2. *Covenant between partners on dissolution that one should pay firm debts, breach of.* Plaintiff and defendant executed a deed of dissolution of partnership, whereby defendant covenanted to pay the debts of the firm within eighteen months, and to

indemnify the plaintiff against all costs, &c., which he might be liable to in respect of those debts. The defendant not having paid a creditor of the firm within eighteen months, the plaintiff paid part in cash, and gave promissory notes for the residue. In an action by him upon the defendant's covenant, commenced during the currency of the notes, it was *held*, that the measure of damages was the whole amount of the creditor's demand, including that for which the promissory notes were given. *Robinson v. Robinson*, xxix. 212.

3. *Rule of, for breach of contract.* The damages which one contracting party ought to receive for a breach of contract are either such as may fairly be considered as arising naturally from the breach, or such as both parties in making the contract may reasonably be supposed to have contemplated as the probable result of a breach. *Hadley v. Bazendale*, xxvi. 398.

4. *Special circumstances.* When a contract is made under special circumstances, these circumstances, if known to both parties, are to be considered in estimating damages for a breach; but otherwise if they were not known to the party breaking the contract. *Ib.*

5. *Breach of contract to deliver goods at specified time.* The measure of damages in the case of a breach of a contract to deliver goods at a specified time, is, the difference between the contract price and the market price at the time of the breach of contract, or the price for which the vendee had sold; but the latter cannot recover, as special damage, the loss of anticipated profits to be made by his vendees. *Peterson v. Ayre*, xxiv. 382.

6. *Covenant with person entering partnership respecting state of firm, breach of.* The plaintiff entered into a partnership with A and B, on condition that they should furnish security as to the state of the firm. The defendant covenanted with the plaintiff that the amount due the old firm should not be less than a sum specified, and that the debts of the firm should not exceed a certain sum. It appearing that the debts exceeded the amount specified, but also that less than that amount had been paid on account of the liabilities of the old firm, it was *held*, that the defendant's covenant was a contract of indemnity only, but that the plaintiff was entitled to recover as damages the actual loss which he had sustained by reason of the defendant's breach of covenant; and that the amount of such damage was purely a question for the jury. *Walker v. Broadhurst*, xxii. 587.

7. *Payment for goods by bills afterwards dishonored.* Where, by a contract for delivery of goods, payment is to be made by bills which are dishonored before the goods are delivered, the parties are then placed in the same position as if the bills had never been given, or the contract had been to pay in ready money, and the vendee can recover only the difference between the contract price and market price of the goods. *Valpy v. Oakeley*, vi. 168.

8. *Against sheriff for failure to levy execution.* Declaration in case against the sheriff alleged, that although defendant could have levied of goods of the execution debtor within his bailiwick the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods the moneys, or any part thereof; and that defendant, further disregarding his duty, falsely returned, &c. *Held*, that though the execution debtor had other goods, which the sheriff had not seized or not sold, the proper estimate of the damages was what the goods would have realized if sold for the best price which the sheriff could have obtained. *Mullett v. Challis*, ii. 260.

9. *Goods distrained sold without appraisement.* In case for selling goods distrained for rent without appraisement, the measure of damages is the real value of the goods sold, minus the rent due. *Knight v. Egerton*, xii. 562.

10. *Several actions for distinct breaches.* Agreement that the plaintiff should enter into service of defendants for sale of wines on commission; the agreement to continue in force for five years, and the defendants guaranteeing the plaintiff 600*l.* per annum as a minimum revenue from the business during the continuation of the agreement.

Held, that the plaintiff might sue in any year during the continuance of the agreement for breaches in any former year; but that, if there was an entire dismissal from the service before the expiration of the agreement, the plaintiff ought to include in one action the whole *gravamen* he would suffer by such breach of contract. *Clossman v. Lacoste*, xxviii. 140.

11. *Breach of contract sued on since action brought—Reduction of damages.* A breach by the plaintiff of the contract sued upon, since action brought, cannot be pleaded or given in evidence in reduction of damages, to avoid circuity of action. *Bartlett v. Holmes*, xx. 277.

12. *Conversion of vessel by builder before finishing her.* The plaintiffs contracted with R. to build a ship for them, and made advances from time to time in respect of her; and R. gave them, as security for the advances, a bill of sale of the ship, which stated that he (R.) thereby did sell, transfer, &c., to the plaintiffs a certain ship in progress of building, (describing her,) to have and to hold the ship, &c., to the plaintiffs forever when she should be completed. The defendants having converted the vessel before she was finished, and having finished her, the plaintiffs were *held* entitled to recover, as damages in trover, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor, as special damage, the value of freight which the plaintiffs might have earned with her, if R. had completed her and delivered her to them. *Read v. Fairbanks*, xxiv. 220.

13. *Plan and model sent by railway company—Neglect to forward, till too late to compete for prize.* A prize had been offered for the best plan and model of a machine for loading colliers from barges, and plans and models intended for the competition were to be sent by a certain day; the plaintiff sent a plan and model accordingly by a railway, but through negligence it did not arrive at its destination until after the appointed day. *Semble*, by Erle, J., that the proper measure of damages in such a case is the value of the labor and materials expended in making the plan and model, and not the chance of obtaining the prize, as the latter is too remote a ground for damages. *Watson v. The Ambergate, &c. Railway Co.* iii. 497.

II. *Special.*

1. *Insurance against death or accident—Loss of time or profit.* In a suit on a policy of insurance by which 1,000*l.* was to be paid to the representatives of the assured in case of his death by railway accident, and a proportionate part of that sum to him in case of his injury by such accident, it is not a true measure of damages to assume the sum insured as the value of life, and estimate a proportionate sum for the injury sustained; and though the assured can recover for the personal expense and pain caused by the injury, he is not entitled to damages for the loss of time or profit occasioned by it. *Theobald v. The Railway Passengers Assurance Co.* xxvi. 432.

2. *Action by personal representative to recover damages for death—Mental suffering.* In an action by the personal representative of a deceased person to recover damages for his death under 9 & 10 Vict. c. 93, the jury, in assessing the damages, are confined to injuries of which a pecuniary estimate can be made, and cannot take into their consideration the mental suffering occasioned to the survivors by his death. *Blake v. The Midland Railway Co.* x. 437.

3. *Costs of quashing inquisition.* Where the plaintiff, who had been committed to jail for manslaughter, by a coroner's warrant, was afterwards admitted to bail, and subsequently got the inquisition, under which he had been committed, quashed, it was *held*, in an action against the coroner for false imprisonment, alleging as special damage that he had been obliged to pay money in procuring his discharge from custody, that he was entitled to recover the costs of quashing the inquisition. *Fozhall v. Barnett*, xxii. 179.

4. *Action against bankers for refusal to pay checks.* In an action against bankers

for refusing to pay a trader's checks, they having at the time of refusal sufficient assets of the trader, the latter may recover substantial damages without proof of actual damage. *Rolin v. Steward*, xxv. 341.

5. *Presumed after verdict.* In case of an action for an injury to a right, if necessary, it must be presumed, after verdict, that special damage was proved. *King v. The Rochdale Canal Co.* vi. 241.

6. *Action for non-fulfilment of contract, causing non-fulfilment with third parties.* In an action for the non-fulfilment of a contract it was averred, as special damage, that the plaintiffs had thereby been prevented from fulfilling a contract with third parties, and lost the profits thereon. *Held*, that the jury, although not bound to assess the damages at the amount of such profits, yet that they might do so if satisfied by reasonable evidence that the plaintiffs would have obtained such profits but for the breach of contract by the defendants. Also, that such damages were equally recoverable, although the contract which would have produced the profits could not have been enforced at law, because not in compliance with the Statute of Frauds, and although it was made by the three plaintiffs with two of the plaintiffs carrying on a separate business. *Waters v. Towers*, xx. 410.

III. Nominal; Assessment of.

1. *For detention of debt paid after action brought.* In an action of debt the plaintiff, in his particulars, stated: "This action is brought to recover the sum of 1s. damages, for the detention of the debt for which this action is brought, together with the costs of suit; the debt, 86l. 9s., having been paid by the defendant to the plaintiff after action brought." The plaintiff having proved, at the trial, a debt of 69l., the verdict was held to have been properly entered for that sum, debt, and 1s. damages. *Nosotti v. Page*, ii. 326.

2. *Trespass—Evidence.* In an action of trespass, where the plaintiff proves by parol that he occupies the premises under a written agreement from W., and the defendant produces a lease from W. made and taking effect about the time of the acts complained of as trespasses, in order to entitle him to more than nominal damages, the plaintiff must show the duration of his interest, which he can only do by the written instrument. *Twyman v. Knowles*, xiv. 318.

3. *Nisi Prius record not admissible on assessment of damages.* Action of contract for breach of agreement to enter into a partnership. A plea of fraud was pleaded, but subsequently withdrawn. *Held*, that upon the assessment of damages, the *nisi prius* record was not admissible to show that the plea of fraud had been pleaded. *Herring v. Tomlin*, xxviii. 142.

DEBT.

1. *For dividends sold and assigned.* Debt for dividends sold and assigned and on an account stated. Pleas, payment into court of parcel, &c., and as to the residue, never indebted. At the trial, it appeared that the plaintiff had agreed to sell to the defendant certain dividends for 175l., but after the bargain was made it was found that an order of the court of chancery was necessary before the dividends could be received by the defendant, and a dispute having arisen as to which party was to pay the costs of obtaining this order, it was agreed that the deed of transfer should be executed, and the question of costs referred to two solicitors. The deed was accordingly executed, and 125l. paid to the plaintiff, and a paper signed by both parties in which credit was given for that sum, and 50l. stated to be the balance remaining. The deed, however, stated that the whole purchase-money was paid, and contained a release in the usual way. *Held*, first, that the plaintiff could not recover the remainder of the purchase-money under the first count, as the debt only accrued upon the execution of the deed, and at the same time the debt was released; secondly, that there

was no evidence of an account stated, as at the time the memorandum was signed, the plaintiff's claim to the 50l. was contingent upon the result of the reference. *Baker v. Heard*, vii. 531.

2. *An agreement for carriage of goods.* An action of debt is not maintainable upon an agreement that the defendant would carry certain goods for the plaintiff, in consideration that the plaintiff would carry a like quantity for the defendant. *Bracegirdle v. Hincks*, xxiv. 534.

3. *Against municipal corporations for arrears of salary.* Under the Municipal Corporations Act, enacting that the salaries of officers appointed by the council shall be paid out of the "Borough Fund," it was held, that an officer appointed by the council with a salary cannot maintain an action of debt against the corporation for arrears of such salary. *Addison v. The Mayor, &c. of Preston*, x. 489.

DECREES.

1. *For Foreclosure.* On a decree for foreclosure, at the suit of an equitable mortgagee by deposit, the decree simply directs the mortgagor to surrender, without saying at whose expense it is to be done. *Pryce v. Bury*, xxiii. 75.

2. *To carry into execution trusts of will.* A decree directing the trusts of a will to be carried into execution, does not imply that all the trusts are valid. *Gooch v. Gooch*, xxi. 534.

3. *Construction of.* Decrees are to be construed according to the general or ordinary meaning of the words used in them. *Grieves v. Rawley*, xxi. 310.

4. *Form of a decree for partition against infants,* see *Bowra v. Wright*, iii. 190.

DEDICATION.

Of land to public for canal. A demised copyhold land to B, in 1779. In 1794 an act was obtained for a canal part of which was to pass over the demised land, and to be made by C. C's portion of the canal was made under an arrangement between him and B, the lessee. No compensation was made to A, in respect of his reversion, but all the acts of C were done with the consent of the proprietors of the lands of whom A was one. Held, that A must be taken to have dedicated the land used for the canal to the public for the purpose of that undertaking. *Beaufort v. Patrick*, xvii. 28. See WAYS.

DEED.

I. VALIDITY.

II. CONSTRUCTION.

III. DATE.

IV. ACKNOWLEDGMENT.

V. FRAUD.

VI. MISCELLANEOUS CASES.

I. Validity.

1. *Premature conveyance by cestuis que trust of real estate left them by will.* Real estate was left by will upon certain trusts, and the right of sale thereof was restricted in point of time. The trustees appointed by the will declined to accept the trust, and the cestuis que trust wishing to sell part of the property, before the time specified in the will, all joined in the execution of a trust deed containing provisions to that effect, and the property was managed in conformity with the terms of the deed. Held, that under the circumstances the deed should be sustained, although the right of the cestuis que trust to abrogate the provisions of the will was of a questionable character. *Ferrie v. Atherton*, xxviii. 1.

2. *Alteration of deed, effect of.* If a deed be altered in a material part it is not thereby rendered void from the beginning, it ceases to have any new operation and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed or to prove any collateral fact. *The Agriculturist Cattle Insurance Co. v. Fitzgerald*, iv. 211.

3. *Mortgage given under mistake.* If B represent to A that he is liable as security for him to a third person and A, believing that to be true, assigns property to B by way of mortgage, and it proves that B is not legally liable, the mortgage deed is invalid, if there was no other consideration therefor. *Lake v. Brutton*, xxiii. 628.

4. *False recitals.* A young lady, a few months after she came of age, and on the eve of her marriage, with her father's concurrence, but without the knowledge of her intended husband, made an absolute assignment of her reversionary interest in a sum of stock to the trustee thereof, by a deed which recited a contract for sale of such stock to the trustee and the payment of the purchase-money, and upon this deed was indorsed a receipt for the purchase-money, signed by the lady, no purchase-money having in fact been paid. Held, that the falsehood of the recitals in the deed alone would have been sufficient to prevent the court from supporting it as a security, to the amount of the consideration expressed, for a larger sum due from the lady's father to the trustee for money advanced for her education. *Levellin v. Cobbold*, xix. 43.

II. Construction.

1. *Formalities required by acts of parliament.* The effect to be given to such clauses in acts of parliament as that in the stat. 47 Geo. III. c. 34, rendering deeds void for want of indorsement or other formal matters, depends much on the purpose of the act in which they are contained; and if the act be one of general public concern, they are to be construed largely, to defeat the mischief which the act is intended to prevent; but if the act be not such, then the effect to be given to such provisions is to be limited by the purpose for which they are inserted. *Jortin v. The Southeastern Railway Co.* xxxi. 320.

2. *"All my real estate."* The general description in an indenture in these words, "all my real estate," satisfies the words of stat. 27 Eliz., as to a subsequent sale of the "same estate." *Stone v. Van Heythuysen*, xxiii. 491.

3. *"Legal representatives."* The words "legal representatives," used in a deed, cannot be acted upon by the court, unless some context be found in the deed to explain them. *Tipping v. Howard*, vi. 99.

4. *Series of deeds—Rights of parties.* Parties to a series of deeds are to be considered as stipulating according to the rights which they had. *Harman v. Richards*, xvii. 548.

5. *Right to cut sluice—When exhausted.* Where a deed gave a right to cut a goit or sluice through a certain close, in "the most convenient direction," and also the right to repair the same from time to time, the right to construct is exhausted by the construction of one goit or sluice. *Bostock v. Sidebottom*, xiv. 152; *Sidebottom v. Bostock*, xiv. 152.

6. *General words of description, to what limited.* A assigned "all his ready money, securities for money," &c., &c., and all his other personal estate and effects whatsoever or wheresoever of or belonging, or due, or owing to him. Held, that the general words passed only property *ejusdem generis* with that specified, and that they did not convey a contingent reversionary interest in a legacy. *Re Wright's Trusts*, xix. 303.

7. *Deed of partition of lands, mines, minerals, &c.—Proviso.* A. and B., being seised of M. and T. farms, and the mines and minerals under the same, by deed of partition,

conveyed the same to S. to hold the same, as to M. farm, to the only use of A. and his heirs and assigns forever, and as to T. farms to the only use and behoof of B., his heirs and assigns forever. The deed recited the agreement of partition, and that by the said agreement "all coals, cannel, &c., and all mines to be found within the said premises, should be taken by and between them under such payments, restraints, and liberties, as in the said deed were after mentioned, &c." And the deed then provided that all ore, coal mines, &c., and the rents and profits of such mines and minerals to be gotten within the said premises, shall be had, received, and taken, and the costs of getting and carrying away the same, and all trespass and damages done on the lands thereby, shall be paid by A. and B. equally, in such manner as if the lands wherein the same shall be found had not been divided, allotted, or conveyed, but still remained in common between them: provided that he in whose lands such minerals may be found may get and dispose thereof in such manner as he shall think fit, paying to the other one half of the profits thereof, after deducting such costs and payments as aforesaid. *Held*, by the above deed, a complete partition was effected of the lands, surface, subsoil, mines, and minerals, and that the proviso was only for the purpose of working the mines at the joint expense and for common profit, without prejudice to the separate ownership. *Bateman v. Williamson*, xxviii. 127.

8. *Two separate deeds—Marriage settlement—Hotchpot.* On a marriage, two separate sums were provided by two separate deeds, for the portions of younger children, and each deed contained a hotchpot clause. *Held*, that these clauses were separate and distinct, and operated only on the fund contained in each settlement respectively. *Montague v. Montague*, xxi. 575.

9. *Limitation of equity of redemption varied.* Real estate was settled by deeds to such uses as the husband should appoint. He appointed; by a deed of July, 1817, to such uses as "he and his wife should jointly appoint, and in default to himself for life; remainder to his wife for life; remainder to his son in fee." The husband and wife made several mortgages, all except one limiting the equity of redemption upon or consistently with the uses of the deed of 1817. In 1832, they made, under the power in the deed of 1817, another mortgage which limited the equity of redemption to the husband and wife, "their heirs or assigns, or to such other persons, &c., as they should direct;" and by a deed of even date, certain terms were assigned to attend the inheritance according to the uses of the other deed of even date. *Held*, that the deed of 1832 was intended to vary the limitation of the equity of redemption, and defeated the limitation of the fee of the deed of 1817. *Whitbread v. Smith*, xxi. 290.

III. Date.

1. *Acknowledgment of title in mortgagee—Statute of limitations begins to run when.* A mortgage-deed was dated the 27th of October, 1827, but not executed until the 23d of August, 1834, and it contained a covenant by the mortgagor admitting the title to be in the mortgagee, his heirs and assigns. *Held*, that this was a sufficient acknowledgment of title, under 3 & 4 Will. IV. c. 27, s. 14, to enable the mortgagee to recover within twenty years of the execution of the deed, as the statute of limitations commenced to run from the day of the actual execution, and not from the day of the date of the deed. *Jaynes v. Hughes*, xxviii. 589.

2. *Deeds date from the time of their execution, and not from the time of their enrolment.* *Trye v. The Corporation of Gloucester*, vi. 73.

IV. Acknowledgment.

1. *Acknowledgment taken abroad—Erasure.* The court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be filed, notwithstanding an erasure in a material part of the affidavit,—there being satisfac-

tory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn, and also, notwithstanding the address of the commission to J. B., Jr., instead of J. R. B., there being an affidavit identifying them. *In re Mary Bingle*, xxix. 339.

2. *Acknowledgment of married woman, delay to file—Affidavit of commissioner.* Where the certificate and affidavit of an acknowledgment of a married woman, under 3 & 4 Will. IV. c. 74, had not been filed for many years, and one of the commissioners had died, and the other made an affidavit verifying the certificate, (which was in the usual form,) and stating that the acknowledgment was made by the married woman; and that from his practice in such cases, he believed and had no doubt that the proper questions were put to her, and the proper answers made, it was *held*, not sufficient. He should have stated, as in the case of an attesting witness to a deed, that from the fact of his signature to the certificate, he believed, and had no doubt, that all things had been regularly done, as they purported to have been done, inasmuch as otherwise his signature would never have been attached to it. *Ex parte Gardner*, xxx. 513.

3. *Erasures—Enlargement of time to return commission.* An affidavit of the due taking of an acknowledgment at Sydney had an interlineation in the body of it, and an erasure in the jurat. The court refused to allow it to be filed. They also refused to enlarge the time for returning the commission, in order to get the defects remedied, the time for the return having expired. *In re Tierney*, xxx. 531.

4. *Acknowledgment of married woman—Commissioner an interested party.* The certificate of the acknowledgment of a deed by a married woman, if made in the form required by act 3 & 4 Will. IV. c. 4, s. 84, is conclusive evidence of the facts stated in it and of the proper acknowledgment of the deed. *Seem*, that where one of the commissioners to make the acknowledgment was an interested party, the acknowledgment was invalid, but that evidence of this fact was inadmissible where the certificate was correct in form, but that the invalidity of the certificate might have been set up had it appeared on the face of the certificate and deed that the party to whom the conveyance was made was one of the commissioners. *Bancks v. Ollerton*, xxvi. 508. See, also, *In re Ollerton*, xxx. 539.

V. Fraud.

1. *Setting aside deed for fraud.* A deed, though made for valuable consideration, may be affected by *mala fides*, but he who undertakes to set aside a deed solely on the ground of *mala fides* has a difficult task to perform. *Harman v. Richards*, xvii. 548.

2. *Fraud of solicitor in preparing mortgage deed.* Plaintiff applied to a solicitor to raise a certain sum on mortgage. He, to prevent plaintiff from dissipating his fortune, tied it all up, as plaintiff alleged, without his authority or knowledge, and constituted himself sole trustee. *Held*, that such settlement could not be maintained in equity without the clearest evidence of the concurrence of the settlor, for want of which the deed was declared void, and the trust property directed to be reconveyed. *Moore v. Prance*, vii. 17.

VI. Miscellaneous Cases.

1. *Who entitled to possession of deed.* Where the plaintiff in a partition suit was entitled to the greater part of the estate, and had the title deeds in his possession, it was *held*, that the defendant, the owner of the rest, was entitled to such of the deeds as related exclusively to the land which should be allotted to him, but that the plaintiff might retain the rest, he undertaking to abide by any order of the court in the premises. *Jones v. Robinson*, xxvii. 477.

2. Where several have interest in a deed, the title to the possession of it is ambulatory; and any of the parties interested having possession may retain it against the other. *Foster v. Crabb*, xi. 521.

3. *Partial execution of.* There can be no such thing as a partial execution of a deed. Therefore, a declaration alleging that the plaintiff had executed a certain deed, except certain sections thereof, is bad on demurrer. *Wilkinson v. The Anglo-Californian Mining Co.* xii. 444.

4. *Erasures and interlineations.* The presumption is, that an erasure or interlineation in a deed was made at the time of the execution of the deed. *Doe d. Tatham v. Catamore*, v. 349.

5. *Purchase of equity of redemption—Title.* T. C., the executor of S. E., purchased the equity of redemption of an estate for 615*l.*, subject to a mortgage in fee, (which contained a power of sale,) to secure the repayment of 800*l.*; this security was transferred to Messrs. A. and D. T. C. was illegitimate. He died unmarried and intestate in December, 1831. S. B. purchased the estate, which on the 12th of August, 1834, was conveyed to him in fee by A. and D., the mortgagees, and by S. A., the administratrix *de bonis non* of S. E. The deed recited that T. C. had purchased the estate in part with the money of S. E. T. B., the purchaser, died, and his estate was sold under the direction of the court. Objections were taken to the title, because the mortgagees had not executed their power of sale under the mortgage, and because no person claiming through T. C. had conveyed the estate or was a party to the suit; because there was no evidence showing that T. C. was illegitimate, or that he had died without heirs, or that he was a trustee for S. E., and if those statements were true the estate had escheated to the crown; and because, as the equity of redemption had not been foreclosed, it was assets for the payment of his debts, and this personal representative was not before the court. The Master reported that a good title could not be made. Upon exceptions to his report, it was *held*, that the evidence of T. C. being a mere trustee was not such that a purchaser could be compelled to take the title; that, assuming T. C. had a beneficial title, the equity of redemption had not escheated to the crown; that, as the equity of redemption might possibly be assets for the payment of the debts of T. C. generally and on covenant, no title could be made in the absence of the legal personal representative of T. C. If it could, then mortgagees having the legal estate might hold the whole property against creditors discharged from the equity of redemption. The exceptions were, therefore, overruled; but, as it was on grounds different from those on which the Master had relied, without costs. *Beale v. Symonds*, xix. 506.

6. *Annuity—Enrolment.* A deed releasing part of an annuity previously granted, to which the grantor is no party, does not require to be enrolled under the provisions of the 53 Geo. III. c. 141, s. 2. *Humphreys v. Jenkinson*, xx. 477.

DEMURRER.

See PLEADING.

DESIGNS.

See COPYRIGHT OF DESIGNS.

DETINUE.

1. *Goods delivered up after action brought—Judgment for damages.* In detinue for goods, if all or any are delivered up after action brought, the plaintiff cannot have judgment to recover the goods so delivered to him, or their value, but may have judgment to recover damages for their detention, if he has sustained any damage, and may have judgment to recover the residue of the goods, or their value, and damages for their detention. *Crossfield v. Such*, xvi. 514.

2. Payment into court, by way of awards, may be made in detinue, that action being a personal one within the 3 & 4 Will. IV. c. 42, s. 21. *Ib.*

3. *Power of court to order return of chattel.* By the 78th section of the Common-law Procedure Act, 1854, the court has power, on the application of a plaintiff in detinue, to order the return of the chattel without giving the defendant the option of retaining it on paying the value. *Held*, that this rule does not apply where, at the trial, the value of the chattel has not been assessed. *Chilton v. Carrington*, xxix. 255.

4. *By administrator for goods of intestate.* A person having died intestate, the defendant and B. took possession of his goods, and divided them between themselves. Letters of administration having been subsequently obtained by the plaintiffs, an action of detinue was brought against the defendant. *Held*, that the action was not maintainable as to the goods which B. had kept possession of, as they had not been in the defendant's possession, after the grant of letters of administration. *Crossfield v. Such*, xxii. 555.

5. *By cestui que trust.* A *cestui que trust* cannot maintain detinue for the deed under which he claims, against a bailee of the trustee. *Foster v. Crabb*, xi. 521.

DISCOVERY.

1. *When granted.* If a discovery may be useful for obtaining any relief which the plaintiff may obtain, he is entitled to it. *Hambrook v. Smith*, ix. 226.

2. *Bill alleging fraud—Denial of title.* A and B each claimed to be heir at law of C. A filed his bill, alleging that B had used false and fraudulent statements to induce the Master to report him heir at law of C, &c.; also containing various interrogatories addressed to the discovery of the alleged falsity and fraud. B, by his answer, denied A's title, and refused to answer the interrogatories, &c. *Held*, affirming the decision of the late Master of the Rolls, allowing exceptions to the answer, that B was not protected from the discovery, which was required as a means to establish the fraud averred in the bill, although incidentally, B may have to disclose his own title. *Stainton v. Chadwick*, viii. 105.

3. *Infringement of patent—Bill for an account.* Upon a bill charging the defendant with infringing the plaintiff's patent, and asking for an account of his dealings and transactions, and seeking to make him answerable for the profits received by him in consequence of the infringement, it was *held*, that the defendant must answer the interrogatories, though he disputes the title of the plaintiff, and insists that the discovery will be an act of oppression upon him, and that there was little probability that the court, at the hearing, would direct an account upon the facts if disclosed. *Swainborne v. Nelson*, xv. 572.

4. *Death of partner—Executor continuing assets in business—Imbecility of one partner.* Where A, B, and C were partners, and A died, bequeathing his residuary property equally to G. S. and H. S., and appointing the latter one of his executors, and he acted as partner in A's place, and employed his assets in the business, and G. S. filed a bill against H. S. for administration and an account of the assets, and alleged that the partnership was to be wound up, denied H. S.'s right to act as partner, and alleged that B had been long imbecile, and this allegation and the interrogatories thereon were excepted to, it was *held*, that B's state of mind during this time was a material fact in considering whether H. S. was properly a partner, and whether it was possible now to wind up the partnership business. The exceptions were overruled. *Simpson v. Chapman*, viii. 48.

See INSPECTOR OF DOCUMENTS.

DISTRESS.

- I. WHO MAY DISTRAIN.
- II. WHAT MAY BE DISTRAINED.
- III. HOW LANDLORD MAY ENTER.
- IV. MISCELLANEOUS CASES.

I. *Who may Distrain.*

1. A landlord has a right to distrain upon a tenant at will. *Doe d. Benson v. Frost*, xiv. 506.

2. *Demise and redemise—Interest in premises.* Trespass to goods. Plea, that by an indenture, made in 1847, it was agreed between Q. and the defendant, that Q. should hold certain premises as tenant at will to the defendant, at the yearly rent of 150*l.*, for which rent it should be lawful for the defendant to distrain as landlords may for rents reserved on leases for years; that Q. held the premises under the said indenture; that three years' and a quarter's arrears of rent became due, during the time Q. held the premises as such tenant, and the defendant was possessed of them as aforesaid; and that the defendant distrained the goods for rent. The plaintiff set out the indenture on oyer, from which it appeared that Q., having become in 1847, the lessee of the premises, under M. for twenty-one years, wanting one day, and having borrowed money from the defendant, demised the premises to the defendant by way of mortgage, at a peppercorn rent, and that the defendant redemised the same to Q., at a yearly rent of 150*l.*, with power of distress. *Held*, on demurrer, that the plea was bad in not showing such an interest in the premises, on the part of the defendant, as entitled him to distrain. *Pinkhorn v. Sonster*, xiv. 454.

II. *What may be distrained.*

1. *Goods sent to auctioneer to be sold.* Goods sent to an auctioneer to be sold in a room hired by him from one who has no authority to let it, are privileged from distress, while they are in that room for the purpose of being sold by auction. The fact of such room never having been used as an auction room before, and only being hired for the occasion, is immaterial, as regards the privilege of the goods from distress. *Brown v. Arundell*, i. 373.

2. *Goods specified in schedule.* A schedule annexed to a notice of distress specified certain goods, and concluded thus: "And all other goods, chattels, and effects that may be found in and about the said premises, that may be required in order to satisfy the above rent, together with the expenses." *Held*, that this notice did not justify the seizure of any goods besides those specified in the schedule. *Kerby v. Harding*, iii. 574.

3. *Spinning machines become part of freehold.* Defendant distrained for rent certain spinning machines, which were fixed by screws, some into the wooden floor, and some into lead which had been poured when melted into holes in the stone for the purpose of receiving the screws. The machines having been replevied by an invalid replevin, defendant entered and seized them a second time. *Held*, that the machines never became a part of the freehold, and were distrainable. *Hellawell v. Eastwood*, iii. 562.

III. *How Landlord may enter.*

1. A landlord may not break open the door of a stable, though without the curtilage, in order to make a distress. *Brown v. Glenn*, ii. 275.

2. A landlord, in order to distrain, may open the outer door in the ordinary way in which other persons using the building are accustomed to open it. Therefore, where

the door of a stable was kept closed by a padlock attached to a movable stable, and the owner and other persons usually opened the door by pulling out the staple, it was *held*, that a distress made upon goods in the stable, after an entry in this mode, was legal. *Ryan v. Shilcock*, viii. 508.

IV. Miscellaneous Cases.

1. *Bankrupt tenant—Landlord entitled to six years' rent.* A landlord levied a distress for rent, and before he sold, the tenant was adjudicated bankrupt, and then the sale took place under the distress. The commissioner decided that the landlord was only entitled to retain one year's rent; but, on appeal, it was *held*, that the landlord was, under the 42d section of the 3 and 4 Will. IV. c. 27, (the Statute of Limitations,) entitled to six years' rent out of the proceeds of the sale. *Ex parte Bayly; In re Lougher*, xix. 472.

2. *Abandonment of distress.* A distrained for rent due from his tenant B, a livery stable keeper, and took a pony and carriage belonging to one of B's customers. While the broker was in possession, the owner, who was ignorant of the distress, was allowed to take his pony and carriage out as usual, the broker believing that he would bring them back. *Held*, that this was not an abandonment of the distress, and, the owner having brought them back, they were still subject to the distress. *Kerby v. Harding*, iii. 574.

3. *Sewers-rate—Void warrant—Trespass.* A was assessed to a sewers-rate in respect of land, of some of which he was neither owner nor occupier. Before the commissioners he disputed the validity of the rate altogether as affecting his lands, but did not object, as to any part of the lands assessed, that he was not the owner or occupier. The commissioners issued a warrant of distress to levy the whole amount. *Held*, that the warrant was void altogether, and afforded no justification for the distress; and that A was entitled to recover as damages in an action of trespass the whole amount levied thereunder. *Tucker v. Mailland*, xxix. 208.

4. *Action on the case for distress and wrongful sale of goods—More rent claimed than is due.* Declaration in case alleged as the cause of action, first, that defendant took certain goods as a distress for certain arrears of rent then claimed and pretended by defendant to be due to him, whereas part only of the rent was due; and, secondly, that he wrongfully sold the said goods, as such distress, for the said alleged arrears and costs. *Held*, that the distress and the sale were substantive grievances, both which were admitted by the payment of money into court for plea, and that the sale was not merely matter of aggravation. Afterwards on error in the exchequer chamber, it was *held*, first, that the allegation as to the sale could not be understood as charging that more goods were sold than were necessary to raise the amount of the arrears actually due, and costs. Secondly, that the making a distress for rent, some rent being due, accompanied by an untrue claim or pretence that more was due than really was due, is not actionable. *Tancred v. Leyland*, iii. 482. See ADMISSION.

5. *Rent-charge cannot be split.* A rent-charge cannot be so split as to enable the grantee to distrain upon several portions of the lands charged; and if he once distrain and might take enough to satisfy the charge, but does not, he cannot again distrain for the balance. *Owens v. Wynne*, xxx. 360.

DIVORCE.

I. GROUNDS FOR A DIVORCE.

II. MISCELLANEOUS CASES.

I. Grounds for a Divorce.

1. *Malformation.* In libels for divorce on the ground of malformation, long delay

in bringing the suit must be satisfactorily accounted for by the libellant. *B—n v. B—n*, xxviii. 95.

2. *Legal cruelty*. The use of abusive and obscene language and threats of injury to the wife made to third persons, habits of constant intoxication, or of gaming and cruel and indecent treatment of the children, are not such legal cruelty as will justify a decree of separation between man and wife. The wilful communication of a cutaneous disorder is an act of cruelty, though perhaps not sufficient of itself to justify a decree of separation. And in a case where this act was coupled with evidence of personal ill will, of blows given, and of habits of intoxication, on the part of the husband, a separation was decreed. *C— v. C—*, xxviii. 603. See, also, *Ciucci v. Ciucci*, xxvi. 604.

3. *Impotency*. The medical report stated that a woman was a virgin, and capable of consummation; that with respect to the man, there was no apparent incapacity, but, from his failure to accomplish sexual intercourse during a long course of cohabitation, the inspectors believed him to be impotent as regards A, and that such impotency could not be removed by art or skill. The cohabitation had lasted two years and some months. *Held*, that the report was sufficient to support a sentence of nullity, and that the rule of triennial cohabitation was not binding where the cohabitation had been sufficiently long, looking to the evidence, to satisfy the court that the man's capacity had been fully tried. *Anonymous*, xxii. 637.

4. *Adultery, and criminal connection before marriage*. Where, in a libel for divorce, adultery is alleged to have taken place with A, a criminal connection with A, previous to the marriage, may be alleged also. *Weatherley v. Weatherley*, xxix. 605.

5. *Divorce a mensâ et thoro—Cruelty—Desertion—Scotch law*. Neglect, silence, shunning the wife's company, and declarations by the husband that he will never cohabit with her, do not constitute that "cruelty and maltreatment" in respect of which the law will grant to the wife a divorce *a mensâ et thoro*. Where, in a case of this sort, the court of session had pronounced for a divorce, the Lords reversed the interlocutor. Actual personal violence, or the immediate menace of it, is not the only ground of maltreatment in respect of which such a divorce will be granted. *Quære*, whether constant revilings and accusations of all sorts of crimes made, and falsely made, before friends and servants, would constitute a ground for such a divorce. The general principle of the law as to divorce *a mensâ et thoro* is the same in England and Scotland. [But it seems that a special principle exists in the law of Scotland, which permits a divorce for a wilful desertion continued for four years.] *Paterson v. Paterson*, xii. 19.

II. Miscellaneous Cases.

1. *Alimony*. In a cause of separation promoted by the wife against the husband, alimony was allotted. The wife had not complied with an order of the court of chancery respecting the custody of the children. *Held*, that the refusal of the wife to obey the court of chancery was no ground for stopping the payment of alimony. *Hope v. Hope*, xxix. 608.

2. *Rescript does not amount to sentence of separation*. A rescript of the cardinal vicar-general at Rome, authorizing husband and wife to live separate, does not amount to a sentence of separation. *Connelly v. Connelly*, ii. 570.

3. *Divorce a vinculo applied for after grant of divorce a mensâ et thoro*. A domiciled Scotchman married an Englishwoman, who afterwards abandoned him and returned to England. He commenced a suit for the restoration of conjugal rights, which was met by a "responsive allegation" praying for a divorce *a mensâ et thoro*, on the ground of adultery committed by him in Scotland; which divorce was granted. She subsequently made the same act of adultery the ground of an application in the Scotch courts for a divorce *a vinculo*: plea, that by instituting the former suit the wife was barred in the present. *Held*, that the plea was bad. It seems, per the Lord Chan-

cellor, that the "responsive allegation" is not instituting a suit. (But *TRURO contra.*) Also, that by the Scotch law, a divorce *a vinculo* may be obtained after a divorce *a mensâ* has been decreed for the same cause. *Geils v. Dickenson*, xx. 1.

4. *Separation deed, how avoided.* Reconciliation and re-cohabitation avoid a deed of separation, but the husband may nevertheless so conduct himself afterwards as to contract a new obligation on the footing of the separation deed. *Webster v. Webster*, xvii. 278.

5. *Condonation.* Mere payments to the wife of an annuity for life, provided by the deed, though continued after a reconciliation, and after the death of the husband, are not sufficient evidence of such a new obligation. *Ib.*

6. Form of plea of condonation sufficient without answer to a bill by the widow, on behalf of herself and all other creditors, against the assets of the husband, deceased, claiming as a creditor of his estate under the deed of separation. *Ib.*

DOMICIL.

I. HOW GAINED AND LOST.

II. MISCELLANEOUS CASES.

I. *How gained and lost.*

1. *By residence and ownership of real estate.* W. A. having landed property in Ireland, and money in the English funds, fourteen years before his death bought a house in France, where, with the exception of occasional returns to lodgings in England, he continued to reside, and where he died. He left an English will, dated in 1843, and a French will, dated in 1848. *Held*, that the domicile of W. A. was in France. *Laneville v. Anderson*, xxii. 641. Decree affirmed, xxix. 59.

2. *Lodging in another country—Lease—Description in will.* A man may obtain a new domicile in a country, where he is only a lodger, and not a housekeeper, and without repudiating his nationality. And this domicile is not changed by a subsequent residence in another country, where he takes a lease of apartments determinable by either the lessor or the lessee, at the end of three years. And the fact that he describes himself in his will as being of a certain city in his native country, makes no material difference. *Whicker v. Hume*, v. 52.

3. *Acting as surgeon in navy.* A domicile in Scotland is not lost by acting as surgeon of the navy at various stations and at sea, the person returning to Scotland at times and spending intervals of employment, though he finally moves his goods and family therefrom, if he has made no permanent settlement elsewhere. *Brown v. Smith*, xi. 6.

4. *Pauper—Imprisonment in another parish.* The absence of a person from a parish in which he is residing, in consequence of an imprisonment out of the parish, is not of itself such an interruption of the residence as would prevent his becoming irremovable by five years' residence including the time of the imprisonment, if an intention to return at the expiration of the imprisonment exists throughout it. *Holbeck v. Leeds*, ii. 245.

II. *Miscellaneous Cases.*

1. *Of husband and wife living apart.* Where the husband and wife are living apart under a sentence of separation, the domicile of the husband is not the domicile of the wife, and the consequent defect of jurisdiction apparent on the face of the libel will not be cured by the appearance of the wife. *Williams v. Dormer*, ix. 598.

2. *Of testator, how determined.* Where the question before the court is the domicile of the testator, the conduct of parties to the suit subsequent to his death is immaterial. *Laneville v. Anderson*, ix. 581.

DONATIO MORTIS CAUSA.

1. *Donor need not have immediate death in view.* To constitute a valid gift *causâ mortis* it is not necessary that the donor should have immediate death in view, but only that the gift should be made upon the supposition that there is no hope of recovery. *Meredith v. Watson*, xxiii. 250.

2. *Check.* A testator, upon his death-bed, gave a check of 1,000*l.* to his wife, and, at his request, she changed it for the check of another person of the same amount. The testator's check was paid in his life, and after his decease, the widow obtained the 1,000*l.* upon another check given to her for that for which she had parted with her husband's check. *Held*, that the gift to the wife was complete, and that the 1,000*l.* did not form a part of the husband's estate. *Bouts v. Ellis*, xxi. 337.

3. A testator, four days before his death, said to his wife: "I am a dying man; you will want money before my affairs are wound up." On the following day he gave his wife a crossed check, and, on the next day but one, remembering that the check was crossed, he asked a friend who visited him to take it, and give the wife another for it, which the friend did, but his check was post-dated. The testator's check was paid before the testator's death to his friend, who, after that event, gave to the widow a check not post-dated for the other. *Held*, that the transaction constituted a good *donatio mortis causâ*. *Boutts v. Ellis*, xxxi. 174.

4. *Delivery of evidence of debt, with wish to have debt cancelled.* A lent B 500*l.* in October, 1843, on which occasion B wrote and signed the following document: "Received of A 500*l.*, to bear interest at 4*l.* per cent.," and gave it to A. In June, 1845, A being dangerously ill, gave the document to her servant, with an expression to the effect that she wished the debt to be cancelled. Ten days after this delivery, A died. *Held*, that this was a *donatio mortis causâ* in favor of B. Gifts of this nature have not been abolished by the last Wills Act. *Moore v. Darton*, vii. 134.

5. A *donatio mortis causâ* leaves the whole title in the donor, unless the event occurs which is to divest him. *Staniland v. Willott*, xii. 42.

DOWER.

1. *Election of widow.* A testator gave certain legacies out of his personal estate, and the residue thereof, together with the proceeds to be derived from the sale of his freehold and leasehold estate, he directed to be divided into four parts; one fourth he gave to his wife and the other three fourths to certain other relations. Amongst other legacies, sums of money were given in unequal amounts to his wife and the other devisees. The testator, after the date of his will, had leased parts of his estates for terms of years, with an option to the lessees to purchase, and had permitted one lessee to erect buildings, which had been done, and the estate was thereby greatly improved. *Held*, that the widow of the testator was not to be put to her election, but was entitled to dower, as well as to the benefits given her by the will, and that she would take her dower according to the existing value of the estate, since the acts by which the value of the property had been altered were not her acts. *Gibson v. Gibson*, xvii. 349.

2. Principles which govern the doctrine of election stated. *Id.*

3. *Equitable bar of dower.* Equitable bar of dower in a court (of equity) depends entirely upon the doctrine of contract; and an adult lady may agree to take any consideration or security she pleases, and she takes it with all its defects. *Dyke v. Rendall*, xiii. 404.

4. *Declaration in dower—Damages from death of husband—Demand.* On a plea of *tot tempus prius* to a declaration in dower under the statute of Merton, replication of a demand and refusal to render dower before the writ sued out, rejoinder traversing the demand, and issue thereon found for the demandant, the demandant is entitled to damages from the death of her husband, and not from the date of the demand only. Dower may be demanded by another person on behalf of the widow; and a demand in the presence of witnesses is not necessary. *Watson v. Watson*, i. 371.

DURESS.

1. *Money paid to recover goods wrongfully detained.* Where a sum of money is paid simply for obtaining possession of goods which are wrongfully detained, that money can be recovered back, for it is not a voluntary payment. *Oates v. Hudson*, v. 469.

2. *Debtor under arrest, arrangement with creditor by.* Where a debtor who is under arrest gives to the creditor, as the consideration for his discharge, a warrant of attorney for the whole amount of the debt in respect of which he is arrested, together with sums justly due from him to the creditor on other accounts, the fact of such warrant being given while he is under arrest will not be a ground for the interference of the court, if the arrangement has been entered into by him deliberately, advisedly, and with full knowledge of the circumstances. That one of the debts for which such warrant is given is barred by the statute of limitations will make no difference: *Richards v. Curlewis*, xxxi. 419.

EASEMENT.

I. WHAT IS AN EASEMENT; ACQUIREMENT AND LOSS OF.

II. PARTY WALLS; ADJACENT PROPRIETORS.

III. ANCIENT LIGHTS.

IV. RIPARIAN PROPRIETORS.

V. RIGHT TO LAY PIPES; WATERCOURSE.

I. *What is an Easement; Acquisition and Loss of.*

1. *Right of inhabitants of township to take water from a well on private premises—Custom.* A right claimed by the inhabitants of a township to enter upon the land of a private person and take water from a well therein for domestic purposes, is an easement and not a *profit à prendre*, and may, therefore, properly be claimed by custom. *Owens v. Wynne*, xxx. 360.

2. As to the distinction between an easement and a *profit à prendre*, see *Bland v. Lipscombe*, xxx. 189.

3. *Agreement to grant an easement—Use of way.* An agreement to grant an easement, such as the right to use a certain way, to an incorporated body need not be by deed, and may be permanent, though it is to the company only, and not to the company and their successors. *The Great Northern Railway Co. v. The Manchester, Sheffield, &c. Railway Co.* x. 11.

4. *Deed of an easement in a watercourse.* By a deed between A, owner of Greenacre, and B, owner of Blackacre, it was agreed that A should have during the first ten days of every month, for the purpose of irrigation, all the water of a stream which flowed through Greenacre into Blackacre, and that at all other times the water should be under the control and at the disposal of B, his heirs and assigns, and be allowed to flow in a free and uninterrupted course towards and into Blackacre, through a channel therein particularly described; and that the owner of Greenacre should cleanse and repair the said channel, with liberty to B, his heirs, &c., to do so on his default. *Held*, that this deed operated as a grant to B, of an easement of the watercourse therein described at all times, except the first ten days of each month, and that he thereby acquired a right in respect of that channel, and that an alteration of this channel was an injury to his right, in respect of which B might maintain an action, although no actual damage had occurred. *Held*, also, that a declaration describing the right as an easement to which the plaintiff was entitled by reason of his possession of Blackacre, without referring to the deed, was sufficient. *Northam v. Hurley*, xviii. 164.

5. *Inclosure Act, construction of—Right to carry coals over a railway.* An inclosure

act reserved to the lord of the manor his rights to mines and minerals in certain lands, and also liberty to make ways along certain commons, and to do every act then, or thereafter, in use for working and carrying away the mines and minerals within and under the said commons, and also for carrying the coals and produce of any other mines and minerals from or under any other lands. *Held*, that this gave the lord power to convey coke along a railway, which he had made on the commons, coke being a produce of a mine, and the word "other" meaning not other than coals, but other than the mines and minerals mentioned in the former clause. *Bowes v. Ravensworth*, xxix. 247.

6. *Interruption of enjoyment—Evidence.* Although an interruption in the enjoyment of an easement for a less period than a whole year does not prevent altogether the operation of sect. 2 of stat 2 & 3 Will. IV. c. 71, instances of such interruption are material for the consideration of the jury, on the issue whether the enjoyment has been of right. *Eaton v. The Swansea Waterworks Co.* v. 340.

7. *Footway and packhorse road.* Case for obstructing a carriage and footway. Plea, traversing the right of way. The plaintiff proved enjoyment of a footway and packhorse road for more than twenty years, but forty years ago there had been no carts in the district, and from June, 1831, to Lady-day, 1846, the servient tenement had been held under two successive leases for years, exceeding three years. The enjoyment of the right commenced before the granting of the first lease, and the claim was not resisted by the reversioner within three years after the determination of the term granted by the last lease. *Held*, that there was evidence for the jury of the right as claimed. *Palk v. Shinner*, xvi. 112.

8. *Enjoyment for twenty years.* Sect. 8 of stat. 2 & 3 Will. IV. c. 71, which excludes the time of enjoyment during a lease exceeding three years in the computation of the period of forty years, does not apply where the claim is founded on enjoyment for twenty years only; and if sect. 8 could be applied to that case, the condition imposed by it, that the claim should be resisted by the reversioner within three years after the determination of the term, must be applied also. *Ib.*

9. *Nonuser—Abandonment.* Nonuser will not amount to an abandonment of a right of way unless the circumstances show an intention to abandon the right. *Ward v. Ward*, xiv. 413, and note.

II. Party Walls; Adjacent Proprietors.

1. *Party walls—Right of support.* Where the owner of land builds houses upon it, adjoining each other so as to require mutual support; there is, either by a presumed grant, or by a presumed reservation, a right to such mutual support, and such right is not affected by subsequent subdivision of the property. *Richards v. Rose*, xxiv. 406.

2. A, the owner in fee, demised land on a building lease to B, who erected thereon two houses adjoining each other. B subsequently underleased to C, who mortgaged the houses, and the assignee of the mortgage, under a power of sale, sold one house to the plaintiff, and afterwards sold the other to the defendant. *Held*, that the plaintiff could maintain an action against the defendant for excavating, under his own house, and removing his own soil, whereby the plaintiff's house was deprived of support, and sank. *Ib.*

3. *Adjacent proprietors—Withdrawal of stratum—No present damages.* The withdrawal of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action, as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. *Nicklin v. Williams*, xxvi. 549.

4. *Mines—Owner of adjoining soil—Support.* A declaration in case by reversioners stated that certain buildings and closes of land were in the occupation of A and B as

tenants to the plaintiffs, the reversion belonging to them. That the defendant negligently, and without leaving proper support, worked certain mines near and contiguous to the said premises, and dug minerals out of the said mines, whereby large portions of the buildings became injured, and the ground on which the building stood and the said closes swagged and gave way. *Held*, on motion in arrest of judgment, that the declaration was good; that, as it did not appear that the soil in which the mines were belonged to the defendant, or that the defendant had all the right to get the mines that the owner of the adjoining soil had, the defendant was *prima facie* a wrongdoer, and that it was unnecessary to aver in the declaration that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked. *Jeffries v. Williams*, i. 433.

III. *Ancient Lights.*

1. *Ancient lights—Alteration of premises—Enlargement of windows.* Where a party who has a right to the access of light and air through certain ancient windows makes an alteration in the size of his windows, so as to exceed the limits of his ancient right, he thereby acquires nothing in addition to his former right; and if the excess cannot be obstructed by his neighbor in the exercise of his lawful rights on his own land, without at the same time obstructing the ancient right, such party must be considered as having by his own act suspended and lost for the time his former right. *Quære*, whether the former right is entirely destroyed by the alteration? *Renshaw v. Bean*, x. 417.

2. The plaintiff, owner of a building in which there were ancient windows, rebuilt it within twenty years from time of suit, raised it a story, put windows into the new story, and altered the position of and enlarged the lower windows, so that portions of them occupied spaces where theretofore there had been no aperture. The defendant, who occupied a house separated from the plaintiff's by a passage way, or court, belonging to the plaintiff, rebuilt and raised his premises within twenty years after the rebuilding of the plaintiff's house, and thereby obstructed the windows in the upper story of the plaintiff's house, as well as those in the lower stories. *Held*, that the defendant was justified in so obstructing the new lights, and that the plaintiff could not complain that as a necessary consequence the privileged windows were also darkened. *Ib.*

3. *Payment of rent not evidence of interruption.* The mere payment of rent for the enjoyment of lights is no evidence of an interruption of said enjoyment. *The Plasterers Co. v. The Parish Clerks Co.* vi. 481.

IV. *Riparian Proprietors.*

1. *Right of the crown to the sea-shore.* The right of the crown to the sea-shore is limited by the line reached by the medium high tides between the spring and neap, in each quarter of a lunar revolution, during the whole year. The sea-shore is not "capable of ordinary cultivation or occupation," or "generally dry and manurable." *The Attorney-General v. Chambers*, xxvii. 242.

2. *Flowing land—Irrigation—Mill owner.* Flowing water, air, and light are bestowed by Providence for the common benefit of men; and so long as the reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie. A riparian proprietor has a right to irrigate his land by water from the stream, provided he does not interfere with the rights of other riparian proprietors; and whether his use of the stream for this purpose be reasonable and permitted, or not, depends on the circumstances of each case. Where an action on the case, founded on such an irrigation,

was brought against a riparian proprietor by another having a mill lower down on the stream, it appearing that the irrigation took place only at intermittent periods, when the river was full, and that no damage was done thereby to the working of the mill, and that the diminution of the water was not perceptible to the eye, it was held, that this was a reasonable use of the water by the defendant, for which no action could be maintained. *Embrey v. Owen*, iv. 466.

V. Right to lay Pipes ; Watercourse.

1. *Right to lay waterpipes.* A water company laid pipes in a land tax division under a statutory power. Held, that the right of the company was in the nature of an easement, and could not be treated as "land" or a "hereditament," under the Land Tax Acts. *The Chelsea Waterworks Co. v. Bowley*, vii. 376. See, also, *Regina v. The East London Waterworks Co.* ix. 271.

2. As to the right of the Dover Gas Light Company, under their charter 3 Geo. IV. c. 15, to lay down additional pipes, see *The Dover Gas Light Co. v. The Mayor, &c. of Dover*, xxxi. 514.

3. *Watercourse.* E. gave a body of subscribers permission by parol to conduct a watercourse through his land. The easement was enjoyed for nine years. There was a disagreement as to the price to be paid, and E. diverted the watercourse into the old channel. A bill was filed by several of the subscribers. Held, upon its being amended, and made on behalf of the plaintiffs, and others whose names and residences were unknown, being subscribers to the fund, that the plaintiffs were entitled to the use of the watercourse passing under the lands of E.; and an injunction was granted to restrain the defendant from preventing, obstructing, or interfering with the flow of water, or with the plaintiffs' use of the watercourse. *Devonshire v. Elgin*, vii. 39.

See, also, WAY, MINES, WATERCOURSE.

ECCLESIASTICAL LAW.

1. *Sequestration to compel residence—Right to hearing.* A writ of sequestration issued, under the stat. 1 & 2 Vict. c. 106, to compel a clergyman to reside on his benefice, is not merely in the nature of a distress to compel residence, but is also a penal proceeding against him. The bishop, therefore, ought to give the clergyman an opportunity of being heard before directing the sequestration. So, if, in obedience to a monition issued by the bishop, a clergyman goes into residence and again ceases to reside, the bishop may serve him with an order to reside; but if that order be disobeyed, the bishop is not justified in directing a sequestration at once, without giving him an opportunity of being heard. *Bonaker v. Evans*, ii. 234.

2. *Monition in such case.* By the 1 & 2 Vict. c. 106, s. 54, the bishop, in case of non-residence of a beneficed clergyman within his diocese, is enabled to issue a monition requiring the said spiritual person to reside, and to make a return to the monition; and if no return, or an unsatisfactory return be made, then to issue an order to him to reside; and in case of non-compliance with such order, to sequester the benefice; and if the benefice continues "for the space of one whole year," under sequestration for non-residence, such benefice shall be deemed void, and the patron may appoint thereto. Held, that the monition there mentioned, is not, within the meaning of the act, a judicial decision, but only in the nature of process, calling upon the party to show cause why an order to reside should not issue; and that, consequently, no citation or summons to show cause why the monition should not issue, is necessary before the monition, and that the phrase "for the space of one whole year" means one whole year from the day on which the sequestration issued, and not a year commencing on the 1st January, and ending on the 31st December, both inclusive, as defined in sect. 130. *Bartlett v. Kirwood*, xxii. 277.

3. *Writ of sequestration—Death of bishop—Practice.* A rectory in the diocese of B.

was subsequently annexed to the diocese of S. The plaintiff's writ of sequestration was accepted by the bishop of S., since deceased, and sequestrators were appointed, and the writ remained in the same office, in the diocese of B., by the permission of the former bishop of S. *Held*, that on the death of a bishop, to whom a writ of sequestration has been directed, the present bishop is bound to return the writ of the late bishop. *Semble*, that a writ of sequestration directed to the bishop of B. would have been good, but that, under the circumstances of this case, it was too late for the bishop of S. to object to the form of the writ. *Semble*, that the 10 & 11 Vict. c. 98, which provides for the saving of the powers of the ecclesiastical court, does not apply to the act of issuing a sequestration on a *levari facias de bonis ecclesiasticis* by a bishop, in which he acts as ecclesiastical sheriff, who is a mere ministerial officer *Phelps v. St. John*, xxix. 420.

4. A writ of sequestration is a continuing execution, and continues in force until the debt and costs are realized, without reference to the time at which the writ is nominally returned, or until the bishop is ruled to return it. *Ib.*

5. *Charge of erroneous doctrine—Jurisdiction of bishop.* Upon a charge preferred against a clerk in orders of having affirmed and maintained doctrines repugnant to the thirty-nine articles, the bishop of the diocese has no power of proceeding, personally and without process in court, to hear and adjudicate upon such charge, under the 13 Eliz. c. 12, s. 2. The proceedings in such a case must be instituted and conducted as required by the Church Discipline Act, 3 & 4 Vict. c. 86. *Ex parte Denison*, xxviii. 240.

6. *Church discipline act—Commission of inquiry.* A charge of erroneous doctrine was formally presented to the Bishop of Bath and Wells against the Archdeacon of Taunton, who was also vicar of East Brent, of which living the bishop was patron, with a request that the bishop would send the charge for decision in the arches court by letters of request. The bishop sent a copy of the charge to the archdeacon, and called upon him, by letter, in which he expressed his view of the charge, to give such explanations of his doctrine as might satisfy him, (the bishop) that, with a due vigilance over the purity of his teaching, he could abstain from granting letters of request. The archdeacon, in compliance with this requirement, sent a statement of his doctrine and in reply, the bishop wrote another letter, in which, after stating that he rejoiced to find that the archdeacon reaffirmed all the doctrinal statements of the Church of England, and agreed to the positions laid down in his, the bishop's former letter, but also expressing his regret as to the tenor of certain speculations in the archdeacon's sermons, and the error of requiring assent to them as the dogmatic teaching of the church, he proceeded to say: "The question, then, before me, is this: are these errors, as I esteem them, of so grave a character as to render it my duty to allow my office to be used to promote an attempt to eject you from the ministry of the English Church? Now, as to the first of these, though I esteem your opinion erroneous, still, it does not appear to me to be one which the church has censured. . . . And I do not consider it my duty to seek in the ecclesiastical courts for an authoritative decision thereon. . . . As to the second error, I see, with much pleasure, from your statement to me, that you admit that it is not for you to say what statements of doctrine may or may not justify exclusion from the ministry; and I trust, therefore, that, without my having recourse to any further steps, I may rest on the assurance that you will herein submit to my judgment when I admonish you, as I now do." *Held*, that there had been no adjudication by the bishop upon the charge preferred against the archdeacon, so as to make the issuing of a commission to inquire into the charge by the Archbishop of Canterbury, under the power given by sect. 24, of the Church Discipline Act, an excess of jurisdiction. *Ib.*

7. *Church discipline act—Suspension—Right of bishop to require certificate of good behavior.* It was *held*, that, under the Church Discipline Act, a bishop had a right to annex to a sentence of suspension the condition that the person suspended should,

at the expiration of the period, procure certain certificates of good behavior. *Ex parte Rose*, xii. 480.

8. *Church discipline act—Practice—Limitation of time for instituting proceedings.* To a citation against a clerk in holy orders, under the Church Discipline Act, the clerk appeared under protest, on several grounds; first, that the 3d section limited the number of parties complaining to one; secondly, that the charges were laid between March, 1850, and June, 1851, and the letters of request were not sent to the court of appeal till after the 22d May, 1852; thirdly, that the bishop of the diocese could not substitute himself for the original promoters; fourthly, that the offences being charged between March, 1850, and June, 1851, and the decree being dated September, 1852, the offences may have been committed more than two years before the institution of the suit in the court of arches, the proceedings there being viewed as original proceedings. *Held*, that the first, second, and third objections failed, but that the fourth was a good objection; and the clerk was dismissed. *The Bishop of Hereford v. Thompson*, xxiv. 610.

9. *Church rates, subtraction of—Practice.* A libel, in a cause of subtraction of church rates, pleaded that the parish church, &c., were in want of repair, and that a monition was granted, calling on the church-wardens to take the necessary steps to procure the repairs, &c.; that a vestry was convened, and the majority there present in effect voted against the rate; whereupon, the chairman declared such vote illegal, and the minority passed a resolution in favor of the rate. No objection was taken in vestry to any of the items for which the rate was levied, but, in opposing the admission of the libel, counsel took objection to several of those items as invalidating the rate. *Held*, that the libel was admissible, and that, if the items were illegal, they should have been objected to in vestry. *Cordy v. Bentley*, v. 590.

10. *Suspension of vicar—Appointment of parish clerk by stipendiary curate, to hold office during suspension.* The vicar of a parish had been suspended by the diocesan *ab officio et beneficio* for two years, and until a satisfactory certificate of his good conduct should be obtained, and the diocesan, by the ordinary form of license, appointed K. during the suspension, "to perform the office of stipendiary curate in the parish in reading the Common Prayer, and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer, and the canons and constitutions in that behalf lawfully established." Whilst the suspension continued, the office of parish clerk became vacant, and the plaintiff was appointed by K. to hold the said office during the continuance of the suspension. *Held*, in an action to recover certain fees of office received by the defendant, who had been subsequently appointed to the same office by the vicar, and had first obtained a license from the bishop, that K. as minister of the parish for the time being, within the terms of the 91st canon of 1603, had the right to appoint to the office, and that the plaintiff was therefore entitled to recover in the action. And *semble*, that the appointment of the plaintiff was in point of form valid, though to hold the office only during the suspension, as the tenure of the office was not thereby changed. *Pindar v. Barr*, xxviii. 235.

11. *Clergyman's opinion as to cause of parishioner's death—Coroner's order—Appeal.* The mere opinion of a clergyman as to the cause of death of a parishioner, upon whose body a jury had returned a verdict of "found drowned," does not justify him in refusing to comply with the coroner's order for burial. The bishop of the diocese and patron of the preferment has power, by the 8 & 4 Vict. c. 86, s. 24, to send the case by letters of request to the court of appeal. If the clergyman's parish is not rightly described in the citation, the objection should be raised by plea, setting forth the wrong description. *Cooper v. Dodd*, ii. 583.

12. *Proctor—Practice in ecclesiastical court—Registrar.* The 54 Geo. III. c. 68, s. 9, prohibits a proctor from permitting or suffering "his name to be in any manner used in any suit, the prosecution or defence of which shall appertain to the office of a

proctor, or in obtaining probates of will, letters of administration, or marriage licenses" for the benefit of any other person. The 10th section enacts, "that in case any person shall, in his own name, or in the name of any other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted and enrolled, he shall forfeit 50*l.* Held, that, construing these two sections together, the acts intended by the latter section to be prohibited were those which were legally incident to the office of a proctor; not those which, though usually performed by him, were not of right incident to his office. And, therefore, that a registrar of an ecclesiastical court, who, in cases where there was no testamentary contest, had prepared the documents, and done the acts necessary for obtaining letters testamentary, and probates of wills, and other similar matters, had not thereby subjected himself to the penalty imposed by the 10th section. On the trial of an action brought on this statute, evidence from certain ecclesiastical courts was tendered, to show that it was customary for the registrar to do these acts, and to receive fees on account of doing them. Held, that such evidence was properly admitted. *Stephenson v. Higginson*, xviii. 50.

13. *Doctrine not repugnant to doctrine of Church of England.* The doctrines, that baptism is a sacrament generally necessary to salvation, but that the grace of regeneration does not so necessarily accompany the act of baptism that regeneration invariably takes place in baptism; that baptism is an effectual sign of grace, by which God works invisibly in us, but only in such as worthily receive it, in whom alone it has a wholesome effect; that without reference to the qualification of the recipient, baptism is not in itself an effectual sign of grace; that infants baptized, and dying before actual sin, are certainly saved, but that in no case is regeneration in baptism unconditional,—are not contrary or repugnant to the declared doctrine of the Church of England. *Gorham v. The Bishop of Exeter*, i. 19.

14. *Doctrine—Efficacy of infant baptism.* A clerk, in his examination previous to institution by the diocesan, stated that he did not hold the doctrine that every infant is absolutely and unconditionally regenerated by the Holy Spirit in and by water baptism duly administered; and the diocesan refused to institute him by reason of his unsoundness in doctrine. Held, that the diocesan was justified in so refusing. *Gorham v. The Bishop of Exeter*, i. 601.

15. *Sums paid to ecclesiastical commissioners.* *Semble*, all sums paid into the hands of the Ecclesiastical Commissioners, under the 6 Will. IV. c. 19, and 6 & 7 Will. IV. c. 77, continue subject to the same fees and stipends in respect of any office as the same were subject to before the passing of the acts. *Temple v. The Ecclesiastical Commissioners for England*, xxiii. 555.

16. *Union of benefices.* The union of two or more benefices cannot be effected without the assent of the patrons. The bishop of N., by an instrument under his episcopal seal, addressed to A, as perpetual curate of W. S. and rector of C., which recited that good causes had been alleged, united the rectory with the perpetual curacy during the incumbency of A, in the latter, provided that A should keep a sufficient curate to instruct and teach the people of the parish in which he should not reside. Held, that the legal effect of this instrument was not to create a union of the two benefices in the proper sense of the term, so that residence in the one produced a non-residence in the other of the two benefices; and that the bishop had jurisdiction, under the 1 & 2 Vict. c. 106, to appoint a curate for the parish in which A did not *de facto* reside. *Daniel v. Morton*, ii. 205.

17. *Refusal to pay arrears of curate's stipend—Sequestration.* A monition issued by the bishop recited that a complaint had been made by the curate that arrears of stipend were due to him, which A had refused to pay, and that A and the curate having appeared before him, the said complaint was duly proved, and required A to

pay the said arrears. Default being made in payment, a sequestration issued. *Held*, that A could not, after the sequestration issued, object that he had not been guilty of a refusal to pay the stipend, or that he had no notice of the curate being appointed by the bishop. *Ib.*

18. *Ecclesiastical leases—Purchase by railway company—Accumulation.* Where land belonging to a dean and chapter, but subject to a lease, was purchased by a railway company, and the money paid into court, it was *held*, that the dean and chapter were only entitled, during the continuance of the lease, to so much of the dividends of the purchase-money as would equal the amount of rent, and the rest of the dividends were to be accumulated till the expiration of the lease. *Ex parte The Dean and Chapter of Christ Church*, xxiii. 171.

19. *Rescript authorizing husband and wife to live separate.* American subjects, Protestants, domiciled in the United States, were there married. They were afterwards admitted at Rome to the Catholic church, and the husband, on petition, was permitted to take orders. The rescript to the petition authorized the parties to live separate; and in compliance therewith the wife took vows of chastity. The parties afterwards residing in England, the husband there promoted a suit for restitution of conjugal rights; and the wife pleaded the rescript as tantamount to a sentence of separation. *Held*, first, that the rescript merely authorized husband and wife to live separate, and did not amount to a sentence of separation. Secondly, that the *status* of parties, domiciled subjects of, and married in, America, was not so affected by a sentence pronounced at, and founded on a rule of law peculiar to Rome, the persons being then resident at Rome, and coming subsequently to England, that an English forum would, by reason of such sentence, refuse to entertain questions arising out of the married state of such persons. *Connelly v. Connelly*, ii. 570.

20. *Pew—Prescriptive right.* Where a pew is held by faculty or prescription, the ordinary cannot interfere. *Knapp v. The Parishioners of St. Mary*, v. 562.

21. A faculty for altering the boundaries of a churchyard, and diverting part of the consecrated ground to secular purposes, refused. *The Rector and Church-wardens of St. Johns v. The Parishioners*, xxiv. 595.

22. A license may be granted to a parish to build a vestry-room on consecrated ground. *Campbell v. The Parishioners of Paddington*, xxiv. 597.

EJECTMENT.

I. WHEN THE ACTION WILL LIE.

II. OF THE DEFENCE.

III. SERVICE OF WRIT, (DECLARATION,) &C.

IV. MESNE PROFITS.

V. MISCELLANEOUS CASES, AND HEREIN OF PRACTICE.

I. When the Action will lie.

1. *Railway Company—Taking land and holding it after time for assessment of damages.* A railway company having complied with the provisions of sect. 85 of 8 Vict. c. 18, entered upon and took land within the prescribed period for exercising their compulsory powers, and continued in possession after that period, without having the compensation assessed and the land conveyed to them. *Held*, that the possession of the company was not unlawful, and that ejectment would not lie against them. *Doe d. Armistead v. The North Staffordshire Railway Co.* iv. 216; *Worsley v. The South Devon Railway Co.* iv. 223.

2. Nor, in such a case, will the railway company be made trespassers, so that ejectment will lie, by a demand of possession. *Doe d. Hudson v. The Leeds and Bradford Railway Co.* vi. 283.

3. *Person claiming under a mortgage*—Stat. 7 Will. IV. and 1 Vict. c. 28. A, being seised in fee of land, leased it to B, who mortgaged it for a term of years. Subsequently the mortgage was paid off, and the mortgagor and the owner of the equity of redemption conveyed all their interests to the person under whom the lessor of the plaintiff claimed. *Held*, that the lessor of the plaintiff was a person claiming under a mortgage within stat. 7 Will. IV. and 1 Vict. c. 28, and might bring ejectment within twenty years after the mortgage was paid off, though after the expiration of twenty years from the payment of rent to the mortgagor, or acknowledgment of title in him by the tenant in possession. *Doe d. Palmer v. Eyre*, vi. 355.

4. *Mortgage—Tenancy at will*. Where the effect of a mortgage deed is to create a tenancy at will only, a demand of possession, without any notice to quit, is sufficient to entitle the mortgagee or his assignee to maintain ejectment. *Doe d. Dixie v. Davies*, viii. 510.

5. *Mortgagee of tolls, &c.* As to the right of a mortgagee of tolls, toll-gates, &c., to maintain ejectment, to recover possession of the toll-gates, &c., &c., see *Doe d. Butt v. Rous*, xvi. 218.

6. *Landlord and tenant—Lease obtained by fraud*. It is no defence to an ejectment by the lessee against the lessor, after a forcible eviction, that the lessee obtained the lease by a fraudulent representation that he was a respectable man and wanted the premises for a respectable business; while he intended to use them and did use them for an illegal and immoral purpose. *Feret v. Hill*, xxvi. 261.

7. *Action to secure land and bank of canal*. Ejectment to recover a portion of the land and banks of the Swansea Canal. In 1779, P. demised the above-mentioned land to M. and Co. for sixty-five years. In 1793, the Swansea Canal Company was formed for making a canal, intended to pass in part through the land in question. In 1797, M. and Co. and the Duke of B. widened a canal made by M. and Co. and extended the same through part of the above land, which canal formed a continuation of the Swansea Canal. The powers for making a portion of the canal which passes through a portion of the lands sought to be recovered were obtained by the Duke of B. and M. and Co. By that act it was enacted, that upon payment or tender of certain sums of money, adjudged by certain commissioners or assessed by juries, for the purchase of any such lands, &c., it should be lawful for the canal company to enter upon such lands, or before such payment or tender by leave of the owners and occupiers, and thereupon such lands shall be vested in such company. The lands sought to be recovered formed part of the lands authorized to be taken by the act. No payment or satisfaction was made or agreed to be made to the owners of the lands, but every thing was done by the Duke of B. with the full consent and approbation, and in accordance with the wishes, of such owners and proprietors. The defendant, in 1835, became the assignee of the Duke of B. One J. C., in 1800, became the purchaser of the said lands, and the interest therein afterwards became vested in the lessors of the plaintiff at the expiration of the lease in 1845. *Held*, that the demise to M. and Co. having terminated, the lessors of the plaintiff were entitled to recover possession of the lands. *Doe d. Patrick v. Beaufort*, iv. 496.

8. *Possession by tenant, when necessary—Elegit*. To entitle a tenant by *elegit* to maintain an action of ejectment for the premises, it is not necessary that the sheriff should have given him possession, in a case where the whole land is taken under the *elegit*. This is only necessary where a moiety of the land is so taken. Per Campbell, C. J. *Hughes v. Lumley*, xxviii. 270.

II. Of the Defence.

1. *Who may defend—Applicant's right of possession—Tenant of boxes at opera house*. Upon an application under sect. 127 of the Common-law Procedure Act, 1852, to be allowed to appear and defend an ejectment in respect of a part of the premises sought to

be recovered, the court will not consider nice questions as to the applicant's right of possession. It is enough if a *prima facie* case be shown by affidavit, stating that the applicant is in possession by himself or his tenant, and thus it was held in the case of the tenant for years of boxes in an opera house, who had entered into possession of them and furnished them. *Croft v. Lumley*, xxix. 78.

2. *Tenant by elegit*. But where the applicant was a tenant by *elegit*, who had recovered the premises in ejectment against the defendant, but had never been put into actual possession, the court declined to permit him to come in and defend. *Ib.*

3. *When landlord is entitled of right to defend*. Under the new form of the action of ejectment established by the 15 & 16 Vict. c. 76, a landlord who can satisfy the court or a judge that he is in possession of the land, either by himself or his tenant, is entitled to appear and defend the action as matter of right; and it is not competent to the court or a judge to impose on him any condition, such as the giving security for costs; and this, even though he be a foreigner, residing out of the jurisdiction of the court. Per Pollock, C. B., Platt, B., and Martin, B.; *dissentiente*, Parke, B. *Butler v. Meredith*, xxix. 507.

4. *Equitable defence—Practice*. There is now, since the Common-law Procedure Act, 1852, no plea to an action of ejectment, and therefore the defendant in such an action cannot plead an equitable defence; notwithstanding the 83d section of the Common-law Procedure Act, 1854, enables a defendant "in any cause" to plead the facts which entitle him to relief in equity by way of defence. If, however, a plea be pleaded in such action, the plaintiff ought not to demur, as the court will not give any judgment thereon. *Semble*, the plaintiff should make up the issue in the form given by the act, without noticing the plea. *Quære*, if on the trial of an action of ejectment the defendant can give in evidence any equitable defence? *Neave v. Avery*, xxx. 471.

III. Service of Writ, (Declaration,) &c.

1. *Direction of writ—Vacant possession*. In ejectment for a vacant possession, it is sufficient to direct the writ to the assignees and personal representatives of S. B., deceased, the last occupier, and paste it on the premises. *Harrington v. Bytham*, xxviii. 443.

2. *Affidavit of service*. *Quære*, whether the affidavit (required by the 112th rule of Hilary term, 1853,) of service of the writ of ejectment, under the 170th section of the Common-law Procedure Act, 15 & 16 Vict. c. 76, should show (as under the old practice) that the nature and object of the service were explained to the party served. At all events, an irregularity in that respect is waived by a subsequent attornment. *Edwards v. Griffith*, xxix. 321.

3. *Service of declaration and notice in ejectment upon the attorney of the tenant, the premises being abandoned*. *Doe d. Laundry v. Roe*, xxii. 449.

4. *Service on one of two joint tenants*. Service of a declaration and notice in ejectment, upon one of the two joint tenants, the notice being addressed to that one only, is not sufficient. *Doe d. Braby v. Roe*, xii. 517.

5. *Writ of possession*. Sect. 2 of stat. 3 & 4 Will. IV. c. 67, which enacts, "that all writs of execution may be made returnable immediately after execution thereof," applies to ejectment. *Doe d. Howson v. Roe*, xi. 448.

IV. Mesne Profits.

1. *Mesne profits*. In ejectment by landlord against tenant, under 15 & 16 Vict. c. 76, s. 214, mesne profits may be recovered, although not specially claimed in the writ or issue. *Smith v. Telt*, xxiv. 483.

2. *Defendant in ejectment cannot afterwards deny that he is landlord*. A person who has been defendant in an action of ejectment, under the 11 Geo. II. c. 19, upon enter-

ing into the consent rule as mortgagee and landlord, is precluded by the consent rule from denying that he is landlord in a subsequent action for the mesne profits. *Doe v. Challis*, vi. 249.

V. Miscellaneous Cases, and herein of Practice.

1. *Agreement to purchase, an acknowledgment of title.* Defendant being in possession of premises, entered into an agreement for the purchase of them. The purchase not being completed, the vendor brought ejectment. Held, that the agreement was an acknowledgment that the title was in the vendor. *Doe d. Bourne v. Burton*, vi. 325.

2. *Non-joinder of plaintiffs.* Where, in an action of ejectment by tenants in common, it appears that other parties, whose number is not ascertained, are also jointly interested with the lessors of the plaintiff, the lessors of the plaintiff are not entitled to a general verdict, and the jury are obliged to say to what portion of the premises they are entitled. *Doe d. Hellyer v. King*, v. 517.

3. *Judgment irregularly obtained.* When a judgment in ejectment has been irregularly obtained, and possession has been delivered under it to the lessor of the plaintiff, the court will grant a rule upon him for restoring the possession. But if the lessor has absconded, a writ of restitution is awarded. *Whittington d. Whittington v. Hards*, v. 317.

4. *Practice—Amendment.* The declaration in ejectment stated a joint demise to A, and B, his wife. Proof, that A was devisee in trust for the sole use of B. Held, that the judge had no power, under 3 & 4 Will. IV. c. 42, s. 23, to amend the record by striking out the name of B in the demise. *Doe d. Wilton v. Beck*, xiv. 255.

5. *Order for particulars.* The court will only under special circumstances grant an order for particulars of the premises sought to be recovered in an action of ejectment. *Doe d. Saxton v. Turner*, xx. 300.

6. *Execution on warrant of attorney—Usury.* In an action of ejectment, by an execution creditor claiming under a writ of *elegit* executed upon a judgment on a warrant of attorney, it cannot be set up as a defence to the action that the warrant of attorney and judgment were given to secure a loan at more than 5l. per cent. interest, and being a charge on land were rendered invalid by the usury laws, and, therefore, that the plaintiff's title by *elegit* could not be supported. Such objection, if available at all, should be made in a summary application to the court before trial. Supposing the judgment to have been altogether invalidated by the usury laws, or the execution of it, so far as affected land, rendered improper, the right course of proceeding would be either to move to set aside the warrant of attorney and judgment or the writ of *elegit*. *Hughes v. Lumley*, xxviii. 270.

7. *Rule nisi for judgment—Delay.* The court refused a rule nisi for judgment against the casual ejector in a country cause, where two terms had been allowed to elapse since the service of the declaration, by reason of pending negotiations as to a settlement of the action; it not being shown that the tenant had taken advantage of the delay to avoid fresh service. *Doe d. Panton v. Roe*, x. 509.

8. *Common-law Procedure Act.* Where the declaration in ejectment was served before the passage of the Common-law Procedure Act, the action may be proceeded with, notwithstanding that statute. *Doe d. Smith v. Roe*, xvi. 504.

See, also, *Doe d. Hudson v. The Leeds and Bradford Railway Co.* vi. 283; *Doe d. Davies v. Davies*, vi. 301; *Matthew v. Osborne*, xx. 238.

ELECTIONS.

- I. VOTER, QUALIFICATION OF.
- II. DESCRIPTION IN VOTING PAPERS.
- III. NOTICE OF OBJECTION TO VOTER.
- IV. MISCELLANEOUS CASES.

I. Voter, Qualification of.

1. *40s. freehold.* The appellant claimed, with twenty-nine other persons, to vote in respect of certain freehold premises which were let at a gross rent. During the six preceding years the landlords had voluntarily paid for repairs. *Held*, that the question whether the annual value of the freehold was reduced by such payments below 60*l.*, depended upon the rent which could be obtained if the tenant had to keep the premises in repair; and that the revising barrister, having found that the rent which could be obtained in that case would be less than 60*l.*, the several persons in whom the freehold was vested were not entitled to vote. *Hamilton v. Bass*, xiv. 264.

2. The appellant claimed to vote in respect of a freehold which he let for 40*s.* a year, he agreeing to pay the usual tenant's rates. If he had not so agreed, he could only have obtained 40*s.*, minus the amount of those rates. *Held*, that the appellant had not an estate of the clear yearly value of 40*s.*, and, therefore, that he was not entitled to vote. *Moorhouse v. Gilbertson*, xxiv. 309.

3. *Mortgagor in possession—40s. freehold.* A mortgagor of freehold premises in possession of the rents and profits is not entitled to be registered as a county voter under 6 & 7 Vict. c. 18, s. 74, unless he receives therefrom 40*s.* by the year, after deducting money paid annually by him by way of interest on a sum secured by a mortgage which contains no mention of interest, the time for repayment of the principal sum mentioned in such mortgage having expired; such annual payment being, therefore, in fact a consideration for remaining in possession. *Lee v. Hutchinson*, i. 329.

4. *40s. freehold—Building society—Mortgage.* The claimant, a member of a building society, purchased land of the yearly value of 6*l.* and mortgaged it to the trustees of the society for the amount of the purchase-money, which they had advanced to him. He was also a holder of three shares in the society. By the rules of the society he was bound to pay 1*s.* 6*d.* weekly for each share (11*l.* 14*s.* per annum.) And by the mortgage, which was in accordance with the rules of the society, power was reserved to the trustees, on neglect or refusal to observe any of the regulations, &c., to sell the premises, &c. Of the 11*l.* 14*s.* per annum, 2*l.* 16*s.* was appropriated to the payment of interest on the money still due upon the mortgage, and for incidental expenses, and the remainder was taken in part discharge of the mortgage debt. *Held*, that the whole 11*l.* 14*s.* must be deducted from the annual value of the estate, and therefore that the claimant had not an estate of the value of 40*s.* by the year, within the meaning of the 8 Hen. VI. c. 7, and the 6 & 7 Vict. c. 18, s. 74, and was not entitled to a vote. *Beamish v. The Overseers of Stoke*, vii. 485.

5. *40s. freehold—Apportionment of mortgage interest.* Mortgage interest may be apportioned for the purpose of ascertaining whether the freehold is of the annual value of 40*s.* above all charges; and, therefore, a freeholder is entitled to be registered as a voter for the county in respect of freehold land in the county of the annual value of 5*l.*, although such land is, with other land of the annual value of 50*l.* subject to a mortgage for 300*l.*, the interest of which is 15*l.* a year. *Moore v. The Overseers of Crisbrooke*, xiv. 295.

6. *Criterion of value of freehold.* The criterion of value of a freehold, for the purpose of voting, under 8 Hen. VI. c. 7, is not the annual amount which the land actually produces, but what it reasonably may produce. *Astbury v. Henderson*, xxviii. 350.

7. Therefore, where A bought two pieces of land fit for building purposes from a freehold land society, for 150*l.*, and they were conveyed to him in fee, and he had been offered a ground-rent of 15*l.* a year for them, and it appeared they were worth 15*l.* a year for building, but, if let to a tenant for any other purpose, they would not produce a rent of 40*s.* a year—*held*, that A. was entitled to vote, although his land in its existing state was not worth 40*s.* a year. *Ib.*

8. *Qualification in voting for coroners.* The qualification necessary to give a vote in elections of coroners, must be a legal interest in lands amounting to a freehold. A right of common in gross is insufficient. *Regina v. Day*, xxvi. 79.

9. *Poor-rate—Burgess roll.* To entitle a rate payer to be upon the burgess roll, it is sufficient if it can be shown that he was intended to be rated to the relief of the poor, although there may be a mistake in his name as entered upon the rate. *Regina v. Gregory*, xviii. 239.

10. *Freehold estates—Vote for members of parliament.* The 8 & 9 Vict. c. 6, an Allotment Act, empowers deputies appointed under its provisions to make small allotments of land to resident freemen of L., to be held by them so long as they shall be willing to hold the same, and pay the rent, and conform to certain regulations. All the land is vested in the deputies as trustees; and they have the power to sell with the concurrence of a majority of a meeting of freemen occupiers. *Held*, that the allottees have freehold estates which entitle them to vote for members of parliament as their estate may continue for life, and is not determinable on the mere will of the grantors. *Reeson v. Burton*, xiv. 276.

11. *Payment of taxes.* By 11 & 12 Vict. c. 90, no person is entitled to be registered as a voter, unless, on or before the 20th July, he shall have paid all assessed taxes which have become payable by him previous to the 5th January preceding. By the 43 Geo. III. c. 161, s. 23, the assessed taxes are payable, and are to be paid quarterly, on the 20th of July, the 20th of September, the 20th of December, and the 20th of March. By the 48 Geo. III. c. 141, s. 1, the collectors are directed to collect the assessed taxes, in equal moieties, within twenty-one days after the 10th of October and the 5th of April; but with a proviso that nothing therein contained shall be construed to alter the time when the duties are made payable by the previous act. The quarter's house tax due from the appellant on the 20th of December was not demanded till the 11th of April following, and he did not pay it before the 20th of July. *Held*, that the quarter's assessed taxes, which, by the 43 Geo. III. c. 161, s. 23, became payable on the 20th of December, are taxes which, in the language of the 11 & 12 Vict. c. 90, have become payable before the succeeding 5th of January, although no demand for payment had been previously made; and that, therefore, the appellant was not entitled to be placed on the register. *Ford v. Smedley*, xiv. 280.

12. *Apportionment of rent-charge—County vote.* The owner of freehold land, on which was a rent-charge, granted a part of it in fee, subject to a certain proportion of the rent-charge. The conveyance contained covenants by the grantor to pay, and to indemnify the grantee against the remainder; there was also a power of distress to the grantee over the residue of the land in case he were compelled to pay more than his proportion. The rent-charge was thus fairly apportioned, and the residue of the land was sufficient to meet its proportion. *Held*, that in estimating the value of the grantee's land with reference to the county franchise, the apportioned part only of the rent-charge was to be deducted from the annual value; for that the "charges" to be deducted, under the 8 Hen. VI. c. 7, and the subsequent statutes, were such as were ultimately payable out of the land, and not what were primarily charged upon it. *Barrow v. Buckmaster*, xiv. 299.

13. *Semble*, that in the absence of the covenant of indemnity and power of distress, the same deduction only would be made, the rent-charge being apportionable, at least in equity. *Ib.*

14. *Paying scot and lot.* A, a freeman of the borough of Shrewsbury paying scot

and lot, for upwards of two years last past, and down to the 25th of March, 1851, occupied and resided in a house on the Wyle Cop, within the ancient and present limits of the borough, and since the 25th of March, down to and on the 31st of July, occupied and resided in a house at Coton Hill, without the ancient but within the present limits of the borough. *Held*, a qualified voter. *Jarvis v. Peele*, xiv. 323.

15. *Persons employed in collecting customs.* By the 22 Geo. III. c. 41, s. 1, "No commissioner, &c., or other officer or person whatsoever concerned or employed in the charging, collecting, levying, or managing the customs, or any branch thereof," is to have a vote. An "extra tide-waiter" is a person whose name is on a list, confirmed by the commissioners of customs, of persons liable to be called on to act whenever there may be occasion. He is paid by the job, and makes the declaration required by 8 & 9 Vict. c. 85, s. 10, once for all upon his appointment. *Held*, that such a person is "an officer or person employed in the collecting the customs," and is not entitled to a vote. *Pownall v. Hood*, vii. 489.

16. *Borough-vote—What is a "building."* The premises in respect of which a vote for a borough was claimed, under 2 Will. IV. c. 45, s. 27, consisted of a two-stalled stable built of brick, with another brick building annexed, but of a lower elevation, and to which also a wooden building was annexed, in three compartments, each of which, as well as the two brick buildings, had an opening into the same yard; but there was no internal communication. All three were occupied together under the same landlord, and used by the claimant for a wheelwright's business. *Held*, that this was "a building" within the meaning of the statute. *Pownall v. Dawson*, vii. 492.

17. *Borough franchise—Meaning of "therewith."* The appellant claimed to vote in respect of the occupation of premises described as a "house and garden," and held under the same landlord, at one entire rent. The house alone would not let for 10l., and the garden was separated from it by waste land and a row of buildings. *Held*, that the word "therewith," in the 27th section of the Reform Act had reference to time and not to locality, and that, therefore, the circumstance of the garden being separate from the house did not invalidate the qualification, as the house alone would not have let for 10l. *Collins v. Thomas*, xiv. 284.

II. Description in Voting Papers.

1. *Notice of claim signed with initials only.* Under 5 & 6 Will. IV. c. 76, s. 17, the mayor and assessors might place on the burgess list the name of a person who signed his notice of claim thereof with the initials only of his given names,—there being no dispute about his identity. *Regina v. Hartlepool*, viii. 303.

2. *Surname and initial of christian name—Name of street.* Where at an election of councillors for a borough, the voting paper is signed with the surname and the initial of the Christian name of the burgess voting, it is a sufficient compliance with sect. 32 of the 5 & 6 Will. IV. c. 76, which requires such paper to be previously signed with the name of the burgess voting, and with the name of the street, lane, or other place in which the property for which he appears to be rated on the burgess roll is situated. The voting paper described the property in respect of which a burgess voted, as "Pilton street." He was described in the burgess roll as "of Pilton," and his qualifying property, "house in the street." It appeared in evidence that Pilton consisted of only one main street which was called "Pilton street," or "the street," indiscriminately. *Held*, that the voting paper was sufficient. *Regina v. Avery*, xiv. 86.

3. *Variance between voting paper and burgess roll.* In the voting paper handed in at the election of a councillor for a borough, the voter described himself "of King street, in the parish," &c. In the burgess roll he appeared to be rated for a house in Minster street. It appeared that King street and Minster street joined, and that in

his business as a mercer, the voter occupied jointly a house numbered in King street, which was the corner house where the two streets met, and the adjoining house in Minster street. They were separate houses, and had a distinct entrance door in each street; and in his bills the voter's place of business was described as No. 8 King street, and 63 Minster street. *Held*, that as the houses were occupied as one, the description in the voting paper was such as would be commonly understood within the meaning of the 5 & 6 Will. IV. c. 76, s. 142, and, therefore, that the variance between it and the burgess roll was no valid ground of objection under the 33d section of the same act. *Regina v. Gregory*, xvi. 226.

4. *Description of place.* An accurate description of a wrong place in a voting paper is not cured by the 5 & 6 Will. IV. c. 76, s. 142, though an inaccurate description of the right place is. *Regina v. Coward*, v. 301.

5. *Description of premises in notice of claim.* Where the description in the notice of claim given to the overseers, under sect. 38 of 6 & 7 Vict. c. 18, of the situation of the premises in respect of which a borough vote is claimed, is not strictly accurate, but is, in the opinion of the revising barrister, sufficient to give notice for what premises the claim really is, it is his duty, not to amend the claim, but to proceed as if the claim had been strictly accurate in its description. *Eaden v. Cooper*, vii. 517.

6. *"Place of abode," meaning of.* The place of residence and of business of W. H. were in the same parish, and both within the borough. He was as well known by his place of business as by his place of residence. In *quo warranto* against W. H., upon an issue whether the voting papers in question contained the place of abode of defendant, it was *held*, that sect. 32 of stat. 5 & 6 Will. IV. c. 76, which required the voting papers to state the "place of abode" of the candidate, meant, "the place of residence." *Regina v. Hammond*, viii. 356.

III. Notice of Objection to Voter.

1. *Sufficient description of objector.* The respondent, claiming a vote for the city of C., received a notice of objection from the appellant, who described himself therein, as "on the list of freemen for the city of C." It appeared that besides the list of freemen for the city entitled to vote for members of parliament, there was a list called the Freemen's Roll, kept for municipal purposes. *Held*, that the notice was sufficient, under the 17th section of the 6 & 7 Vict. c. 18, as affirming that the objector was on the list of freemen entitled to vote. *Dissentiente*, Maule, J. *Feddon v. Sawyers*, xiv. 256.

2. *Sufficiency of notice.* The notice of objection to the name of a person being retained on the burgess list of a borough, given to the party objected to, was in the following form: "To J. B. I hereby give you notice that I object to your name being retained on the burgess list of the borough of H." The notice did not describe J. B. as he was described in the burgess list. *Held*, that the notice was sufficient under the 5 & 6 Will. IV. c. 76, s. 17. *Regina v. Harwich*, xviii. 193. But see *Regina v. Harwich*, xiv. 149.

3. A notice in the following terms: "Take notice, that I object to your name being retained on the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts," is sufficient notice to a person that his vote for the county will be objected to under 6 Vict. c. 18, s. 7. *Lambert v. The Overseers of St. Thomas*, xiv. 267.

4. *Two lists of voters.* There being two lists of voters for the city of W. prepared by the overseers of C., namely, the list of 10l. occupiers, and the list of voters under the reserved rights, it was *held*, that the following notice to the overseers sufficiently specified the former list, in accordance with the 6 Vict. c. 18, s. 17, and Schedule, (B.) Form No. 10: "To the overseers of C.—I give you notice that I object to the

name of J. A. being retained on the list of persons entitled, under the Reform Act, to vote for the city of W." *Huggett v. Lewis*, xxviii. 326.

IV. *Miscellaneous Cases.*

1. *Notice of claim to be inserted on burgess roll.* A notice of claim, under sect. 17 of the 5 & 6 Will. IV. c. 76, to be inserted on the burgess roll of a municipal corporation, must state the parish in which the property is situated in respect of which the claim is made. *Regina v. The Borough of Kidderminster*, iv. 248.

2. *Borough rates—Composition, payment of—Burgess roll.* By a local act of the borough of K., owners of dwelling-houses of a less yearly rent than 10*l.* were to be rated to the poor. The overseers were empowered to compound with the owners at one third the rate where the "annual rent" did not amount to 7*l.*, and at one half where the annual rent amounted to 7*l.* but not to 10*l.* Sect. 15 provided that nothing in the act was to prejudice or affect any municipal or parochial franchises of the occupiers, but that they might claim to be put on the burgess roll as if that act had not passed. M. claimed to be put on the burgess roll in respect of a house which he occupied as tenant at a yearly rent of 7*l.* The house was stated in the poor rate to be of the gross estimated value of 6*l.* 10*s.*, and of the ratable value of 5*l.* 4*s.* His landlord had compounded at one third the poor rate, and paid his composition. The borough rates were paid out of the poor rates. *Held*, that under the act the criterion for composition was the rent which could fairly be obtained when the premises were let, or the value for which they could be let when they were vacant; but that the title of the occupier to be put upon the burgess roll would not be affected by any mistake in the composition between the owner and overseers; that the overseers were entitled to include the borough rate in the composition as part of the poor rate; and that payment of the composition was equivalent to the payment of the borough rate. *Ib.*

3. A vote thrown by an elector for a candidate known by him to be ineligible, is to be thrown out as a nullity. *Regina v. Coaks*, xxviii. 304.

4. *Expense of preparing voting lists.* A town clerk is entitled, under stat. 6 & 7 Vict. c. 18, s. 55, to remuneration for expenses actually incurred in the preparation of voting lists, but not for his own labor, or for the labor of clerks not employed especially for that purpose. *Regina v. Kingston-on-Hull*, xx. 149; *Regina v. The Overseers of the Poor of Hull*, xxx. 409.

5. *40s. freehold—Equitable estate for life.* A case stated that the respondent, being minister of a congregation, occupied premises worth more than 40*s.* per annum, under the trusts of a deed, one of which trusts was "to permit the minister for the time being to reside in the premises rent free," and that the evidence of the respondent's appointment was his own statement that it was for life. The legal estate was in the trustees. *Held*, that there being no appeal upon questions of evidence, the case disclosed an equitable estate for life in the respondent. *Burton v. Brooks*, vii. 483.

6. *Defective burgess lists, revision of.* If the burgess lists of a municipal corporation be defective and null, and the mayor and assessors decline to revise them, they are not bound to revise the list of claimants who claim to be inserted on the burgess lists. *In re The Mayor and Assessors of Harwich*, x. 382.

7. *Majority of guardians present—Chairman to be counted.* By an order of the commissioners the election of the officers in a certain parish was to be by a majority of the guardians present. *Held*, that the chairman must be counted as a "guardian present" and hence the election must be by a majority of all present, including the chairman. *Regina v. Griffiths*, xxiv. 179.

8. *Improper rejection of votes.* The improper rejection of votes at an election of church-warden does not vitiate the election, unless it appear that the result of the election is affected thereby. *Regina v. The Vicar, &c. of Bourne*, xxviii. 126.

9. *Bribery of voters—Voting in wrong names.* At an election for two councillors for St. John's Ward, in the borough of Blackburn, T. was one of the candidates elected. Some of the burgesses who voted for T., after they had voted, received from T.'s agent a ticket, and were directed to go, and did go to a particular inn, where they were shown into a room, and, upon presenting the ticket, received the sum of 2s. 6d., and from another agent of T. one or two 4d. tickets for ale and spirits, as a gift. Others of the burgesses entitled to vote at the said election, and who voted for T., signed the voting papers required to be handed in, not in their real names, but in the names by which they were by mistake described on the burgess roll. The grounds of objection in a rule nisi for a *quo warranto* information against T. were, the reception of votes for T. from persons not entitled to vote, or who fraudulently personated persons who were entitled to vote, and the reception of votes from persons who had been bribed to vote for T. Held, upon the first ground, first, that as the persons were entitled to vote, the objection taken was answered, the misnomer in the burgess roll being cured by the 142d section of the 5 & 6 Will. IV. c. 76; and, secondly, (supposing the objection had been raised,) that the fact of the burgesses having voted in the wrong names did not vitiate their votes; and by Lord Campbell, C. J., upon the second ground, that as there appeared to be evidence, from which a jury might have inferred an agreement with the voters, before voting, that they should receive 2s. 6d. for their votes, that should have been a ground for making the rule absolute. *Regina v. Thwaites*, xviii. 219.

ELEGIT.

1. *Outstanding claim.* Though *elegits* are satisfied, an outstanding unsatisfied claim will still be considered in taking accounts under a trust for the benefit of incumbrancers. *Hele v. Bezley*, xxi. 457.

2. *Tenancy by, extinguishment of.* In a suit for enforcing securities, it is the duty of the creditor to prove that his security is existing, and he is answerable for his acts, neglects, and omissions; and a creditor by *elegit*, having taken from a trustee for sale a conveyance in fee of a part of the lands of which he was in possession under extents issued upon two *elegits*, his tenancy under them was held to be extinguished in the remainder of the estate, and the judgments on which they were issued were held to be satisfied. *Ib.*

3. *Necessary to complete title.* In suits by judgment creditors, under 1 & 2 Vict. c. 110, the plaintiff's title as to the real estate of the debtor is incomplete until a writ of *elegit* has been sued out. *Smith v. Hurst*, xv. 520.

See also *Hughes v. Lumley*, xxviii. 270.

EMBEZZLEMENT.

1. *Difference between larceny and embezzlement.* The prosecutor gave some marked money to J. W., to expend at his (the prosecutor's) shop, for the purpose of detecting a servant, of whom the master had suspicions. The servant was convicted of embezzling a portion of the marked money. Held, upon the authority of *Rex v. Hedge*, 2 Leach's C. C. 1033, that the conviction was right. *Regina v. Gill*, xxiv. 550.

2. *Servant receiving goods for master himself, and not for and on account of his master.* The prisoner having been intrusted by his master with a number of articles of soldier's clothing, for the purpose of selling them, and ten pounds in silver, to enable him to give change, sailed in a ship for the coast of Africa, having, before his departure, written to his master to say that he would send the account, together with a remittance, from Madeira. Held, that he could not be convicted of embezzlement, having received the goods from his master himself, and not from another for and on

account of his master; but that he might have been convicted of larceny. *Regina v. Hawkins*, i. 547.

3. *Breach of trust by bailee of money.* The prisoner was a carrier, whose employment was to carry gloves between a glove manufacturer at A, and glove sewers at B, to receive the money for the work and pay it to the glove-sewers, deducting his charge. Instead of paying over the money received for certain of the glove-sewers, he denied the receipt of it, and appropriated it to his own use. *Held*, that he could not be considered the servant of the persons defrauded, and therefore was not liable to be convicted of embezzlement, for his offence was a mere breach of trust, as he was a bailee of the money. *Regina v. Gibbs*, xxix. 538.

4. *Servant spending master's money—Evidence.* The duty of a servant was to go into a neighboring county, D., every Monday, and there collect moneys for his master, and to return to N., where the master lived, and to pay over what he had received on Saturday night. The servant received money for his master in county D., but did not return to his master and account on the following Saturday. Afterwards his master met him in N., and asked him for the money, upon which he stated that he was sorry; he had spent it. *Held*, that there was evidence for the jury of an embezzlement in N. *Regina v. Murdock*, viii. 577.

5. *Miller of county jail applying fees to his own use.* The miller of a county jail was appointed by the county magistrates, receiving a salary from the governor of the jail out of the county rates. It was his duty to direct people bringing grain to obtain a ticket stating the amount; to grind it; to receive the fees, and hand them to the governor. He had no right to grind for his own benefit. He ground grain for certain persons without directing them to get a ticket, and applied the fees to his own use. *Held*, that he could not be convicted of embezzlement, as he had used the mill improperly, and consequently did not receive the money on account of his masters, whoever they might be. *Quære*, who were they? *Regina v. Harris*, xxv. 579.

6. *Privity between coal company and carman in their employ, making him their agent.* According to the terms of a contract, W. provided a number of carmen to deliver coals for a company to their customers. It was agreed that W., or the carmen, should daily "well and truly pay, account for, and deliver to the said company's coal manager, all checks, moneys, &c.," which they might receive in payment for the coals. The prisoner was a carman of W., and it was found to be his duty to pay over directly to the company's clerks any money he received for coals. He received money, and appropriated it to his own use. *Held*, that there was such a privity between the prisoner and the company as to make him their agent, and he could not be convicted of embezzling W.'s money. *Regina v. Beaumont*, xxiv. 558.

ENLISTMENT.

1. The Mutiny Act and the articles of war apply only to her Majesty's forces. *Wolton v. Gavin*, ii. 153.

2. An enlistment on a Sunday is not void under 29 Car. II. c. 7. *Ib.*

3. A recruit received enlisting money, knowing it to be such, from a soldier who was employed by a non-commissioned officer in the recruiting service, and who had belonged to a regiment for a longer period than that within which he ought to have been attested according to the provisions of the Mutiny Act. *Held*, that such soldier must be presumed to have been regularly attested. The fact that the soldier intended to have taken the recruit to be attested before a justice who had no authority to attest, affords no counter-presumption that the recruiting soldier had been himself improperly attested. *Ib.*

4. A recruit who has never been attested may be punished as a deserter. *Ib.*

5. The 20th article of war provides that no officer commanding a guard shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer, who shall at the same time deliver an account in writing, signed by

himself, of the crime with which the prisoner is charged. *Held*, by Lord Campbell, C. J., Coleridge, J., and Wightman, J., (*dissentiente* Erle, J.,) that a commanding officer receiving a soldier charged with desertion by a non-commissioned officer, who delivered a written signed charge of the crime, is justified under that article in detaining such soldier, although he was not taken before a civil magistrate, and a warrant obtained for his detention. *Ib.*

6. An infant ward of court enlisted in the East India Company's service, and was about to be sent to the East Indies, but at the instance of the guardian, the court, after notice to the East India Company and the officer in command of the recruits, ordered his discharge. *Rochford v. Hackman*, xxiii. 285.

EQUITABLE CONVERSION OF PROPERTY.

1. *Land bought with wife's money, sold, and proceeds invested in stocks.* Money belonging to a married woman was, with consent of herself and husband, laid out in land, and settled upon trust for her for life, &c. Then followed a power of sale by the direction of the husband and wife, the produce to be laid out in land. The land was duly sold and the money invested in funds, the dividends of which the wife received for her life. The husband, wife and surviving trustee declared the stock to be held on the trusts of the original deed. The husband died intestate. *Held*, that the stock was to be treated as real estate, although the money had never been reinvested in land. *Gillies v. Longlands*, v. 59. See also *In re Wharton*, xxiii. 485.

2. *Marriage trust—Sale by trustee—Consols.* Real estate, settled in marriage upon trusts for sale, being sold under compulsory powers, and, on petition of the trustees invested in consols, is not converted into personalty. *In re Taylor's Settlement*, xv. 412.

3. *Purchase-money of land taken for public purposes paid into court for reinvestment.* Where the purchase-money of land taken under the compulsory powers of an act of parliament, for public purposes, is paid into court, subject to be reinvested in the purchase of land, free of expense to the parties beneficially interested, on their petition, it is impressed with real uses, and is *prima facie* to be treated as real estate. *In re Stewart's Estate*, xiii. 533.

4. *Money-land—Election—Investment in consols.* If the person absolutely entitled to the money-land have a right to elect to take it as personalty, a mere acquiescence in its remaining invested in consols during his life, and his will, by which he bequeathes personal estate only, and does not devise realty, are not such proof of election as to prevent the fund descending on his death to his heir. *Ib.*

5. Money paid into court for land taken under the compulsory powers of an act of parliament, for public purposes, during the life of a tenant for life, who, by the failure of intermediate limitations, became tenant in fee simple, passed as real estate to her heir. *In re Horner's Estate*, xiii. 531.

6. *Sale of reversion of real estate by trustees—Investment of purchase-money.* A reversion of real estate, which, subject to an old life-estate, was vested in trustees, was sold. The trustees of the settlement had power of sale, with a direction to lay out the produce in land to be settled to the same uses. Upon the sale the trustees, instead of paying the value of the old life-estate to the tenant for life, invested the whole in their names, and paid that person the dividends for her life. The old tenant for life, the tenant for life under the settlement, and the party ultimately entitled to the fee-simple under that instrument, concurred in the sale and in this dealing with the purchase-money. After the death of the old tenant for life, it was *held*, that the money represented, and must be treated as, real estate. *In re Pedder's Settlement*, xxxi. 244.

7. *Deed by cestuis que trust under a will dividing real property into classes.* Where the *cestuis que trust*, under a will passing both real and personal estate, executed a trust deed of the real property passed by the will, dividing it into two classes, the one to be sold absolutely, for the payment of the testator's debts; and the other to be dis-

posed of upon the happening of certain contingencies, and in the mean time to be held and applied together with the rents thereof to the uses mentioned in the will; it was held, that, as to the first class, it took the character of personal property from the date of the deed, but that as to the second class of property and the rents accruing therefrom, it retained its character of real estate until the time when it should be actually sold. *Ferrie v. Atherton*, xxviii. 1.

EQUITY.

1. *Purchaser of lands subject to rent-charge.* A court of equity will give no assistance against a purchaser, of lands subject to a rent-charge, for a valuable consideration without notice. *The Attorney-General v. Wilkins*, xxi. 116.

2. *Legal rights of judgment creditors.* When a court of equity has occasion to deal with the legal rights of judgment creditors, its province is to aid and not to supply or extend the legal rights. *Smith v. Hurst*, xv. 520.

3. *Jurisdiction of court of equity in cases of trusts.* The distinction between the exercise of the jurisdiction of the court in cases of trusts for the benefit of particular persons and the cases of trusts for creditors is, that in the latter cases the court will examine into the circumstances under which the deed was executed, and carry on its investigation into what may have subsequently occurred. *Ib.*

4. *One who seeks must do equity.* The rule, that a party coming for equity must do equity does not extend so far as to affect matters unconnected with the transaction in respect of which the relief is sought. *Wilkinson v. Fowkes*, xv. 163.

5. *Bill for account by principal against agent.* A bill for an account by the principal against his agent cannot be maintained where the transaction is single, untainted with fraud, and remediable at law. *Navulshaw v. Brownrigg*, vii. 106.

6. *Illegal transaction.* The illegality of a transaction is not necessarily a bar to relief in equity. *Mullock v. Jenkins*, ix. 30. See, also, *Williams v. Trye*, xxiii. 501.

7. *Setting aside and enforcing instrument—Release at law.* An enforceable instrument will not be set aside in equity in favor of the debtor, as against the executors of a deceased creditor, unless under circumstances which amount to evidence of a release at law. An imperfect declaration of such a nature will not be enforced in equity, unless the person to be charged has been instrumental in causing the testator to omit perfecting the declaration in his lifetime. *Peace v. Hains*, xxiii. 34.

See ACCOUNTS; COSTS; DISCOVERY; FORFEITURE; INJUNCTION; PARTIES; PLEADING; PRACTICE; SPECIFIC PERFORMANCE; WILLS.

ERROR, WRIT OF.

1. *Error on judgment on special cases.* The 32d section of the Common-law Procedure Act, 1854, permitting parties to bring error on a judgment upon a special case, unless the parties agree to the contrary, applies only to special cases agreed to subsequently to the act coming into operation; and does not warrant error being brought on a special case which, though agreed to be drawn up previous to the act, was not finally settled until after the statute was in force. *Hughes v. Lumley*, xxviii. 233.

2. *Error to house of lords—Judgment roll.* Where error is brought in the House of Lords upon a judgment of the exchequer chamber, in a proceeding in this court, under sect. 155 of stat. 15 & 16 Vict. c. 76, the court of queen's bench will authorize the master to leave the judgment roll with the clerk in parliament, to remain there until the writ of error has been determined. *Lane v. Hooper*, xxv. 206.

3. *Attorney-general bound to issue his fiat for writ of error.* In a case of misdemeanor the attorney-general is bound to grant his fiat for a writ of error *ex debito justitiae* in all cases in which he thinks such writ ought to go; a *mandamus* will lie to compel him to exercise his discretion, but, after he has done so, the court will not interfere. *Regina v. Newton*, xxx. 367.

4. *Points reserved—Common-law Procedure Act.* Where a point was reserved on the trial of a cause before the passing of the Common-law Procedure Act, 1854, the party in whose favor it is reserved cannot, if he fail in the court below on his motion to enter a verdict, or nonsuit on the reserved point, appeal from the decision of that court to a court of error, under sect. 34 of the above-mentioned act, which only authorizes proceedings in error in the case of points reserved since the act passed. *Platt, B., dissentiente. Vansittart v. Taylor*, xxx. 320.

5. *Power to quash—Indictment.* The court of queen's bench has jurisdiction, under sect. 39 of stat. 12 & 13 Vict. c. 109, to quash a writ of error upon its judgment on an indictment for false pretences sued out with a view to a compromise of the prosecution. *Regina v. Alleyne*, xxix. 179.

6. See, also, *Corsar v. Reed*, viii. 380.

7. As to costs on writ of error, see *Costs*, xii.

ESCAPE.

1. As to the sufficiency of an indictment for aiding an escape, see *Regina v. Holway*, v. 310.

2. See *SHERIFF*.

ESTOPPEL.

1. *Trespass for mesne profits—Estoppel by judgment in ejectment.* In trespass for mesne profits the defendant pleaded first, not possessed; and secondly, title in himself; the plaintiff replied by way of estoppel as to trespasses since October 26, 1853, setting out a writ in ejectment of that date in which he was claimant, directed to the defendant as tenant in possession, and averred judgment thereon by default, and an entry by virtue of the judgment; and on demurrer the replication was held good to both pleas. *Wilkinson v. Kirby*, xxvi. 371.

2. The estoppel in such case is from the date of the writ, and the plaintiff's title is presumed to continue unless the rejoinder shows it to have been determined. *Ib.*

3. It is not necessary to aver notice to the defendant of the proceedings in ejectment, or the issuing and executing of a writ of possession. The replication contained a sufficient averment of the plaintiff's entry. *Ib.*

4. *Decision of court of equity as to fact which is matter for jury.* The decision of a court of equity as to a fact which is matter for a jury, does not bind the party so that he may not traverse the fact in a court of law. *Lumley v. Gye*, xiv. 442.

5. *Action on covenant to pay annuity—Grantor estopped from pleading fraud.* In an action on a covenant for the payment of an annuity, the defendant, the grantor, is estopped from pleading that the annuity was granted for the fraudulent purpose of multiplying voices. *Phillpotts v. Phillpotts*, i. 339.

6. *Claimants under trust, estopped to deny validity of trust.* Persons claiming under a certain trust, as their only title, are estopped from showing that the trust was originally invalid. *Drummond v. The Attorney-General*, ii. 15.

7. *Inference of law—Affidavit.* A statement, not of simple fact, but an inference of law drawn by the plaintiff, made by the plaintiff in an affidavit relative to the bankruptcy of G., who had been the factor of both parties, that the defendant had paid the factor for certain of the plaintiff's goods sold to him by the factor, will not estop the plaintiff from denying the payment in a subsequent action against the defendant. *Morgan v. Couchman*, xxiv. 321.

8. *Must be certain to every intent.* An estoppel growing simply out of argument and inference is not sufficient; it ought to be certain to every intent. *Callow v. Jenkinson*, v. 533.

9. *Application for habeas corpus to discharge prisoner—Record of conviction—*as

estoppel. Upon an indictment charging felony committed within the jurisdiction of the central criminal court, plea,—not guilty, a prisoner was tried, convicted, and sentenced to imprisonment. After sentence, application was made to the court of common pleas for a writ of *habeas corpus* for his discharge, upon an affidavit showing that the offence was not committed within the jurisdiction as alleged. *Held*, that the record was an estoppel, and the writ was refused. *Ex parte Newton*, xxx. 432.

10. *Wilful misrepresentation—Estoppel from proving truth*. If a party wilfully misrepresents a state of things, and induces another to act upon a belief in the truth of his representation, and that person does so act upon it to his prejudice, the party who makes the representation is estopped from proving the truth. *Howard v. Hudson*, xi. 47.

11. *Estoppel by consent rule—Action for mesne profits*. In an action for mesne profits, after judgment in ejectment for the lessor of the plaintiff, it appeared that the defendant had been made defendant in the ejectment, under sect. 13 of stat. 11 Geo. II. c. 19, upon entering into the consent rule as mortgagee and landlord. *Held*, that the defendant was concluded by the consent rule from denying that he was landlord. *Doe v. Challis*, vi. 249.

EVIDENCE.

- I. PRESUMPTIONS.
- II. ONUS PROBANDI.
- III. PRIMA FACIE EVIDENCE.
- IV. COMPETENCY OF WITNESSES.
- V. COMPETENCY OF HUSBAND AND WIFE.
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- XIV. PRIVATE WRITINGS, SECONDARY EVIDENCE OF.
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- XVII. HANDWRITING.
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- XIX. DEPOSITIONS, ADMISSIBILITY OF.
- XX. COMMISSION TO EXAMINE WITNESSES.
- XXI. ADMINISTRATION OF OATH.
- XXII. VIVA VOCE EXAMINATION IN CHANCERY.
- XXIII. CROSS-EXAMINATION OF WITNESSES.

I. Presumptions.

1. *Presumption as to alteration of written instrument*. Where an alteration or interlineation appears upon the face of a will, the presumption is that it was made after the execution of the will, and it lies upon the party setting up the will to give some evidence to rebut that presumption. *Doe d. Shallcross v. Palmer*, vi. 155.

2. *Counterpart agreement*. In an action of debt for rent on a demise, the plaintiff

produced a deed properly stamped as a counterpart lease, and proved the same to have been executed by the defendant. *Held*, that although there was no evidence of any lease having been executed by the plaintiff, the presumption was that there was such; and the deed produced was therefore rightly admissible as a counterpart. *Hughes v. Clark*, iii. 528.

3. *In favor of a grant.* Almost every thing will be presumed in favor of a grant fairly made, and under good advice on the part of the grantors, and acted upon for upwards of thirty years. *Delarue v. Church*, iii. 160.

4. *Authority of an officer of a company.* The secretary of a joint-stock company is the servant of the directors of the company, who are presumed to have control over him as such; and this presumption is not rebutted by the circumstance that the company has ceased working. *Elmes v. Ogle*, ii. 379.

5. *Judgment of a court.* Where a sentence of an ecclesiastical court is brought in question, the presumption is in favor of such sentence, and this presumption will remain until rebutted by facts alleged and proved. *Harrison v. The Corporation of Southampton*, xvii. 364.

6. *Legal origin of a custom or usage.* Where it is proved that it has been the practice, for a long series of years, for the vicars choral of a cathedral, during their year of probation, to be excluded from a share in some of the emoluments of their office, and it can be gathered from the documents in existence, that some person had the power of regulating the manner in which the vicars choral were to be maintained, it will be presumed that some regulation was made, out of which the practice originated. *Shourbridge v. Clark*, xxii. 435.

7. *Presumption of death from absence.* A left this country on the 9th of November, 1829. On the 16th of June, 1831, his brother-in-law received a letter from America, on behalf of A, describing him as having changed his name to B. Three months after this A's wife sent a letter to him, addressed to him as A, by the hand of a friend, who could not find him. He was not heard of any more, and it did not appear that any other inquiries were made by his family. *Held*, that on this state of facts, there was not sufficient information to ground presumption of death, still less of the particular period of death. *Creed, in re*, xix. 119.

8. *Implied assent presumed from acquiescence.* It is only where a party has power to prohibit a thing that his omitting to do so is evidence of his assent to it. *Morgan v. Thomas*, xviii. 526.

9. *Of what a court will take judicial notice.* The court of common pleas will take judicial notice that the Queen's prison is within the realm. *Wickens v. Goatley*, viii. 420.

10. *Estoppel.* Where matters are offered in evidence which might have been pleaded as an estoppel, the evidence is not conclusive, but where no opportunity has been offered so to plead, it seems the evidence is conclusive. *Regina v. Blakemore*, ix. 541.

II. *Onus Probandi.*

1. *Affirmative of issue.* The *onus probandi* does not always lie on the party who asserts the affirmative of the issue; for when a negative averment is necessary to make a pleading good, the *onus* of proving that averment lies on the party who makes it. *Harvey v. Towers*, iv. 531.

2. *Proof of consideration.* A post-nuptial settlement purported to have been made in consideration of natural love and affection, and for divers other good and valuable considerations. *Held*, that the *onus* of proving that some valuable consideration actually passed, lay on the party sustaining the deed. *Kelson v. Kelson*, xvii. 107.

3. *Burden of proof to sustain an award.* The *onus* of showing that payment awarded to be made to a stranger is for the benefit of a party to the submission, lies upon the party who seeks to enforce the award. *Wood v. Adcock*, ix. 524.

4. *Proof to sustain a post obit bond.* If a person presents for payment a *post obit* bond executed by a deceased person, it is incumbent on him to show that the donor executed the bond voluntarily, and knowing what he was doing, especially if the existence of the bond has been kept a secret, or there are other suspicious circumstances. *Cooke v. Lamotte*, xi. 26.

5. *Restraint of a legal right.* On a bill to restrain the exercise of a legal right, it is the duty of the plaintiff to satisfy the court that there are substantial grounds for doubting the existence of the legal right. *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Co.* xii. 249.

6. *Allegations of fraud as a defence to a deed.* On an interpleader issue to try the title to goods taken on execution, plaintiff gave in evidence a deed from the debtor assigning the goods to him. The witness to the execution of the deed was cross-examined by defendant, with a view to show that the deed was void for fraud. *Held*, that the plaintiff was not bound to give evidence in the first instance to establish the validity of the deed, although called upon by the judge to do so, and although the nature of the defence appeared by the cross-examination of the attesting witness. *Shaw v. Beck*, xx. 309.

7. *Action for penalty.* In an action brought to recover from the defendant a penalty of £50 for having acted as commissioner under a local paving act, when not duly qualified, the evidence was that he was in all respects qualified, but there was no proof of his having taken the oath required. *Held*, that he was not bound to prove it. *Tipper v. Newton*, xxvi. 336.

III. *Primâ facie Evidence.*

1. *Proof of guilty knowledge.* On indictment for feloniously receiving goods knowing them to have been stolen, the prosecutor cannot, in proof of guilty knowledge, give in evidence that the prisoner, previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort belonging to a different owner, and stolen from each other. *Regina v. Oddy*, iv. 572.

2. Upon an indictment for uttering a counterfeit half-crown, in order to prove the guilty knowledge, evidence was given of a subsequent uttering by the prisoner of a counterfeit shilling. *Held*, that this evidence was admissible. *Regina v. Foster*, xxix. 548.

3. In an action against acceptor of a bill of exchange, indorsed to plaintiff by A, the plea was that defendant was defrauded of his acceptance, and that it was fraudulently indorsed by drawer to a person unknown; that A took it, with notice of the fraud, and that the plaintiff took it with notice of the premises. It having been proved that the plaintiff had said in 1852, he had known A for a long time, a witness was asked whether he had not seen A in the dock at the Old Bailey, and seen him removed to prison. It was *held*, that this evidence was inadmissible; but that if it had been proved that the plaintiff knew of the conviction of H, it might not have been necessary to prove his actual knowledge of the fraud pleaded. *Berry v. Alderman*, xxii. 484.

IV. *Competency of Witnesses.*

1. *Judge to decide upon facts as to competency.* If a question arises in the course of a cause as to the reception of evidence, the facts which raise the point must be decided by the judge alone. *Heslop v. Chapman*, xxii. 296.

2. *Witness to prove foreign law.* On a trial for bigamy, a woman was called as a witness, who stated that she was present at a ceremony performed in a private house in Scotland, by a minister of some religious denomination; that she herself was married in the same way, and that parties always married in Scotland in private houses. *Held*, that she was not a competent witness to prove the law of Scotland as to mar-

riage, and that her evidence did not prove the fact of a marriage. *Regina v. Povey*, xiv. 549.

3. *Competency of lunatic.* A lunatic, under confinement in a lunatic asylum, is admissible as a witness, if the judge considers him competent in point of understanding, and to be aware of the nature and sanction of an oath. The lunatic may be examined and cross-examined, and witnesses called on either side, in order to determine the question of competency; but when admitted, it is for the jury to determine whether his testimony is affected by his insanity, and what degree of weight is to be attached to it. *Regina v. Hill*, v. 547.

4. *Interest of witness.* A person entitled to a share in the proceeds of land devised to A in trust for sale, is a competent witness in an action brought by A to establish his right to the land. *Harding v. Hodgkinson*, iv. 462.

5. A creditor, who is a party to a deed of assignment by his debtor to a trustee for creditors, is a competent witness for the trustee in an action to enforce the deed. *Black v. Jones*, iii. 559.

V. Competency of Husband and Wife.

1. It is settled by authority that husband and wife cannot give evidence for or against each other in civil cases; whether rightly or not, *quære*. *M'Neillie v. Acton*, xxi. 3.

2. The 14 & 15 Vict. c. 99 has not rendered a wife a competent witness for or against her husband in civil proceedings. *Barbat v. Allan*, x. 596; *Alcock v. Alcock*, xii. 354; *Stapleton v. Croft*, x. 455.

3. Whether by consent she might be examined as a witness, *quære*. But, assuming that such consent would render her admissible, where the objection had been taken, it was held to be discretionary with the judge whether he would allow the objection to be withdrawn. *Barbat v. Allan*, x. 596.

4. An affidavit of the husband was not admitted to prove access to his wife after separation. *Patchett v. Holgate*, iii. 100.

VI. Competency of Parties to Suits.

1. *Under 14 & 15 Vict. c. 99.* The words of the act 14 & 15 Vict. c. 99, s. 2, are broad enough to make the parties in every proceeding of every description in which witnesses could be examined, competent and compellable to give evidence on behalf of either or any party thereto. The 3d section, which excepts the parties charged by the crown in any criminal proceeding, does not extend to the defendant in an information filed by the attorney-general for breach of the revenue laws, and held, per Platt, B., and Martin, B., that he was rendered a competent witness by the 14 & 15 Vict. c. 99. Per Pollock, C. B., and Parke, B., *contra*. *The Attorney-General v. Radloff*, xxvi. 413.

2. *Privilege of party called as witness.* Under the 14 & 15 Vict. c. 99, a party to a suit may be called as a witness by his adversary. In such a case the adversary has a right to insist on his being put into the box and sworn, although his counsel state that he will not answer the questions, as the answers would tend to criminate him—if the questions have that tendency, the objection must be taken by the party himself on oath. *Boyle v. Wiseman*, xxix. 473.

3. *Tendency to criminate party.* It is no ground for refusing leave to administer interrogatories, under the 17 & 18 Vict. c. 125, s. 51, that the attorney for the party to be interrogated states in his affidavit that the questions, if answered, may tend to criminate his client. It is for the client himself to take the objection on oath. *Osborne v. The London Dock Co.* xxix. 380.

4. *Evidence of co-party.* The evidence of a defendant in favor of a co-defendant is

inadmissible under the 6 & 7 Vict. c. 85, if it proves the case of the witness himself. *Triston v. Hardey*, vii. 204.

5. *Waiver of objection by cross-examination.* The cross-examination of a defendant, tendered as a witness, is a waiver of his incompetency, where the objection must be assumed to have been known at the time of the cross-examination. *Id.*

6. *Examination of parties—Practice.* The stat. 14 & 15 Vict. c. 99, enabling parties to a cause to be examined as witnesses, renders unnecessary the common order under the old practice, giving liberty to a party to examine another party, saving just exceptions. *Swann v. Wortley*, xii. 257.

7. *Examination of party once rejected.* Where a party offers himself at the first hearing as a witness, with a view to be cross-examined by the other party, and is rejected by such other party, the party so rejecting the party offering himself cannot, at a subsequent hearing before the court of appeal, demand that the course so rejected by him shall be followed at the rehearing. *Hindson v. Wetherill*, xxvii. 149.

8. *Absence of party as a ground of continuance.* The defendant, a master mariner, having gone abroad in the course of his business, after the commencement of the action, and after time obtained to plead, but before issue joined, the court refused to postpone the trial until his return to England, on the ground that his evidence was material and necessary to make out his defence. *Semble*, that the examination of a party to the suit, under a commission, is receivable in evidence under the 14 & 15 Vict. c. 99, s. 2. *Solomon v. Howard*, xxii. 466.

VII. Admissions and Confessions.

1. *Offers of compromise.* The court will discountenance all attempts to convert offers of compromise, by letter, into admissions prejudicial to the parties using them. *Jones v. Fozall*, xiii. 140.

2. *Inducements to confess.* Where a constable, apprehending a prisoner, told him the nature of the charge and said: "You need not say any thing to criminate yourself, but what you do say will be taken down and used as evidence against you," and the prisoner made a confession, it was held, that the confession was receivable in evidence. *Regina v. Baldry*, xii. 590.

3. A female servant was taken into custody by a policeman, on the charge of setting fire to her master's premises, and he gave her into the charge of a Mrs. A., a married daughter of her master, but who did not live in the house. Mrs. A. took the girl apart and said to her: "I am sorry for you; you ought to have known better. Tell me the truth, whether you did it or no." The servant said: "I am innocent." Mrs. A. replied: "Do not run your soul into more sin, but tell the truth." The prisoner thereupon confessed. Held, that there was no inducement held out to render the confession inadmissible; and, secondly, that Mrs. A. was not a person in authority, competent to hold out an inducement which would prevent the reception of the confession in evidence. *Regina v. Sleeman*, xxii. 606.

4. The second caution in the 18th section of the 11 & 12 Vict. c. 42, is only necessary where some previous inducement or threat has been held out. There is nothing in the statute to exclude a confession which would have been admissible at common law. If the prisoner's statement be returned purporting to be signed by the magistrate, and bearing on the face of it the first caution, it is admissible without any other evidence. *Regina v. Sansome*, i. 540.

5. A confession made after the inducement of a threat held out by A, when B was present, was the same thing as if B had used the threat; and as B was the person likely to prosecute, he was a person in authority, so that the confession made after the inducement held out in his presence was inadmissible as evidence. *Regina v. Luckhurst*, xxii. 604.

6. The prisoner was indicted for the wilful murder of a new-born child; her mistress

told her "she had better speak the truth;" after which the prisoner made a confession. *Held*, that the mistress was not a person in authority within the rule which excludes confessions, her husband not being prosecutor, nor the offence in any way connected with the management of the house. *Regina v. Moore*, xii. 583.

VIII. *Privileged Communications.*

1. *Communication with solicitor.* Any thing that passes between a client and his solicitor, whether in a cause, or with a view to a cause, or with reference to a matter which afterwards becomes the subject of litigation, is a privileged matter, in respect of which the client has a right to say the solicitor shall not say what passed. *Warde v. Warde*, i. 94.

2. *Communication not relating directly to suit at issue.* Where it is sworn that documents are confidential communications, relating to the particular suit, or to another suit, which though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit. *Thompson v. Falk*, xv. 245.

3. *Discretion of attorney.* An attorney subpoenaed to produce a document at a trial, may in his discretion refuse to produce it, on the ground that it has been intrusted to him by a client. He is neither bound to produce it, nor to answer a question with respect to its nature, and the judge ought not to examine it to see whether it is a document which ought to be withheld. *Volant v. Soyer*, xvi. 426.

4. *Possession of documents.* The attorney of a party to a suit may be asked, and is bound to answer, whether a document which he has received from his client in the course of his professional employment is in his possession or elsewhere in the court. *Dwyer v. Collins*, xii. 532.

5. *Notes of counsel in former trial.* The counsel in the case may be examined, to show from his notes, taken at the former trial, what was the evidence then given. *Regina v. Bird*, ii. 439.

6. *Solicitors of opposite parties.* The rule of privilege protecting confidential communications does not extend to communications between the solicitors of opposite parties. *Gore v. Harris*, viii. 147.

7. *Transactions of parties conducted by solicitor.* The depositions of the solicitor of the plaintiff, in the case of a bill filed by a residuary legatee against the executors, as to a transaction conducted by himself between the parties to the bill, were suppressed, as being in violation of professional confidence. *Lodge v. Prichard*, viii. 121.

8. *Letters of solicitor.* Letters with reference to a suit written to or by a solicitor in his character of solicitor, are privileged communications; but those written by a defendant to his co-defendant, to be communicated to his solicitor, are not protected. *Goodall v. Little*, iii. 79.

9. *Communication with a testator.* Communications between a testator and solicitor, in reference to the testator's will, are not privileged after the death of the testator. *Contra*, as to communications between the same solicitor and the executors. *Russell v. Jackson*, viii. 89.

10. *Semble*, that the existence of an illegal purpose prevents any privilege attaching to communications between solicitor and client. *Ib.*

11. *Fraudulent communications.* The defendant J. T. was entitled to an annuity under a will, subject to a proviso, that if he attempted to charge or dispose of such annuity, it should be applied by the executors for the benefit of the said J. T. or his wife, or other persons mentioned in the will. A writ of sequestration having issued against J. T., he assigned his annuity to a trustee for the benefit of his wife. The sequestrators filed this bill to set aside the assignment, alleging that it was a fraudulent arrangement to defeat their claims. The wife of J. T., by her answer, stated that the object of the assignment by J. T. was to effect a forfeiture of the annuity, for the

benefit of his wife, and at the same time to defeat the claims of the plaintiffs. She submitted that she was not bound to produce the documents and communications which passed between her and her solicitor relative to the assignment. *Held*, that there was no fraud in this transaction; that it was one as to which it was perfectly lawful for a client to ask, and for a solicitor to give professional advice, and the documents relating to it were within the admitted rule of privilege. *Follett v. Jefferyes*, i. 172.

12. Cases of fraud contrived between a client and solicitor do not come under the rule as privileged communications. *Ib.*

13. *Solicitor acting for two parties.* A document prepared by B, acting as solicitor as well for the person under whom both the plaintiffs and the defendants claimed, as also for a third party, a mortgagee, held to be a privileged communication; and the interrogatory relating to such document, and the deposition in answer to that interrogatory, were suppressed, except for the purpose of proving handwriting. But a document prepared by B, acting as solicitor only for the person under whom both the plaintiffs and the defendants claimed, held not privileged. *Chant v. Broune*, xii. 299.

14. *Solicitor for husband and wife.* A husband and wife being desirous of releasing an estate from the wife's jointure, a solicitor is employed and a deed executed, the wife entering into the arrangement and acting under the advice of the solicitor, and having no other legal adviser in the matter; a suit being afterwards instituted by the wife, the husband and solicitor each stating in their answer that the solicitor acted for the husband, the production of certain cases prepared and opinions taken by the solicitor was refused. *Warde v. Warde*, i. 94.

15. *Books intrusted to counsel.* In an action by the payee against the maker of a promissory note for money lent, the plaintiff, for the purpose of taking the case out of the Statute of Limitations, tendered an account-book containing an admission by the defendant of payment of interest to him. The defendant's counsel then raised a collateral issue as to the admissibility of the book, and proved that the plaintiff, being the attorney of the defendant, wrote to her for a statement of the debts and payments of her late husband, adding: "This from you will assist me in preparing the case for counsel," whereupon the book in question was sent to the plaintiff. The judge, having heard the evidence, rejected the book. *Held*, that the communication was privileged. A judge is bound to decide the preliminary question of fact whether a communication is privileged or not; and his decision, if erroneous, may be reviewed. Per Martin, B., a communication by a client to his attorney made under a *bond fide*, although mistaken, belief of its being necessary to his case, is privileged. *Cleave v. Jones*, viii. 554.

16. A trading company appointed the defendants, three of its members, to act as a committee for the shareholders in winding up its affairs. The plaintiffs brought several actions on certain debentures against the defendants as shareholders, and filed a bill for discovery. The defendants answered that they had documents which were privileged, inasmuch as they related to the matters in dispute, and arose out of communications between the parties themselves, with a view to a defence in the suit, and contained also the opinions of legal advisers. *Held*, that the documents were not privileged, except the opinions of the legal advisers, and that they must be produced by the defendants. *Glyn v. Caulfield*, vi. 1.

IX. Privilege of Witness; Not bound to criminate himself.

1. *Tendency to criminate—Witness to determine for himself.* A witness called to support a plea that the consideration for a bill was money lost at play, stated that he was present when the money was alleged to have been lost in his own house, but saw no gaming. He was then asked: "Was there a roulette-table in the room?" The judge told him that his answer might tend to subject him to a prosecution under the 8 & 9 Vict. c. 109, s. 2, for keeping a common gaming-house, and the witness declined

to answer. *Held*, that the witness was not compellable to answer, as his answer might have had that tendency, and that the judge did right in cautioning him. *Semble*—per Jervis, C. J., and Maule, J., that it is for the witness to determine whether his answer may tend to criminate him. *Fisher v. Ronalds*, xvi. 417. But see note.

2. *Quære*, if a witness is exempted from liability to answer a question if he swears that the answer tends to criminate him, or whether the court must be first satisfied that the question has that tendency. *Osborne v. The London Dock Co.* xxix. 380.

3. *Stock-jobbing transactions*. The plaintiff, contemplating stock-jobbing transactions through his brokers, transferred to them railway shares, to secure any balance which might become due to them. Dealings and transactions took place. Plaintiff filed his bill against his brokers, containing numerous searching interrogatories as to the stock transactions, and the ownership of the railway shares. The defendants, in their answer, set out the 8th section of the Stock-jobbing Act, 7 Geo. II. c. 8, and stated that the plaintiff had alleged, prior to filing his bill, that the transactions in which they were concerned for him were prohibited by that act of parliament; and they declined to answer the other interrogatories, on the ground that the discovery would tend to subject them, severally and respectively, to the penalties enacted by that statute. *Held*, that the answer was not insufficient, and that the defendants were protected from giving the discovery under the rule, that a person shall not be compelled to criminate himself. *Semble*, the rule as to protection from discovery, on the ground that it may tend to criminate the party, extends to every interrogatory which the party swears would form a link in the chain of the evidence by which the supposed guilt might be made out. *Short v. Mercier*, i. 208.

X. *Witness, Contradiction and Impeachment of.*

1. *Party may contradict his witness but not discredit him*. Where a witness proves facts against the party who produces him, and an account of the transaction which he had given before his production is entirely different from that sworn to on his examination, the party producing him may produce fresh witnesses to prove the original facts, but cannot plead in exception to his own witness, nor plead the account he had given of the transaction. *The Lochlibo*, i. 645.

2. *Collateral issue*. The defendant being sued as executor of A in respect of a promissory note purporting to be signed by A and B, but alleged by the defendant to be forged, stated, in cross-examination, that he had not heard B admit having signed the note. *Held*, that the plaintiff was not at liberty to contradict the defendant by showing that the latter had heard B make the admission, the issue being collateral. *Palmer v. Trower*, xiv. 470.

3. *Witness called to contradict, not to be himself contradicted*. The 14 & 15 Vict. c. 99, has made no alteration in the rule of practice at trials, which compels a plaintiff, who has notice of the defence, either to go into all his evidence at once, or retain it all until the defendant has given his; and therefore, where, in an action against two defendants, the plaintiff appeared as a witness in proof of his own case, and deposed to a conversation between himself and the defendants, in which one of them used, as he said, expressions supporting the plaintiff's right of action; that defendant having been called to contradict that account of the conversation, it was *held*, that the plaintiff's counsel could not call the other defendant as a witness to contradict him. *Rowlandson v. Fenton*, xx. 367.

XI. *Public Records.*

1. *Papers on record and minutes of proceeding*. On the trial of an indictment for perjury at the central criminal court, to prove the fact of a former trial in the same court, it was *held*, that the production, by the officer of the court, of the caption, the indictment, with the indorsement of the prisoner's plea, the verdict, and the sentence of the court

upon it, together with the minutes of the trial made by the officer in court, was sufficient evidence of it; and that the production of neither the record nor a certificate, under the 14 & 15 Vict. c. 99, s. 13, and 14 & 15 Vict. c. 100, s. 22, was necessary. *Regina v. Newman*, ix. 529.

2. *Evidence of judge to contradict minutes.* Minutes of proceedings in the county court made under the 9 and 10 Vict. c. 95, s. 111, or a copy of them, cannot be contradicted by the evidence of the judge. *Dews v. Ryley*, vii. 469.

3. *Parish registers.* Extracts from parish registers signed by "incumbent," "rector," &c., are receivable in evidence on a petition for the payment of money out of court. *In re Hall's Estate*, xv. 416.

4. *Certificate of foreign officer.* A certificate of the registration of a deed by a registrar of deeds in a colony, who was not authorized to administer an oath, is not made evidence by the 22d section of Chancery Amendment Act, but the signature of the registrar must be proved. *Baillie v. Jackson*, xvii. 131.

5. *Unstamped copy of will.* Under the 14 and 15 Vict. c. 99, s. 14, an unstamped copy of an act book of the ecclesiastical court, is sufficient evidence of the probate of a will to prove the executorship of the person named in it. *Dorrett v. Meux*, xxvi. 364.

6. *Extracts from foreign records.* A document under the seal of the court of the holy office or inquisition of Rome, but apparently drawn up by the notary whose name is attached to it, from a record in that court, but which was not set forth in the document, is not evidence to prove the grounds of a judgment pronounced by that court, the *ratio decidendi* not being stated, although it is admissible in support of an allegation in a plea of justification that such a judgment has been pronounced. *Regina v. Newman*, xviii. 113.

XII. Books of Corporations.

1. *Register of shareholders.* The register of shareholders of a company within the Companies Clauses Consolidation Act, authenticated by its seal, is admissible in evidence without any proof that such seal was affixed at an ordinary meeting of the company pursuant to the 9th section. *The Northwestern Railway Co. v. M'Michael*, i. 414.

2. The register of shareholders kept in accordance with the statute is evidence to prove that an individual is a shareholder, without any authentication of the seal. *Regina v. Nash*, xii. 578.

3. The Companies Clauses Consolidation Act, 1845, enacts that the company shall keep a book, to be called "The Register of Shareholders," which is to contain the names, &c., of the shareholders, and to be authenticated by the common seal of the company, which book was to be *prima facie* evidence of a party being a shareholder. In the present case the register book consisted of several large volumes, the last of which only containing a recapitulation of the previous volumes, was authenticated by the seal of the company. *Held*, that this was sufficient, and that it was properly received in evidence. *Inglis v. The Great Northern Railway Co.* xvi. 55.

4. *Proceedings of directors.* The Companies Clauses Consolidation Act directs that all minutes of proceedings of directors shall be entered in a book, "and every such entry shall be signed by the chairman of such meeting, and such entry, so signed, shall be received in evidence," &c. *Held*, following *Miles v. Bough*, 3 Q. B. 845, that where a meeting for a particular purpose was adjourned to a subsequent day, and the minutes of the adjourned meeting were signed by the chairman, the minute was properly admissible in evidence. *Ib.*

XIII. Private Writings.

1. *Books of the steward of the plaintiff's ancestor.* In ejectment, the question being
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whether certain premises were, or were not parcel of a manor, one of the parties was allowed to put in as evidence certain books, purporting to be the books of the steward to the plaintiff's ancestor. No evidence was offered to prove the existence of the steward, or what was his position, but the books being fifty-five years old, and coming from the proper custody, the accounts contained in them were received as evidence. *Doe d. Ashburnham v. Michael*, xxiv. 180.

2. *Entry in an ancient book not admissible as evidence of reputation in a question of title.* It being proposed to read in evidence an entry in an ancient book, to show that certain lands were identical with those included in a lease said to have been made three hundred years ago, but which was not proved ever to have existed, it was held, that the entries were not admissible as evidence of reputation, as to the extent of the manor, or as entries made by a deceased person in the discharge of his duty, or as secondary evidence of the documents referred to. *Doe d. Padwick v. Wutcomb*, v. 487. Affirmed in the House of Lords, xxviii. 42.

3. *Entry against the interest of party making it—Whole statement to go in.* In support of the right of the Earl of L. to a fishery in the Solway Frith, the defendants put in evidence the following entry in the book of a former receiver of rents of the Earl of L.'s estate: "Received of T. H. the respective shares due from three proprietors (T. H. being one) of the raise net set in the Solway Frith in D., in the year 1733." *Dictum*, the entry is evidence not only of rent having been paid by T. H., but also by the two other proprietors. Per Pollock, C. B. If an entry is admissible as being against the interest of the party making it, it carries with it the whole statement. But if the entry is made merely in the course of a man's duty, it does not go beyond those matters which it was his duty to enter. *Percival v. Nanson*, vii. 538.

4. *Ancient survey of lands.* A private survey of lands, though ancient, is not admissible to prove the lands to be part of the lordship of the person making the survey, nor is the presentment of the jury of survey admissible as evidence of reputation. *Daniel v. Wilkin*, xii. 547.

5. *Maps.* Upon an issue whether a certain house is in U. or S., a map having on its face these words: "A new map of the county of S., taken from the original map published by J. K., in 1736, who took an accurate survey of the whole county, now republished, with corrections and additions, by J. and W. K., sons of the author, 1766, and engraved by J. R.," and produced by a witness, a magistrate of U. and S., who had bought it twelve years previously, is not admissible evidence. *Hammond v. Bradstreet*, xxvi. 546.

6. *Entry of the receipt of rates.* An entry of the receipt of rates by a deceased clerk of a collector, who was duly appointed, is evidence of payment of rates to satisfy the stat. 4 & 5 Will. IV. c. 76. *Regina v. St. Mary*, xviii. 309.

7. *A void instrument admissible to show its worthlessness as security.* A debenture, or bond, issued as collateral security by a private incorporated company under their common seal and signed by their secretary, in which is left a blank for the name of the payee, though void because of such blank, and because it is improperly stamped, is admissible in evidence, in an action for money lent, to show the worthlessness of the security. *Enthoven v. Hoyle*, ix. 434.

8. *Agreement for a trotting match.* On the trial of an action against the stakeholder to a trotting match, by the party whose horse was defeated, to recover back his stake, the plaintiff set up that he had been induced by fraud to enter into the match. *Held*, that in order to prove this fraud, the articles of agreement for the match were receivable in evidence without a stamp, being used for a collateral purpose and not to set up the agreement. *Holmes v. Sixsmith*, xiv. 517.

9. *Receipt and delivery order.* A receipt, and also a delivery order, given by the plaintiff to a witness a month after the sale, but dated on the day of the sale, and not otherwise shown to be in existence before the sale is admissible, as affording some

evidence that the sale took place on the day of the date of the documents. *Morgan v. Whitmore*, v. 506.

10. *Contract for sale—Unstamped receipt.* A document, purporting on the face of it to be a receipt for purchase-money, but inadmissible as evidence of the payment of the money for want of a sufficient stamp, is nevertheless admissible as evidence of the agreement for sale, if it contain the requisite terms. Per the Lord Chancellor; opinion of Lord Cottenham in *Evans v. Prothero*, ii. 83, *Contra. Evans v. Prothero*, xiii. 163.

11. *Entry by clerk, acknowledging receipt of money—Signature only admissible on trial for embezzlement.* A clerk, who had signed his name in a book acknowledging the receipt of a sum larger than 2*l.* for his employers, was tried for embezzling a sum of money so paid and received; and at the trial the whole of the entry, though unstamped, was read to the jury for the purpose of identifying the prisoner. *Held*, that the entry was not admissible in evidence, as, coupled with the extrinsic testimony, it proved a material fact against the prisoner, viz: the receipt of the money, and that, for the purpose of identifying him, only the signature should have been put in and proved, after it had been shown that the money was paid to the party who signed the book. *Regina v. Overton*, xxiv. 567.

12. *Letter of allotment—Circular of directors of a projected railway company.* The plaintiff received a letter of allotment, allotting him one hundred shares in a projected railway, upon which he paid a deposit of 2*l.* 2*s.* per share. With the letter of allotment, the board of directors (one of whom was the defendant) caused to be sent to the plaintiff a circular containing, amongst others, the following provision: "In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction." *Held*, that the letter of allotment and circular were admissible in evidence, without being stamped, inasmuch as they did not constitute the whole agreement between the directors and the allottees. *Ward v. Londesborough*, xxii. 402.

13. *Abstract of title containing recitals of deeds.* An abstract of title, stating the recitals in certain deeds, and relied upon by a party before a Master in Chancery in another suit, is admissible against him in an action as evidence of the matters recited, without producing the deeds. *Prichard v. Bagshawe*, v. 371.

14. *Entries by executor, made by direction of executrix.* In an action by the executor of the payee of a promissory note against the maker, where the plaintiff, in order to take the case out of the Statute of Limitations, produced a book in which he had made memorandums, by the direction of the testatrix, of payments of interest by the defendant to the testatrix, within six years, the evidence was *held* admissible, and not excluded by the 9 Geo. IV. c. 14, s. 3. *Bradley v. James*, xxii. 514.

15. *Accounts, entries in, how taken as evidence.* A gave a bond to B. Both died. D, administrator of B, filed a bill against C, executor of A, to enforce the bond. C filed a bill against D, alleging that there had been various accounts between A and B, and that the bond ought to be taken subject to the account, and not according to the letter; and, in support of such allegations, adduced, as evidence, an account in the handwriting of B. A decree was made in the causes for taking the accounts between A and B, and for an inquiry as to the circumstances under which the bond was given. *Held*, on exceptions to the Master's report, that the account in B's handwriting was to be taken as evidence in favor of B and against A, as well as in favor of A and against B. *Dickin v. Ward*, iii. 183.

16. *Books of accounts, when taken as primâ facie evidence.* *Held*, (*dubitate Bruce, L. J.*) that sect. 54 of 15 & 16 Vict. c. 86, making it lawful for the court, in any case where an account is directed to be taken, to direct that the books of account in which the accounts to be taken have been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, &c., applies to an account directed to be taken by a decree before the act went into operation, but that

the power thus given is not to be exercised till the means for obtaining the ordinary legal evidence have been exhausted. *Ewart v. Williams*, xxxi. 381.

17. *Partnership books of account.* *Semble*, that by the ordinary rules of the court, partnership books are admissible in evidence for and against all the partners and their estates. *Lodge v. Prichard*, xxvii. 474.

18. *Particulars of set-off.* To a declaration on the common counts, the defendant pleaded a set-off, and delivered particulars of his set-off with the plea. He afterwards withdrew this plea, and pleaded *puis darrein continuance* that a general balance of accounts had been struck between the parties, that the plaintiff admitted the set-off pleaded to be due, and that it was agreed that the balance then struck should be paid by instalments, &c., and that the defendant should release the plaintiff from all liability on a certain contract, &c.; and that this agreement was accepted by the plaintiff in satisfaction of his cause of action. The plaintiff replied that he had been induced to enter into this agreement by fraud. *Held*, that the particulars of set-off, delivered with the original plea of set-off, and in which particulars the statement of accounts differed from the statement upon which the agreement was founded, were admissible in evidence for the purpose of explaining the plea. *Buckmaster v. Meiklejohn*, xx. 324.

XIV. *Private Writings, Secondary Evidence of.*

1. *Admission of secondary evidence.* Where secondary evidence of a document is *prima facie* receivable, the opposite party may interpose with proof of facts which, if true, would render it inadmissible. *Elmes v. Ogle*, ii. 379.

2. *Admissibility of secondary evidence.* Upon an appeal against an order of quarter-sessions it became necessary to prove an application for a copy of depositions. The only application was by a letter, not produced; and no steps were taken to let in secondary evidence of its contents. The copies of the depositions were produced, and shown to have been sent in a letter by the magistrate's clerk. *Held*, that the quarter-sessions were right in refusing to act upon parol evidence of that application. *Regina v. The Justices of the West Riding of Yorkshire*, viii. 295.

3. *What is necessary to let in secondary evidence.* In order to render secondary evidence admissible, it is sufficient to show that all reasonable efforts have been made to procure the original. *Semble*, that where a private document is in the possession of a person beyond the jurisdiction of the court, who refuses to produce it, secondary evidence is receivable. *Held*, that a demand of the document from the person in whose possession it is, made by a stranger to the cause, who does not even disclose his object in making it, is insufficient to let in secondary evidence. *Quære*, whether there is not a difference between documents which are private documents in the ordinary sense of the word, and private documents which are *indicia* of property; such as charter-parties, &c.,—whether, for the purposes of proof, the latter do not rather partake of the nature of public documents. *Boyle v. Wiseman*, xxix. 473.

4. *Refusal of officers to produce books.* Upon appeal against an order of removal, the appellants set up a settlement by payment of rates in a third parish, the overseers of which, who had been subpœnaed to produce the rate-books, refused to do so, it was *held*, that such refusal did not entitle the appellants to give secondary evidence of the rating. *Regina v. The Inhabitants of Llanfaethly*, xxii. 251.

5. *Notice from nature of proceedings.* Upon an indictment for arson, with intent to defraud an insurance society, the nature of the proceedings does not give notice to the prisoner to produce the policy, so as to dispense with actual notice to produce; and where such notice had been given him at noon on the day before trial, he living thirty miles from the court, it was *held*, that secondary evidence of the policy could not be given. *Regina v. Kitson*, xx. 590.

6. *Evidence of parties.* The 14 & 15 Vict. c. 99, s. 2, which renders the parties to

a suit competent and compellable to give evidence, has not altered the rule of law which requires the execution of attested instruments to be proved by the subscribing witnesses. *Quære*, whether since that statute, a party examined as a witness may be questioned as to the contents of a written instrument, without producing it or accounting for its non-production? *Quære*, whether in a suit in chancery, notwithstanding the admission by the defendant, in his answer of the execution of a deed, regular proof of the deed by the subscribing witnesses can be insisted on? *Whyman v. Gath*, xx. 359.

7. Where the sessions have decided that sufficient search had not been made for an agreement, to let in secondary evidence of its contents, this court will not interfere with their decision, unless it sees clearly that the sessions were wrong. An agreement having been traced to the possession of P., a witness was called who stated that he went to P. and asked him whether there was any agreement between himself and the pauper respecting a house. P. said: "I cannot say for a certainty; I will search," and then directed his clerk to search. The witness and the clerk then searched P.'s office, and could not find the agreement. P. was not called as a witness. The sessions *held*, that there was no sufficient proof of search without calling P. The court refused (upon a case stated) to interfere with the decision. *Regina v. The Liberty of Saffron Hill*, &c. xvi. 358.

8. In order to prove a deed, a witness was called who stated that it was destroyed, and that he had seen the names of the parties to it in their respective handwriting. He also stated, that the instrument bore the name of one B., as an attesting witness; that B. was dead, but that he did not know B.'s handwriting, or whether the said name of B. was written by B. *Held*, that under the circumstances secondary evidence of the contents of the deed was admissible without further proof of the handwriting of B. *Per Erle, J.* Where a document is lost and the attesting witness to it is dead, there is no necessity for proving his handwriting. *Regina v. St. Giles*, xvi. 386.

9. An attorney stated that after the execution of a deed which he held for his client, a document was delivered out of his office to the defendant as a copy, but he was unable to say from his own knowledge, that it was a copy. The attorney having refused to produce the deed, it was *held*, that the document so delivered was not admissible as secondary evidence of its contents. *Volant v. Soyer*, xvi. 426.

10. A trust deed was made with the knowledge of certain persons, and it was last seen in the possession of the maker, and there was evidence that she intended it to be operative. At her death it was not found on her premises, but no search in the repositories of the trustees was proved. *Held*, that the search was not sufficient to let in secondary evidence; and declarations made by the maker as to the contents of the deed were not admissible in cutting down her title. *Richards v. Lewis*, v. 400.

11. *Copy produced on notice.* Plaintiff had served the solicitor of the guardian of infant defendants with notice to produce a particular deed, but a copy was sent instead. *Held*, that the production of the copy at the hearing did not amount to secondary evidence of the deed against the infant defendants. *Bacon v. Cosby*, iii. 186.

12. The witnesses to a deed being absent, it was produced at a hearing, with an affidavit of the handwriting of executing parties. The court proceeded to make a decree on the evidence as it stood, on the ground of there being before the court, at least, evidence of an agreement to do a thing for valuable consideration. *Ib.*

XV. *Private Writings, Production and Inspection of.*

1. *Inspection of deeds, which make out the title of both parties.* The right of a plaintiff, under the statute 14 & 15 Vict. c. 99, to inspect deeds in the defendant's custody, (where such a right exists,) cannot be limited by what is necessary to make out a *prima facie* case; but it extends to any deeds which may tend to support or strengthen

the case on the part of the plaintiff. The rule that one party has no right to inspect documents which make out the title of the other, does not apply, if they also make out his own. In an action of ejectment on title, the deeds which constitute the title of the defendant may be inspected as evidence for the plaintiff, if it appear upon the affidavits that the recitals may tend to support his case; for instance, as to pedigree: and inspection will not be refused on the mere suggestion that possibly it might be made available for the purpose of adapting the evidence to the recitals. *Coster v. Baring*, xxvi. 365.

2. *Privileged title deed.* In a suit for redemption, by a mortgagor, against the transferee of the mortgage only, the plaintiff confessing the defendant's title, but stating that he was unable to discover, and seeking discovery by what means the defendant made it out, it was held, that the defendant was not bound to produce the deed of transfer to him, which his answer admitted to be in his possession, and to be relevant to the matters in question, on the ground that it was privileged as the defendant's title deed. *Lewis v. Davies*, xvii. 228.

3. *Joint possession of documents.* Parties cannot be compelled to produce documents which are not in their exclusive possession, but only in their possession jointly with other persons. *Penny v. Goode*, xvii. 361.

4. *Construction of a will—Pedigree—Parish register—Deeds showing precise nature and extent of property.* The question in the suit being whether, upon the construction of certain words in a will, an estate tail or an estate in fee was limited, it became necessary for the plaintiff to prove his pedigree. The plaintiff moved for production of documents in the defendant's possession, consisting of deeds showing the precise nature and extent of the property; copies of pedigrees furnished to counsel to defend an action of ejectment brought against the defendant by the plaintiff; extracts from parish registries of births, deaths, and marriages; and a pedigree from the Heralds' College, procured by the defendant for his defence to the action. Held, that the extracts from parish registries and the pedigree from the Heralds' College must be produced, but none of the other documents required. *Wright v. Vernon*, xvii. 440.

5. *Power of court to allow an inspection.* Wherever an action is brought upon an instrument in which the defendant has an interest, the court has a common law jurisdiction to order the plaintiff to allow the defendant to inspect it. *Doe d. Child v. Roe*, xvi. 202.

6. *Common law jurisdiction.* The 14 & 15 Vict. c. 99, s. 6, which empowers courts of common law to order inspection and copy of documents in possession of the opposite party in all cases where a discovery may be obtained in a court of equity at the instance of the party applying, has not taken away the jurisdiction possessed by those courts previous to that statute, to order the inspection and copy of documents in the hands of an adverse party. *Bluck v. Gompertz*, vi. 524.

7. *Sufficiency of the affidavit on which the application to inspect is based—The answer.* The 14 & 15 Vict. c. 95, s. 6, has not given to courts of common law a power to compel a discovery, by a bill or analogous proceeding—the only power given to them by it, is to allow an inspection by one litigant party, of documents in the custody or under the control of the other litigant party, nor has it taken away the jurisdiction previously possessed by courts of common law, to order the inspection and copy of documents in the hands of an adverse party. And where an inspection is litigated, the party applying for it must show by affidavit that an action or other proceeding is pending, and also circumstances sufficient to satisfy the court or judge, that there are in the possession or under the control of the opposite party certain documents relating to such action, &c.; a *prima facie* case calling for an answer, must at least be stated in this respect. Further, as the party making such application is in the same situation as a plaintiff in a court of equity, he must show, first, what is the nature of the suit, and of the question to be tried in it, and it seems, also, that he should depose in his affidavit to his having just grounds to maintain or defend it; secondly, the affidavit ought to

state, with sufficient distinctness, the reason of the application, and the nature of the documents, in order that it may appear to the court or judge that the documents are asked in order to enable the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them. To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them, or he may show on affidavit that the part concealed does not in any way relate to the plaintiff's case. *Hunt v. Hewitt*, xiv. 513.

8. *No right to search opponent's books generally*—*Opponent not bound to make discovery*. The statute 14 & 15 Vict. c. 99, s. 6, does not enable a party to an action to search generally opponent's books and papers with a view of detecting a flaw in his opponent's case, but entitles him to inspect those documents, and those only, in his opponent's possession which are relevant to the case on which the applicant relies. The applicant cannot, by alleging that his opponent is in possession of documents material to the issues to be maintained by the former, compel the latter to make affidavits in answer, to discover whether he has any such documents in his possession, and to specify what they are. *Galsworthy v. Norman*, ix. 327.

9. *Refusal to produce*. A party who refuses to produce a document when called on, cannot afterwards produce it for his own evidence. *Laxton v. Reynolds*, xxviii. 553.

10. In an action on a contract the plaintiffs put in a letter from the defendant, offering to supply them with coals, &c. On cross examination, it appeared that there had been a reply to this; and it was held, that as the fact of the plaintiffs having sent a written answer was shown by their own evidence, the answer must be produced. *Hayworth v. Barnes*, xxvi. 274.

11. *Sufficiency of admission*. The answer by a defendant, that he has in his possession a book relating to matters improperly inquired into by the bill, and that, save as aforesaid, he has no books, &c., is not a sufficient admission to entitle the plaintiff to a production of the book. *Harford v. Rees*, v. 127.

12. The statute 14 & 15 Vict. c. 99, s. 6, does not enable a party to an action to call upon his opponent to answer by affidavit, whether he has any documents in his possession relating to the matters in question in the action, and, if any, to specify what they are; but it entitles him to have an inspection of all documents in the possession of the other party, material and relevant to the proof of the case on which the applicant relies. *Rayner v. Allhusen*, ix. 324.

XVI. Evidence to explain, enlarge, &c., written Instruments.

1. *Parol evidence not admissible to contradict a deed*. Parol evidence is admissible to enable the court rightly to understand in what sense words are used in a deed, just as evidence is afforded by a dictionary which enables us to translate a foreign language, or by a book of science, which gives us the meaning of words of art; but where the aid of parol evidence is invoked for the purpose of contradicting the express provisions of a deed, then such evidence is inadmissible. *The Attorney-General v. Clapham*, xxxi. 142.

2. *Ancient deed*. Parol evidence was held inadmissible to show that the express provisions in an ancient deed establishing a Methodist charitable trust, were inconsistent with the general system of Methodism. *Ib.*

3. *Will*. Extrinsic evidence is only admitted to assist in the construction of wills where the ambiguity is created by matter *dehors* the will. *Bernasconi v. Atkinson*, xvii. 103.

4. *Evidence of surrounding circumstances*. Evidence of the circumstances attending the execution of a guarantee are admissible to explain whether it applies to past transactions or to the future. *Bainbridge v. Wade*, i. 236.

5. *Sold note—Sale*. The plaintiff contracted by parol with H., the defendant's agent,

for the purchase of flour of the same quality as the defendant had supplied to M. The defendant sent to the plaintiff a sold note, which described the flour as "X S." Flour answering the description of "X S" was delivered. The plaintiff finding it not so good as the flour supplied to M., which was "X S S," complained of it to H., but afterwards used two more sacks, and then paid the contract price under protest. *Held*, that parol evidence was not admissible to show that the plaintiff had bargained for flour other than that mentioned in the sold note. *Harnor v. Groves*, xxix. 220.

6. *Mere delivery of sold notes.* By ERLE J. The mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree. *Sivewright v. Archibald*, vi. 286.

7. *Delivery order for "about" the specified quantity—Proof of usage.* In order to prove a delivery of a specified quantity of goods in a warehouse, under a contract of sale, by a delivery order for "about" the specified quantity, evidence is admissible of a known usage of warehousemen not to accept delivery orders in any other form. *Moore v. Campbell*, xxvi. 522.

8. *Memorandum of service of notice—Parol declaration of the party who made it.* A person who was usually employed to serve notices to quit, received instructions to serve a duplicate notice to quit on A, and on his return signed a memorandum, which had been prepared beforehand, "29th September, delivered a duplicate to A." In fact, he had served the father of A, and he stated that fact to his employer on his return. On ejectment after the death of the person who made service, it was *held*, that the parol declaration was not admissible evidence, because not made in the course of business, or in the discharge of a duty, and that there is no distinction between declarations by parol, and by writing made in the course of business, so far as regards their admissibility. *Stapylton v. Clough*, xxii. 275.

9. *Evidence of custom as to what constitutes a compliance with the terms of a charter party.* On a charter party, by which a shipper agrees to load a full cargo of sugar, evidence is admissible to prove that by the custom of merchants at the port of lading, a full cargo of sugar, in puncheons and hogsheads, is a compliance with such contract, although the same quantity of sugar, if packed in tierces, would not constitute such full cargo. *Cuthbert v. Cumming*, xxix. 456.

10. *Usage as to discount from freight.* In an action for freight against an indorsee of a bill of lading, who has accepted the goods delivered at L. the bill of lading making them deliverable "he paying freight" at a certain rate, &c.; evidence is admissible to show that by the custom of L. the consignee is entitled to a deduction of three months' discount from the freight, though such custom is confined to a few ports. *Brown v. Byrne*, xxvi. 247.

11. *To explain particular phrases—"Regular turns of loading."* Evidence is admissible to explain such expressions as in "regular turns of loading," in an action on a contract for loading coals at Newcastle. *Leidemann v. Schultz*, xxiv. 305.

12. *"Protestant dissenters"—Theological works.* The words "Protestant dissenters," in a trust deed, has no such legal meaning as to prevent the admission of evidence; and theological works of the period referred to may be admitted in evidence to show the meaning of the words. *Drummond v. The Attorney-General*, ii. 15.

13. *Corporate charter—Right to primage—Usage.* Where a charter granted to a corporation a right to exact primage from all persons as well subjects as strangers born, who were owners of goods brought from beyond the seas into a certain river, and afterwards established a distinction between "strangers born" and the inhabitants of a certain port therein named; the defendants contended that they were not included in either class mentioned in the charter, and so were exempt; to this the plaintiffs offered evidence of usage which was objected to by the defendants on the ground that usage was not admissible to aid the interpretation of charters, it was *held*, that the fact that defendants were not mentioned in the charter did not preclude their liability, and that the charter not being incompatible with the claim in question, evi-

dence of usage was admissible in support of it. *Bradley v. The Master Pilots and Seamen of Newcastle-upon-Tyne*, xxii. 189.

14. *Agreement of sale—Inventory.* If A be in possession of goods seized in execution, and the goods are claimed by B as his property, it lies on B to prove clearly that they are his; and if a paper purporting to contain the terms of agreement between the parties and to be an inventory of the goods, is inadmissible for want of a stamp, no other evidence of a sale is admissible; and B will not be permitted to show his title to the goods by parol evidence, however strong. *Yorke v. Smith*, ix. 342.

15. See also *Foster v. The Mentor Life Insurance Co.* xxiv. 103, and *Wyke v. Rogers*, xii. 162.

XVII. *Handwriting.*

Comparison of writings. For the purpose of proving a document in which a word is spelt in a particular manner, *e. g.*, *Titchborne* for *Tichborne*, to be in the handwriting of a party, other documents not in evidence in the cause, but proved to be in the handwriting of the party, and in which the word is similarly spelt, are admissible in evidence. *Brookes v. Tichborne*, ii. 374.

XVIII. *Reputation and Declarations of Third Persons.*

1. *Matters of general interest.* Evidence of reputation is admissible in questions relating to matters of public and general interest, notwithstanding that matters of private interest may also be involved in the inquiry. *Regina v. The County of Bedford*, xxix. 89.

2. *Rumors.* In an action for slander, imputing to the plaintiff unnatural practices, to which there was only a plea of not guilty, the counsel for the defendant, on cross-examination, asked a witness, "Have you heard from other persons that the plaintiff is addicted to practices of this kind?" *Held*, that the question was improper, as it was not confined to rumors existing before the words were spoken by the defendant. *Quare*, however, whether the question could have been allowed if it had been so limited. *Thompson v. Nye*, ii. 169.

3. *Declaration of tenant.* A declaration by deceased tenant, that he was not entitled to common of pasture in respect to his farm, is not admissible against the reversioner. *Papendick v. Bridgewater*, xxx. 293.

4. *Declarations of crew of a vessel.* In a cause of damage, the allegations and admissions of the mate and crew are not admissible in evidence, but those of the master are, he being the servant and agent of the owners. *The Midlothian*, v. 556.

XIX. *Deposition, admissibility of.*

1. *Illness of witness.* Depositions of a witness so ill as to be unable to travel are, under the 11 & 12 Vict. c. 42, s. 17, admissible in evidence before the grand jury as well as before the petty jury. *Regina v. Clements*, iv. 578.

2. *In criminal trials.* The prisoner was charged before a magistrate with wounding A., with intent to do him grievous bodily harm, and A.'s deposition was taken. A. afterwards died of the wound, and the prisoner was indicted for his murder. *Held*, that on the trial for the murder, the deposition of A. might be read in evidence: as, although it was not on the same technical charge, it was taken in the same case, and the prisoner had had full opportunity of cross-examination. *Regina v. Beeston*, xxix. 527.

3. *Absence of witness by procurement of prisoner.* A deposition, taken before a justice under sect. 17 of stat. 11 & 12 Vict. c. 42, is not admissible against a prisoner, without proof that the deponent is kept out of the way by means or procurement of the prisoner. *Regina v. Scaife*, iv. 323.

4. *Admissibility of copy.* A certified court copy of a deposition before a foreign tribunal, if accompanied by an affidavit of a competent party stating that the said court never delivers the originals of depositions, will be received in a case where the rules of court require the original deposition to be produced. *In re Clericetti*, xxx. 532.

5. Opinion on the relative value of affidavits and depositions taken on written interrogatories, and on cross-examination. *The Attorney-General v. Carrington*, iii. 73.

XX. Commission to examine Witnesses.

1. *Discretionary with court to grant a commission.* It is discretionary with the court to grant a commission to examine parties to an action resident abroad, under the 1 Will. IV. c. 22, s. 4, and the court will do so only where it appears from the affidavits in support of the application to be conducive to the due administration of justice. *Castelli v. Groome*, xii. 426.

2. Under the 1 Will. IV. c. 22, the court or a judge has power to issue a commission to a British colony for the examination of witnesses on interrogatories, or *vivâ voce*. *Solaman v. Cohen*, iii. 585.

3. *Administering oath to witness under foreign law.* Where it is the law of a foreign country that burgomasters alone shall administer oaths, and that no voluntary oaths shall be taken, a commission for the taking of depositions must be issued to the burgomasters, without requiring them to take an oath. *Bölin v. Mellidew*, v. 387.

4. *Where the mode of examination differs from the English practice.* A commission may issue under the 1 Will. IV. c. 22, to the judges of a foreign court, (as individuals,) to examine witnesses, although it appears that, according to the foreign law, the mode of examination will be conducted differently from the English practice, counsel not being allowed to put questions to the witnesses, except through the judge; and although hearsay evidence is there receivable. *Lumley v. Gye*, xxii. 367.

5. *Power to reject illegal portions of a deposition.* If at the trial it should appear either on the face of the deposition or by extrinsic proof that illegal evidence has been admitted, or proper questions refused to be put to the witnesses, the judge would have a discretion as to rejecting the whole or the illegal portion of the evidence. *Ib.*

6. *Fresh commission.* Where a former commission, issued to an English commissioner, had been abortive by reason of the witness, in accordance with the foreign law, refusing to be examined except by a judge of the foreign court, the court granted a fresh commission to the judges of that court, on payment of the costs of the former commission. *Ib.*

7. *Exact residence of witness not known—Two sets of examiners appointed.* Where a defendant, whose evidence it was desired to take, was resident in Australia, and it was not known whether in Melbourne or Adelaide, two examiners were appointed in each place, each with power to act in default of the first named examiner being capable, and liberty was, in the same order, reserved to the principal defendant in the cause, to appoint some person in the colony to attend the taking of the examination on his behalf. *Crofts v. Middleton*, xvii. 88.

8. *Examination de bene esse—Filing answer.* An application being made for a commission for the examination *de bene esse* of a witness above seventy years of age, the court refused to impose it as a condition in making the order that the answer should be filed. *Forbes v. Forbes*, xii. 258.

9. *Witness living in London.* Under special circumstances, the court will appoint an examiner to take the evidence of witnesses in London. *Brennan v. Preston*, xvii. 38.

10. *Fresh commission without a new Master's certificate.* The court having directed a commission to issue for the examination of witnesses upon the certificate of the Master, and that commission having miscarried, by reason of the defendant being deprived of an opportunity of cross-examining the plaintiff's witnesses, a new commission was

directed by the court to issue without any further certificate of the Master. *Forsyth v. Ellice*, xiii. 51.

11. *Commissioner not bound to file deposition till his fees are paid.* In the absence of a special agreement, a commissioner for the examination of witnesses will not be required to file the depositions taken in the cause without payment of his fees. *Peters v. Beer*, vi. 63.

12. *Amendment of commissioners' return.* The return of a commission, which omitted to state that the commissioners and their clerks had taken the oaths, ordered to be amended, though the signature of the commissioners to the interrogatories had also been omitted. *Davis v. Barrett*, vii. 207.

XXI. Administration of Oath.

Witnesses are sworn by the court through the instrumentality of some of its officers; and it is not material whether the oath be administered by the crier or clerk of the peace, so that it be done in open court. *Regina v. Tew*, xxix. 537.

XXII. Viva Voce Examination of Witnesses in Chancery.

1. *Where cause at issue before the passing of 15 & 16 Vict. c. 86.* Where a cause was at issue before the passing of the 15 & 16 Vict. c. 86, upon motion by the plaintiff, with notice, the court ordered that the evidence should be taken under the provisions of that act and the orders of August, 1852, upon being satisfied that it was a case in which *viva voce* evidence would be best, and that the defendant had been at one time ready to consent to its being taken under the act, although the defendant opposed. *Cable v. Cooper*, xiii. 439.

2. The court has no jurisdiction to order a plaintiff to be examined *viva voce* before a master under a decree. *Ward v. Homfray*, vii. 55.

3. *Procedure Amendment Act—Examination de bene esse.* The examination of witnesses *de bene esse* is within the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 28.) The examination of witnesses *de bene esse* is to be taken by one examiner. *Cook v. Hall*, xv. 321.

4. *Examination of a witness who has deposed by affidavit.* An examination *viva voce* of witnesses, who have already deposed by affidavit, will not be granted under the new practice, unless, if the case had come on by bill and answer, the court would, under the old practice, have directed an issue. *Wilkinson v. Stringer*, xiii. 500.

XXIII. Cross-examination of Witnesses.

1. Where one prisoner calls a witness who gives evidence tending to criminate another prisoner, the counsel of the latter has a right to cross examine the witness and address the jury upon his evidence. *Regina v. Burdett*, xxix. 540.

2. *Record of conviction to be produced.* Per Cresswell, J. If a witness be asked, on cross-examination, whether he has been convicted, the question, if objected to, ought to be rejected, unless the record be produced. *Macdonnell v. Evans*, x. 484.

3. *Former deposition presented to witness.* The counsel for the prisoner cannot, when cross examining a witness for the prosecution, put into his hand his deposition before the magistrate, and ask him whether, having looked at it, he still adheres to the statement made in his evidence in court, the counsel not intending to put the deposition in evidence. *Regina v. Ford*, iv. 576.

4. *Bona fides of a sale—Would witness have acted upon an order to deliver goods?* A bankrupt, before his bankruptcy, having sent goods to the witness, a clerk in a bookkeeping office, afterwards called with the plaintiff and told the witness that he had sold the goods to the plaintiff. *Semle*, that in a suit in which the *bona fides* of the

sale is in dispute, the witness may be asked, on cross-examination, "whether he would have acted upon the order of the plaintiff for the delivery of these goods." *Morgan v. Whitmore*, v. 506.

5. *Witness not to be asked if he did not write an answer to a letter charging him with an offence, unless the letter be produced.* A witness cannot be asked on cross-examination whether he did not write a certain letter in answer to another which charged him with an offence without such other letter being first produced, its non-production being unexplained, even although the object of the cross-examination was only to discredit the witness. *Macdonnell v. Evans*, x. 484.

6. The 40th section of the 15 & 16 Vict. c. 86, as to the cross-examination of witnesses, applies as well to motions for decrees as to other proceedings. *Williams v. Williams*, xix. 36.

EXCEPTIONS.

1. *Refusal of judge to sign, unless explanation introduced into.* A bill of exceptions was tendered to a judge's direction, and under the 55 Geo. III. c. 42, s. 7, was signed by him at the time of the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the court. *Held*, that the introduction of this explanation was highly irregular: but that, being on the record, the court below, and this house, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed, and the appellants were not bound to make the irregularity the subject of a substantive application to the court. *Semble*, that a bill of exceptions must be sealed. *The Earl of Glasgow v. The Hurler and Campsie Iron Co.* viii. 13.

2. *Charge to find for defendant—Request for specific instructions.* Where a judge charges the jury that they should find for the defendant, exception thereto is properly taken by a request for specific instructions, which by reasonable implication calls the attention of the court to the fact that there was evidence for the jury to pass upon. *Paterson v. Wallace*, xxviii. 48.

3. If an exception to a judge's ruling sufficiently call the judge's attention to the point, it is immaterial whether the counsel may set forth as the ground of his exception that which is bad law. *Id.*

4. *None in criminal case.* No bill of exceptions can be tendered by either party in a criminal case, and there is no distinction in this respect between misdemeanors and felonies. *Regina v. Alleyne*, xxix. 179.

5. *In case of nonsuit.* If, upon the trial of a cause, the judge directs a nonsuit, and the plaintiff does not appear when called, and judgment of nonsuit is therefore entered against him, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the judge improperly directed the nonsuit. The proper course is for the plaintiff to appear and require the judge to direct the jury in point of law in his favor, and upon the judge refusing to permit him to appear, and nonsuiting him against his will, or refusing to direct the jury in his favor, the plaintiff may tender a bill of exceptions, and bring a writ of error. *Corsar v. Reed*, viii. 380.

EXECUTOR.

See ADMINISTRATION.

EXECUTION.

- I. ON WHAT MAY BE LEVIED.
- II. SATISFACTION OF EXECUTION.
- III. MISCELLANEOUS CASES.

I. On what may be levied.

1. *Bank-notes and money.* Bank-notes and money seized under a *fi. fa.* are subject to the same rights and liabilities as goods are when so seized, and cannot be appropriated by the sheriff under stat. 1 & 2 Vict. c. 110, s. 12, to satisfy a *fi. fa.* against the execution creditor. *Collingridge v. Paxton*, viii. 402.

2. *Annuity out of stock standing in name of Accountant-General.* A, being in receipt of an annuity payable out of stock standing in the name of the Accountant-General, became indebted to B who brought an action against him and obtained a judgment, upon which a *fi. facias* was issued, but nothing was found upon which to execute it. Upon half a year's annuity falling due, B obtained an order stopping the Accountant-General from parting with the check; but upon a petition, the court declined to make an order authorizing the sheriff to seize the check or to direct it to be dealt with as if it was standing in the name of a trustee, and the petition was dismissed. *Courtroy v. Vincent*, ix. 205.

3. *Goods of bankrupt.* An execution against the goods of a bankrupt is valid, within the 12 & 13 Vict. c. 106, s. 133, when the sheriff executes the bill of sale, notwithstanding it contains a clause of indemnity to the sheriff by the execution creditor, and is not executed by the latter until after he has had notice of an act of bankruptcy. *Christie v. Winnington*, xviii. 529.

4. An execution issued upon a judge's order is an execution obtained by "confession" within the 6 Geo. IV. c. 16, s. 108. Therefore, where a debtor's goods were seized under an execution issued upon a judge's order, and an act of bankruptcy was afterwards committed by the debtor, and a *fiat* issued before the sale, the assignees of the bankrupt were held to be entitled to the goods. *Andrews v. Diggs*, ii. 425.

5. *Equitable terms.* An execution creditor (where the judgment has not been registered) is entitled, through the medium of a court of equity, under the 13th section of the above statute, to an equitable term belonging to his debtor. *Gore v. Bowser*, xxxi. 343.

6. *Against shareholders of joint stock company.* Under sect. 36 of 8 & 9 Vict. c. 16, the court will not order execution against a shareholder of a company without a *sci. fa.*, but will only, upon sufficient ground being shown, allow a *sci. fa.* to issue, in order that execution may be obtained against such shareholder to the extent pointed out by that section. It is not sufficient, in order to obtain leave for issuing such *sci. fa.*, to show that *fi. fas.* have been issued against the effects of the company into two counties, and *nulla bona* returned to them. *Hutchings v. The Kilkenny, &c. Railway Co.* i. 357. See, also, *Devereux v. The Kilkenny, &c. Railway Co.* i. 481.

7. *Property of municipal corporation.* Property acquired by a municipal corporation after the passing of the stat. 5 & 6 Will. IV. c. 76, is not liable to be taken on execution for a debt due before that period. *Arnold v. Ridge*, xxiv. 242.

8. *When person may be taken in execution.* The 25th section of the 7 & 8 Vict. c. 96, provides that annuities secured by bonds, covenants, &c., shall be taken to be debts at their real value, and the 57th section of the same act enacts that no person shall be taken in execution on a judgment in an action for a debt where the sum recovered does not exceed 20*l.* Where judgment was recovered for 500*l.* on a warrant of attorney given to secure payment of an annuity of 30*l.* but only 15*l.* was due, the defendant, having been taken in execution, was discharged under that section, the word "recover" being held susceptible of two meanings, according to one of

which only 15*l.* was recovered. *Dubitante, Williams, J. Johnson v. Harris*, xxviii. 376.

II. Satisfaction of Execution.

1. *What amounts to—Levy of debt and costs—Interest.* Where a judgment had been entered up, and a writ of execution for debt and costs had issued, before the commencement of stat. 1 & 2 Vict. c. 110, it was *held*, that, by virtue of sect. 17, the judgment was not satisfied upon the levy, after the commencement of the act, of the debt and costs, and that it would not be satisfied until payment of interest from the commencement of the act until the satisfaction of the judgment. *Semble*, that the interest might be levied by virtue of a separate writ of execution, to be issued after the passing of the act. *Bishop v. Hatch*, xiv. 161.

2. *Unauthorized discharge of defendant by plaintiff's attorney.* *Semble*, that the discharge of a defendant taken on execution, by the plaintiff's attorney, without the authority of the plaintiff, under an agreement that the defendant shall pay part of the debt, is not a satisfaction of the execution. *Ward v. Broomhead*, xiv. 502.

3. *Irregularity in execution—Second warrant.* Trespass against the sheriff and S. his bailiff, for breaking plaintiff's house and taking his goods. Plea by S., justifying under a writ of *feri facias* directed to the sheriff, and a warrant from the sheriff to him. Replication, alleging a prior warrant to J., and a seizure by J. under the writ and warrant, and payment by plaintiff to the sheriff in satisfaction of the writ. Rejoinder, traversing the prior seizure under the writ and the payment to the sheriff. It appeared that L., the clerk and head officer of J., entered plaintiff's house and seized his goods under the warrant. Plaintiff paid the amount to L. at J.'s office, and L. withdrew the man in possession, and sent notice to the execution creditor, in J.'s name, that the money was levied. In the course of the same day J. died, and the execution creditor, upon application at the office, did not obtain the money. The sheriff then issued the warrant to S., who seized plaintiff's goods, and remained in possession for several days. The jury did not agree as to whether L. paid the money to J. before his death, but they found that L. executed the warrant by the direction of J. and that the money was received by L. in pursuance of authority from J. The judge directed the jury that they might find that the money had been paid to the sheriff. The jury found for the plaintiff, damages 400*l.* *Held*, that there was sufficient evidence of a payment to J. after an execution *de facto* under the prior warrant; and that no irregularity in the execution could be taken advantage of by the sheriff, or those acting under the sheriff, so as to enable them to set up the validity of the second warrant; and, therefore, there was no misdirection. *Gregory v. Cotterell*, xviii. 99.

III. Miscellaneous Cases.

1. *On warrant of attorney, in the nature of a marriage settlement, validity of—Bankruptcy.* D., a feme sole, being about to marry W., lent him 300*l.* upon his warrant of attorney, the warrant being given to her and S., who was to act as her trustee. The defeasance showed the loan to be in contemplation of marriage, and stipulated that W. was to be possessed of the money as long as D. should please, paying interest for the same to S.; and, also, that upon the request of D., S. might require payment of the principal on giving one week's notice; judgment was to be forthwith entered up, and execution was to issue on default of payment after such notice. Judgment was accordingly entered up, and the marriage solemnized. After several years had elapsed, notice was given in pursuance of the warrant, and on default a *fi. fa.* issued, under which the goods of W. were taken and assigned by the sheriff. W. was then adjudged bankrupt, and a rule was obtained to set aside the execution, and for the delivery of the goods to his assignee, upon the grounds that the judgment should

have been revived, and that it was discharged by the subsequent marriage of D. and W. *Held*, that the execution having been suspended by the consent of the parties, the judgment did not require reviving; and that, under the circumstances of the case, the warrant of attorney, being in the nature of a marriage settlement, remained a good security for the loan, and that the execution thereupon was valid. *Dolling v. White*, xviii. 241.

2. *Injunction to stay—Payment into court.* The plaintiff had obtained the common injunction to stay execution in an action on the same day that the action was tried, but before the verdict was given against him. *Held*, upon motion by the defendant before answer, that the plaintiff must pay the amount for which judgment had been signed into court within a specified time, or the injunction must be dissolved. *Anderson v. Noble*, xiii. 45.

3. *When revival of judgment unnecessary.* A judgment was more than a year and a day old, but less than six years, when the Common-law Procedure Act came into operation, and had not been revived by *scire facias*. *Held*, that execution might issue under the 128th section, without any revival of the judgment. *Boodle v. Davis*, xvi. 521.

4. *Action for libel—Scire facias—Fiat of attorney-general.* Where writs of execution have been sued out without effect, on a judgment in an action for libel against the publisher of a newspaper,—*quare*, whether a *scire facias* will be issued on the recognizances of the sureties taken under 60 Geo. III. c. 9, and 1 Will. IV. c. 73, without the fiat of the attorney-general. *Semble*, per Parke, B., that it may be so issued, but, per Pollock, C. B., Alderson, B., and Platt, B., that the fiat of the attorney-general is requisite. *The Duke of Brunswick, ex parte*, ix. 475.

FALSE IMPRISONMENT.

1. *Commitment for default—Appearance—Liability of a justice.* Upon a conviction under the Copyright of Designs Act, 6 & 7 Vict. c. 65, the party convicted, making default, was, upon complaint made, summoned to show cause why he had not paid the amount of the penalties and costs under such conviction, and why he should not be committed in default of payment, and be further dealt with according to law. Thereupon his counsel and attorney appeared to show cause, but the sitting magistrate refused to hear the case in the absence of the party himself, and granted a warrant reciting the summons and the neglect of the party to appear, and commanding his apprehension, to answer to the complaint made, and to be further dealt with according to law; under which the party was apprehended and imprisoned. *Held*, (the conviction being afterwards quashed,) that the magistrate was liable to an action of trespass for false imprisonment; first, on the ground that the above section did not apply to default in non-appearance to a summons after conviction; and, secondly, assuming the section to apply to a summons after conviction, that there had been no default in appearance, the appearance by counsel and attorney being sufficient. *Bessell v. Wilson*, xviii. 294.

2. *Arrest for an offence committed in view.* A statute authorizes constables to arrest persons committing an offence in their view. The plaintiff was convicted of the offence, but not proved to have committed it in their view. *Held*, that such conviction was not a conclusive answer to his claim against them for damages for false imprisonment. *Justice v. Gosling*, viii. 475.

3. *Arrest after payment of debt.* S. obtained judgment against plaintiff for a debt, which was ordered to be paid to the clerk of the court; it was not paid, a summons was issued, and plaintiff made no appearance, and was committed for seven days, or until discharged by law. On the warrant was indorsed the debt. Plaintiff was arrested after he had paid the debt to S., who wrote the fact to the clerk of the court. In trespass for false imprisonment against the clerk by plaintiff, it was *held*, that the order and warrant were in force at the time of the arrest, notwithstanding the payment of the

debt, and the letter to the clerk, and therefore the arrest was legal. *Quære*, whether plaintiff could be lawfully discharged without an order of the judge of the county court, under sect. 110 of stat. 9 & 10 Vict. c. 95. *Davies v. Fletcher*, xx. 56.

4. *Liability of clerk of county court.* The clerk of a county court is a mere ministerial officer, acting under sect. 102 of the 9 & 10 Vict. c. 95, and is not liable in trespass for imprisonment under a warrant reciting a bad order. *Dews v. Ryley*, vii. 469.

5. *Petition in insolvency while in custody—Queen's bench prison—Remand ward—Evidence.* The plaintiff, while in custody of a sheriff, petitioned the insolvent court; and a warrant was issued for his discharge on the 12th of April. He was removed by *habeas corpus* to the queen's prison, a copy only of the warrant being sent with him. Defendant told plaintiff he should not discharge him without an order; but, on plaintiff's application, such order was refused as unnecessary, and three days after the 12th he was discharged without any order. The jury found that the defendant led the plaintiff to believe he had, and had acted on the original warrant. *Held*, that the rule of law which prevents a party who makes a wilful misrepresentation, and induces another to act upon a belief in the truth of it to his prejudice, from afterwards proving the truth, did not apply so as to prevent defendant from proving that he had received only a copy of the warrant, and had acted upon it. And that plaintiff's imprisonment in the remand ward was not the gist of the action, nor was such imprisonment shown to be improper; and, therefore, there was no ground for judgment *non obstante veredicto*. By Erle, J.—The placing of a prisoner in a wrong ward is not ground for an action for false imprisonment. *Howard v. Hudson*, xx. 47.

6. *Giving into custody—Evidence.* In an action for giving the plaintiff into custody on a charge of stealing oysters from an oyster-bed, it was *held*, that the defendant could not, to show his good faith, give evidence of a prior conviction of a third party for the same offence, which conviction he did not know of at the time. *Thomas v. Russell*, xxv. 559.

7. *Having means and neglecting to pay judgment—Two warrants.* The return to a writ of *habeas corpus* for the discharge of a judgment debtor set out two warrants of commitment, of different dates, made by the judge of the county court of Brentford. The warrants, in precisely the same terms, recited the judgment recovered in the county court, a subsequent order to pay by instalments and default made, and that a judgment summons had been issued; and then stated that the defendant having appeared and been examined, and it appearing to the satisfaction of the judge that the defendant had since the said judgment recovered against him, and still had sufficient means to satisfy the said judgment, but refused and neglected to pay the same, it was ordered that he be imprisoned for forty days. The prisoner's detention was justified under the last warrant. *Held*, that it was to be presumed that a new default in non-payment had been made, upon which the last warrant was granted, and that the imprisonment, therefore, was legal. *In re Boyce*, xxii. 181.

FALSE PRETENCES.

I. OF THE OFFENCE.

II. OF THE INDICTMENT.

I. Of the Offence.

1. *Begging letter.* A begging letter, making false representations as to the condition and character of the writer, by means of which money is obtained, is a false pretence within the statute. *Regina v. Jones*, i. 533.

2. *Passing flash note.* Passing off a flash note as a Bank of England note on a person unable to read, and obtaining from him in exchange for it five pigs, of the value of 3*l.* 17*s.* 6*d.*, and 1*l.* 2*s.* 6*d.* change, is a false pretence within the statute. *Regina v. Coulson*, i. 550.

3. *Pretence by Secretary of an Odd Fellows Society.* Where the secretary of an Odd Fellows Society falsely pretended to a member that the sum of 13s. 9d. was due by him to the society for fines, by means of which such secretary fraudulently obtained from him that sum of money, it was *held* to be a false pretence within the stat. 7 & 8 Geo. IV. c. 29. *Regina v. Woolley*, i. 537.

4. *Statement by a servant that he had paid out money for his master—Payment by clerk.* A servant falsely stated to the clerk of his master's that he had paid out money in a purchase which he was authorized to make, and he demanded and received the sum from the clerk, and applied it to his own use. *Held*, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining it by false pretences. *Regina v. Barnes*, i. 579.

5. *Alteration of letter of credit.* The prisoner, who had a letter of credit for 210*l.*, authorizing him to draw on the Union Bank of London, in favor of certain correspondents, went to St. Petersburg, and having fraudulently altered the letter, so as to make it appear to be for 5,210*l.*, presented it to W. and Co., one of the correspondents, and drew in their favor, on the Union Bank, for the sum of 1,200*l.* This check was cashed by W. and Co., who had it presented at the Union Bank; but the bank, discovering the fraud, refused to pay it. *Held*, that the prisoner was not indictable for an attempt to obtain 1,200*l.* by false pretences from the Union Bank, since, if W. and Co. had obtained payment, it would not have been in pursuance of the prisoner's wish or desire, and they would have obtained the money for their own and not for the prisoner's use or benefit, and, therefore, there would have been no obtaining of any money by him. *Regina v. Garrett*, xxii. 607.

6. *Continuing representation—Question for the jury.* Upon an indictment for obtaining money by false pretences, where it appears that statements were made on different occasions, it is a question for the jury whether they are so connected as to form one continuing representation. *Regina v. Welman*, xx. 588.

7. *Valuable security.* The secretary of a burial society was indicted for pretending that a death had occurred, and so obtaining from the president the following order: "B. B. Society, B—, 1853. Mr. E., treasurer, please pay the bearer 2*l.* 10s. and charge the same to the society. —, president." *Held*, that this was a valuable security under 7 & 8 Geo. IV. c. 29, ss. 5, 53. *Regina v. Greenhalgh*, xxv. 570.

II. Of the Indictment.

1. *Allegation of a pretence that a certain sum was "due and owing."* The indictment alleged that the defendant falsely pretended a sum of money was "due and owing" to him for work which he had executed for the prosecutors. *Held*, that this was not an allegation of a false pretence of an existing fact, as the allegation in the indictment might be satisfied by evidence of a mere matter of opinion, either as regarded fact or law; and therefore the indictment was bad. *Regina v. Oates*, xxix. 552.

2. *Sufficient to allege the substantial pretence.* Upon a charge of obtaining money by false pretences, it is sufficient if the actual substantial pretence, which is the main inducement to part with the money, be alleged in the indictment, and proved; although it may be shown by evidence that other matters, not laid in the indictment, in some measure operated upon the mind of the prosecutor as an inducement for him to part with his money. *Regina v. Heugill*, xxiv. 556.

3. *Ownership must be alleged.* An indictment for obtaining money, &c., by false pretences, must allege whose property the money, &c., was at the time, and the omission of such an allegation will not be cured by verdict. *Sill v. Regina*, xvi. 375.

FEES.

1. *For copy of printed bill.* Though a fee of one guinea is paid upon service of a copy of a written bill, a second fee must be paid upon service of a copy of the printed bill. *The Trustees of Birkenhead Dock v. The Shrewsbury, &c. Railway Co.* xv. 340.

2. *For production on record.* Where the court requires a record for its own use, no fee should be paid. *Drysdale v. Mace*, xxvii. 193.

3. *Sheriff's fees where debt and costs paid after seizure.* The fees allowed to sheriffs and their officers under the 7 Will. IV. and 1 Vict. c. 55, s. 2, "for search for detainers," and "for supersedeas—discharge to any writ or process, or for the release of any defendant in custody, or of goods taken in execution," are not applicable where the debt and costs are paid after the seizure under a *fi. fa.* *Masters v. Lowther*, x. 471.

4. *Receiver's accounts—Special order.* Special order made by the Lord Chancellor, that, instead of the sum payable under the 6th Order of 25th October, 1852, as a further fee for the certificate upon the passing of a receiver's and manager's account, there should be paid such a fee as the judge to whose court the cause was attached should think reasonable. In another case the Lord Chancellor directed the fee, under the same order, to be paid on each 100*l.* of the net profits of the business over which the receiver and manager had been appointed. *Wells v. Wales*, xxxi. 562.

5. *Discharge fee.* A levy having been made under a writ of *distringas*; the debt and costs were paid, when the sheriff refused to return the 40*s.* issues, unless he was allowed "a discharge fee" of 4*s.* 6*d.* *Held*, that the sheriff was not entitled to such fee. *Taylor v. Warrington*, xiv. 166.

FINES.

Sheriff's duties. By the 3 Geo. IV. c. 46, s. 2, fines imposed at quarter sessions are to be inserted on the roll, and a copy thereof, together with a writ of *distringas* and *capias*, is to be sent within twenty-one days to the sheriff. By sect. 3, the clerk of the peace, before sending the roll to the sheriff, is to make oath that the roll is truly made up, and that the fines are, to the best of his knowledge, inserted therein, and that all fines paid to or received by him are inserted therein, without any wilful omission. *Held*, that on such roll and writ being sent to the sheriff, his duty is not merely ministerial; but that, if he has received the fine, he must not proceed to levy it, although it may appear upon the roll to be unpaid. *Held*, also, that if the clerk of the peace has received the fine, he must enter it upon the roll as paid; and that if the sheriff has received it, and that fact is known to the clerk of the peace, he may enter it upon the roll as paid; but, *quære*, in this latter case, if he is bound so to enter it. *Wildes v. Morris*, xiv. 181.

FIXTURES.

1. *Threshing machine bolted to posts set in the earth.* A threshing machine fixed by bolts and screws to posts let into the earth, so that it cannot be removed without disturbing the soil, passes under a conveyance either as part of the lands, or as a fixture. *Wiltshier v. Cottrell*, xviii. 142.

2. *Rick saddles.* So of rick saddles, or stone pillars, mortared to a brick foundation, let into the earth. *Ib.*

3. But a granary resting by its mere weight on the saddles is a chattel, and does not pass with the land. *Ib.*

4. *Substitution of new fixtures by tenant.* It seems that a tenant under a lease for a long term of years, with covenant to deliver up fixtures at end of the term, is authorized to substitute new fixtures in place of the old ones, without breach of covenant. *Elliott v. Bishop*, xxviii. 484.

5. *Lock and key.* A lock and key belongs to the house as part of it and passes by deed thereof. *Per Martin, B.* *Ib.*

6. *Gas fixtures.* Gas fixtures and ornamental chimney pieces put up by the tenant may be removed by him before the expiration of the term. Per Platt, B. *Ib.*

7. As to whether certain specified fixtures belong to landlord or tenant, see *id.* See also LANDLORD AND TENANT, IV.

FLOWING WATER.

See EASEMENT.

FORBEARANCE.

1. *Promise by surety to pay joint debt.* Forbearance to sue a principal and surety on a joint debt, is a sufficient consideration for a promise by the surety to pay the debt. *Jones v. Beach*, xi. 200.

2. *Promissory note given for portion of debt—Contract not to sue remainder.* *Semble*, per the Lord Chancellor, that a promissory note for a portion of a debt is, although part payment is not, a good consideration for a contract not to sue for the remainder during a limited period. *Moss v. Bainbrige*, xxxi. 565.

3. *Agreement to pay interest due by mercantile usage and prior agreement.* Interest being payable by mercantile usage and by special agreement on a balance of accounts between merchants, an agreement that, in consideration of such payment of interest, the creditor would not require payment of the principal until after six months' notice to that effect, is without consideration. *Orme v. Galloway*, xxiv. 521.

FOREIGN ATTACHMENT.

See GARNISHMENT.

FORFEITURE.

1. *Convict, forfeiture of right of action.* Where a party, who is afterwards convicted of felony, is entitled to a chose in action, the right of suing being in another in trust for him, that right of suit does not vest in the crown upon the conviction. *Bishop v. Curtis*, xiv. 49.

2. *Estate of the wife of a felon sentenced to transportation.* A. died intestate, the wife of a felon under sentence of transportation, and leaving property acquired after the conviction of her husband. *Held*, that such property belonged to the crown as accrued to the felon, and not to the next of kin of the wife. *Coombes v. The Queen's Proctor*, xxiv. 598.

3. *Contract that work might be stopped on notice—Sufficiency of notice.* The declaration stated that the plaintiff agreed to construct sewers, &c., but the defendant would not suffer him to complete them. Plea, a covenant that defendant's engineer might give notice to plaintiff, if he saw cause, to alter what was improper in his works, and to proceed with due expedition therewith, and that if the plaintiff refused to comply within seven days, he might take the work out of his hands. Notice accordingly, refusal to comply, and taking away of the work. Replication, stating the notice in terms. *Held*, that the notice was sufficiently specific. *Pauling v. The Mayor, &c. of Dover*, xxix. 367.

4. *Enforcement of forfeiture—Notice of action—Agreement to perform to surveyor's satisfaction.* Plaintiff contracted with defendants, (a board of health,) to perform certain works to the satisfaction of their surveyor; payment to be made by instalments. If the plaintiff should not proceed to the surveyor's satisfaction, the defendants might, after notice, employ others to complete the works; the deed to be void, at their election, and the amounts already paid to be held full value for the work then completed, and the materials on the premises to belong to defendants. *Held*, that this forfeiture clause might be enforced by the defendants, although the plaintiff had not become entitled to any payment for the work done. *Held*, also, that in an action by the plaintiff against the defendants, for not allowing him to complete his contract, no

notice of action was requisite under the provisions of the Public Health Act. *Davies v. The Mayor, &c. of Swansea*, xx. 529.

5. *Taking wrongful possession of works, &c.* Taking possession of works, materials, tools, &c., even if wrongful, does not avoid a contract, or entitle an injured party to relief at equity while he has an action for damages; though it may compel an account to be made. *Ranger v. The Great Western Railway Co.* xxvii. 35.

6. As to the forfeiture of a lease, see *Wilson v. Wilson*, xxv. 392.

FORGERY AND COUNTERFEITING.

1. *Cutting of part of banking company's note—Comparison.* The prisoner cut out part of a note of a banking company, and took the border to an engraver to have a plate made of this border, intending to fill up the centre with the title of some cosmetic. A plate was made and delivered to him, when he was immediately apprehended with the plate in his possession, and was tried and convicted upon an indictment framed upon the 18th section of the 11 Geo. IV. and 1 Will. IV. c. 66. *Held*, that by the word "note," is not meant merely the obligation or writing, but the whole paper, or thing which circulates as a note; and therefore the border is part of a note within the meaning of the statute. *Held*, also, that the engraving need not show upon the face of it that it purports to be part of a genuine note, but that a comparison may be made with a genuine note in order to see whether it does or does not purport to be part of that note. *Regina v. Keith*, xxix. 558.

2. *Forging an order for payment of money, what is.* Forging a document purporting to be an order for the payment of money, though not addressed to any one, is punishable by the statute 11 Geo. IV. and 1 Will. IV. c. 66, s. 3, as the forging an order for the payment of money, if it can be explained by evidence to whom the order is in fact addressed. *Regina v. Snelling*, xxii. 597.

3. A forged letter purporting to be written by A, and addressed to B, who owed him, in which, after setting out the amount due from B, A was made to say, "Sir,—I hope you will excuse my sending for such a trifle," &c., "but I am obliged to hunt after every shilling." *Held*, to be a forged "warrant" for the payment of money within the meaning of the stat. 11 Geo. IV. and 1 Will. IV. c. 66, s. 3, and *semble*, that it was also a forged "order" for the payment of money. *Regina v. Dawson*, i. 589.

4. *What is an uttering—Receipt for poor rates.* Where the prisoner placed a forged receipt for poor rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person, it was *held*, that this was an uttering within 1 Will. IV. c. 66, s. 10. *Regina v. Ion*, xiv. 556. As to what constitutes a "passing" counterfeit money, see note to same case.

5. *Counterfeit shilling.* The prisoner, in payment for some goods at a shop, put down on the counter a counterfeit shilling. The shopman took it up and said that it was bad. The prisoner then quitted the shop, leaving the coin there. *Held*, that the prisoner had "uttered and put off" the counterfeit shilling within the meaning of the statute. *Regina v. Welch*, i. 588.

6. *Uttering a testimonial of character an offence at common law.* The prisoner was indicted for forging a testimonial to his character as a schoolmaster, and other counts of the indictment charged him with having uttered the forged document. The jury acquitted him of the forgery, but found him guilty of the uttering with intent to obtain the emoluments of the place of schoolmaster, and to deceive the prosecutor. *Held*, that this finding of the jury amounted to an offence at common law, of which the prisoner was properly convicted. *Regina v. Sharman*, xxiv. 553.

FORMER RECOVERY.

1. *Trover—Judgment without satisfaction.* Judgment recovered (though without satisfaction) against one, in an action for a conversion of goods by wrongfully selling,

is a bar to an action for money had and received, against another, for the proceeds of the same sale, whether he be a party to the conversion or a stranger. *Buckland v. Johnson*, xxvi. 328.

2. *Plea of—Misdirection—Damages.* To an action for falsely charging the plaintiff with larceny, and procuring him to be indicted and tried on such charge, on which he was acquitted, the defendant pleaded that before the commencement of this suit the plaintiff brought an action against him for imprisoning the plaintiff on a false charge of felony, that on the trial of that action the judge charged the jury to consider whether the defendant had charged the plaintiff with having stolen the goods mentioned in the declaration, &c., that the jury found for the plaintiff and assessed damages accordingly, averring the identity of the imprisonments in the two actions, and that the grievances complained of were the same with those in respect of which damages had been given on the former occasion. *Held*, first, that this plea was no answer to the action. Secondly, that the judge had misdirected the jury on the trial of the former action. *Guest v. Warren*, xxvi. 381.

3. *Quære*, whether it would have been a defence, that on the trial of the former action, damages in respect of the cause of action complained of in the present had been assessed by the jury with the consent of the parties? *Ib.*

FRAUD.

1. *Fraud renders a contract or purchase only voidable—Property vests till avoidance.* Fraud only gives a right to avoid a contract or purchase; the property vests until avoided, and all the mesne dispositions to persons not parties to, or at least not cognizant of, the fraud, are valid. *Stevenson v. Newnham*, xvi. 401.

2. The property having passed under such contract, the person in possession is, until the party defrauded interferes, entitled to sue for all the injuries to his property. *Ib.*

3. *Sale of land by an uneducated person for less than its value.* A, who was a laboring man, and totally uneducated, believing himself to have a contingent interest in an estate in fee-simple, offered in February, 1838, to sell his interest to B. B declined the purchase; but afterwards consented to lend money to A, and lent sums, amounting to 20*l.* A, on the 5th of May, 1838, executed a money-bond, conditioned in the penalty of 40*l.*, to secure the payment of 20*l.* with five per cent. interest, on the 5th of November then next. A was not called on for interest, nor did he hear of the matter again, till the 22d of September, 1840, the day of his father's funeral. A had at that time become possessed of the estate. On the 24th of September, A agreed to sell the estate to B, and that agreement was carried into execution by a conveyance on the following 10th of October. The bond, agreement, and conveyance were prepared by B's attorney, and executed at his office. A had no attorney. The estate was sold considerably under its value. A afterwards filed a bill, praying that the deed of conveyance might be set aside as fraudulent and void. *Held*, that the bill, as a bill charging fraud, was properly dismissed. *Quære*, whether A might not have maintained a bill to set aside the conveyance, as improvidently made, and hastily executed. *Curson v. Belworthy*, xxii. 1.

4. *Fraud in prospectus issued by railway directors.* Upon the establishment of the West Flanders Railway, a person who had been instrumental in forming the company, and in procuring the grant from the Belgian government, obtained from the directors an agreement to pay him a large percentage upon the capital of the company, to allot him 4,000 shares, and to guarantee him a salary of 500*l.* a year as general manager of the company. The directors also allotted to themselves 20,000 shares, and also another 10,000 shares for themselves and the other shareholders in the Sambre and Meuse Railway, of which they were also directors. These facts were suppressed in the prospectus they subsequently issued; which, however, did state that they had reserved to

themselves a commission of 3l. per cent. upon the capital, by way of reimbursement for the expenses, liabilities, and payments already incurred. Upon a bill by an original shareholder to be relieved from his shares and to obtain payment of his deposit money and calls, with interest, on the ground that he had been induced to take them by the representations made by the prospectus, it was *held*, that the omission to state these facts in the prospectus was not such a misrepresentation or concealment as would induce the court to set aside the contract, and the bill was dismissed, with costs. *Pulford v. Richards*, xix. 387.

5. *Fraudulent release by one joint plaintiff—Evidence.* Work was proved to have been done for defendant by plaintiffs jointly, but he produced in evidence a release to him from one of the plaintiffs, who was proved to have executed it in the presence of the clerk of the defendant's attorney on the morning of the day of trial, without the knowledge of the other plaintiffs. The purport of the deed was, however, proved to have been explained to the releasing plaintiff. *Held*, that the above amounted to some evidence of the release having been given fraudulently, and the judge of the county court was, therefore, not bound to give effect to it. *Wedlake v. Sargent*, viii. 404.

6. *Family compromise.* To render a family compromise binding, there must be an honest disclosure, by each party to the other, of all such material facts known to them, relative to the rights and title of either, as are calculated to influence the judgment in the adoption of the compromise; and any advantage taken, by either of the parties, of the known ignorance of the other, of such facts, will render the same void in equity, and liable to be set aside. *Smith v. Pincombe*, x. 50.

7. *Conveyance fraudulently obtained confirmed by grantor's will.* A conveyance liable to be set aside by the grantor as being fraudulently obtained, may be confirmed by his will, and cannot thereafter be impeached by his heir. *Stump v. Gaby*, xvii. 357.

8. *Decree of House of Lords obtained by fraudulent collusion.* Where a decree of the House of Lords has been obtained by the fraudulent collusion of both parties, in order, by means of that decree, to defeat the objects of public justice, or the rights of one of the nominal parties, being an infant; *semble*, the decree may be called in question, even in an inferior court, and an original suit for relief may be there instituted, notwithstanding such fraudulent decree. Per Lord Cranworth, L. C. *Semble*, such fraudulent decree may even be treated as a nullity in the inferior court, and the question there arising will simply be, was it a real judgment or not? Per Lord Brougham. *Semble*, though such fraudulent decree might, perhaps, be treated by the inferior court indirectly as a nullity, if the case shows manifest direct gross fraud, yet the relief should be sought for in the house in the first instance. Per Lord St. Leonards. *Shedden v. Patrick*, xxviii. 56.

9. *Fraud committed by solicitor—Loss by, upon whom it falls.* A's solicitor agreed that A should advance to B a sum of money on a second mortgage, which was executed by B, no money passing. A repudiated the transaction, but advanced money on a transfer of the first mortgage and a further charge. The second mortgage remained with the solicitor uncanceled. Subsequently, the solicitor advised C to make an advance on a transfer of the second mortgage. The money was paid to the solicitor, who handed over to C the second mortgage, with a memorandum, which he had fraudulently induced A to sign, undertaking to transfer this mortgage. The solicitor appropriated the money to his own use, and subsequently, by fraud, induced A to execute a transfer of the second mortgage to C, and a receipt for the money which C had advanced. *Held*, that as A, by signing the memorandum, had enabled the solicitor to commit the fraud, the consequences must, as between A and C, be borne by A; and that C was entitled to a proportional benefit of the security held by A. *Hiorns v. Holton*, xiii. 596.

10. *Wager as to the price of opium at a future sale—Bidding by parties and their*

agents. Where two parties enter into a wager as to the price of opium at a certain sale, each knowing that the other would use means to influence the price, it is no fraud on one party that the other, by bidding, raises the price; and it is not an unlawful conspiracy to employ agents for this purpose. *Doolubdass v. Ramlohl*, iii. 39.

11. A party having a right to purchase a certain quantity of opium at a sale, no fraud on the vendors is committed by his selling that right, to enable the purchaser to enhance the price of opium at a certain sale. *Ib.*

12. *Sale effected by fraud of the buyer.* A sale of goods effected by the fraud of the buyer, is not an absolutely void transaction; but the seller may elect to treat it as a contract. *White v. Garden*, v. 379.

13. *False representation made without an intention to injure.* If a man tells an untruth, knowing it to be such, in order to induce another to alter his condition, who does accordingly alter it, and thereby sustains damage, the party making the false statement is liable in an action for deceit, although in making the false representation no fraud or injury was intended by him. *Watson v. Poulson*, vii. 585.

14. *Setting aside ancient deed for misrepresentation.* Fraudulent representation or concealment, if sufficiently averred and proved, is enough to set aside deeds thirty-nine years from their date. The allegations in the pleadings, and the issue put to the jury must be precise in their character. Though time be no bar to fraud, it is to be considered by the court in forming its judgment. Concealment, to be fraudulent and material, must be of something that the party is bound to disclose. A conjectural estimate of value is not a misrepresentation. *Irvine v. Kirkpatrick*, iii. 17.

15. *Misrepresentation as to collateral matters—Lease.* The owner of premises, who grants a lease of them for a term, under which the lessee enters, cannot avoid the lease on the ground that it was obtained by the fraudulent misrepresentation of the lessee, as to a matter collateral to the lease, e. g., that he was a respectable man and intended to use the premises for a respectable business, whereas he was not a respectable man, and intended at the time and did afterwards use the premises for an immoral and illegal purpose. *Feret v. Hill*, xxvi. 261.

16. *Misleading grantor as to his interest in property—Misrepresentation as to customary way of remunerating for professional services.* A was aware that B was entitled to property, but might not at first have been aware that the interest of B was not precarious, and impressed B with the notion that it was so; A, however, became aware that the interest was not precarious, yet he did not inform B of that fact, but on the contrary, manifesting much concern in the matter, still represented that the interest was both precarious and could not be recovered without difficulty, delay, and expensive litigation. B, under such a state of circumstances, conveyed one half of the estate to S., the latter giving him an indemnity against all costs of recovering the property, and representing that men of business conducted cases on the arrangement that no law expenses were to be paid unless the proceedings were successful; but if they were, that law costs were to be paid out of the money recovered, and the party conducting the proceedings and furnishing the information was allowed half what was recovered to satisfy him for the risk of paying law expenses. Subsequently B agreed to sell the other half for a stated sum. On a bill to set aside the conveyance and to have the contract for the sale of the second moiety declared void, it was held, that as B did not know his rights when he executed the conveyance, nor when he signed the contract for the sale of the second moiety, and as the former was based on fraud and misrepresentation, and the latter depended on the former, both must fail, and they were set aside. *Reynell v. Sprye*, xiii. 74.

17. *Several representations, of which one was false.* Where a party has induced another to act on the faith of several representations made by him, any one of which has been made fraudulently, he cannot set up the transaction by showing that every other representation was truly and honestly made, or was the result of innocent error. *Ib.*

18. Inadequacy of price is evidence of fraud, but, standing alone, by no means conclusive evidence. *Cockell v. Taylor*, xv. 101.

FRAUDS, STATUTE OF.

I. PROMISE TO PAY DEBT OF ANOTHER.

II. SALE OF LAND; INTEREST IN.

III. PART PERFORMANCE; ACCEPTANCE OF GOODS.

IV. AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR.

V. MEMORANDUM, &C. IN WRITING; SIGNING, &C.

I. *Promise to pay Debt of another.*

1. *Assent by surety to arrangement with principal.* A recovered judgment against B as surety for C. It was afterwards agreed by an indenture between A and C that the debt due from C to A should be fixed at a certain sum, without prejudice to the security of the aforesaid judgment. Before the execution of this indenture this letter was written by A to be sent to B with the indenture: "I hereby consent to the within deed being executed between the parties without prejudice to the rights and remedies of the plaintiff, &c." The indenture was not sent, and B signed the letter and returned it to A, without having seen the deed. *Semble*, that this was not a promise to pay the debt of another within the Statute of Frauds; but that, if it were, there was a sufficient memorandum in writing, as the letter signed by the defendant incorporated so much of the deed as formed the consideration of his promise. *Macrory v. Scott*, ii. 368.

2. *Advances to third party.* Where one advances money at the request of another, (and on his promise to repay it,) to pay the debt of a third party, the payment creates no debt as against such third party if it was not made at all on his credit, and therefore the liability of the party, on whose request and promise it was made, is original, and not collateral; and his promise is not a promise to "answer for the debt of another" within the Statute of Frauds. *Pearce v. Blagrove*, xxx. 510.

3. *Agreement by agent.* An agreement by a factor to sell upon a *del credere* commission, is not within that section of the Statute of Frauds which requires that promises to answer for the debt, default, or miscarriage of another must be in writing. *Couturier v. Hastie*, xvi. 562.

4. *Parol variation of written agreement.* An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtor of their respective claims, being an agreement to pay the debt of another, is within the 4th section of the Statute of Frauds, and cannot, in the absence of fraud, be varied by a subsequent parol agreement. *Emmet v. Dewhurst*, viii. 83.

II. *Sale of Land; Interest in.*

1. *Agreement to pay for investigating title.* Where it was agreed between A and B that, in consideration that A would lend B a sum of money upon the security of the mortgage of certain land, upon B's making out a good title to the same, B should, in case he should change his mind, or the loan should go off by reason of a defectiveness of title pay all of A's expenses in the matter, and the loan went off, the defendant B not having made out his title, it was *held*, that the contract did not relate to any interest in land, but only to an investigation of title, and was not within the 4th section of the Statute of Frauds. *Jeakes v. White*, xiv. 350.

2. *Agreement by tenant to give possession to new tenant.* A verbal agreement was made between the plaintiff and defendant, that in consideration of the plaintiff giving up to the defendant possession of a house which the former occupied under an agree-

ment from his landlord for a lease, and of certain improvements made by the plaintiff on the premises, the defendant would pay the plaintiff 100*l*. The landlord assented to the change of tenants. The plaintiff gave up possession to the defendant, who paid to the plaintiff a portion of the 100*l*. The plaintiff brought a plaint on the contract to recover the balance. *Held*, that this was a contract concerning an interest in land, and that, as it was not in writing, section 4 of the Statute of Frauds prevented any action being maintainable upon it, though it had been so far performed. *Kelley v Webster*, x. 517.

3. *Agreement to give possession of premises.* An agreement for the sale of a milk-walk, by which the plaintiff agreed to let the defendant into occupation of premises of which the plaintiff was tenant, and the defendant agreed to pay the rent, rates, and taxes, is a contract concerning an interest in land, requiring a memorandum in writing, under the 4th section of the Statute of Frauds. *Smart v. Harding*, xxix. 252.

4. *Interest of mortgagee.* Commissioners were empowered by act of parliament to borrow money on mortgage of lands, or on bond; and by a subsequent act the bondholders were to be "entitled to the benefit of" the mortgage, which the act recited had been executed by the commissioners to a trustee in trust for the bondholders. *Held*, that the obligee of such bond was in the situation of a mortgagee; and that a contract for the sale of the bond was a contract for the sale of an interest in land within the 4th section of the Statute of Frauds. *Toppin v. Lomas*, xxx. 427.

5. The paying of the deposit money to an auctioneer, together with an approval of the draft of an agreement to purchase and a verbal agreement to sign the contract as soon as it has been prepared, is not sufficient to answer the requirements of the Statute of Frauds; and the statute may be set up either by demurrer or plea to a bill for specific performance filed by the vendor, and in either case it is a good defence. *Wood v. Midgley*, xxvii. 206.

6. A filed a claim for specific performance of a contract by B C and D, stating in his claim that the defendants had, by an agreement in writing, contracted to demise a house to A for a certain term, at a stated rent, and that the plaintiff A had agreed by parol, at the same time, to pay to the defendants a premium of 200*l*. The claim prayed that the defendants might grant a lease, the plaintiff offering to pay the premium according to the parol agreement. *Held*, on appeal, overruling the decision below, that the Statute of Frauds did not present an obstacle to specific performance if there were no fraud. *Martin v. Pycroft*, xv. 376.

III. Part Performance; Acceptance of Goods.

1. To a parol agreement by a father to convey property in consideration of the marriage then contemplated of his daughter, followed by delivery of possession to the husband after the marriage, the Statute of Frauds cannot be set up as a defence. *Sarcornie v. Pinniger*, xvii. 212.

2. A, a timber-dealer, went with B to look at various lots of timber in different places, and after viewing all, made and signed a memorandum of such as A had agreed to take. Some lots were sent to B, who remitted money on account generally. Afterward B refused the rest, as not sound, which they should have been by the (verbal) agreement. *Held*, that the contract was one and entire; and, therefore, that the statute was satisfied by payment or part delivery of any of the timber. *Biggs v. Waking*, xxv. 257.

3. Where goods ordered by parol, were shipped on board a general ship, consigned to a carrier named by the vendee, to forward them, notice being sent to the vendee of the shipment, and the bill of lading being also sent to the carriers, which was not returned, nor any step taken to repudiate the bargain, until after news arrived of the loss of the ship and goods, it was *held*, that there was no sufficient receipt and accept-

ance of the goods to satisfy the Statute of Frauds, in the absence of a written contract, and that the vendees were not liable for the price of them. *Meredith v. Meigh*, xxii. 91.

4. The defendant verbally agreed to purchase of the plaintiff some cattle then in his field. After the bargain was concluded, the defendant felt in his pocket for his check-book, in order to pay for the cattle, but, finding he had not got it, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field for a few days, and that the defendant should feed them with the plaintiff's hay, which was accordingly done. *Held*, that there was no evidence of an acceptance of the cattle to satisfy the Statute of Frauds. *Holmes v. Hoskins*, xxviii. 564.

5. Where a person agrees to buy goods to be separated from the bulk, and directs them to be sent, when separated, to a particular place, the mere delivery at that place by the vendor is not of itself a sufficient acceptance or receipt within the Statute of Frauds, for the purchaser must have the opportunity of exercising his option, after the separation has been made, unless he has done some act to deprive himself of that option. *Hunt v. Hecht*, xx. 524.

IV. *Agreement not to be performed within a year.*

Contract made in foreign country. An action cannot be maintained in this country upon a parol agreement, which is not to be performed within a year, although made in France, and valid and enforceable there. *Lerouz v. Brown*, xiv. 247.

V. *Memorandum, &c. in Writing, Signing, &c.*

1. *Variance between bought and sold notes.* Where a broker omits to enter and sign any contract in his book, but sends bought and sold notes to the buyer and seller respectively, between which there is a material variance, there is not such a note or memorandum in writing of the bargain as will satisfy the 17th section of the Statute of Frauds. Per Patteson, J. *Sivewright v. Archibald*, vi. 286.

2. *Letters, constructive assent to terms.* In one of several letters between the parties to a parol contract the terms were mentioned by the purchaser, and constructively assented to by the vendor in a subsequent letter referring to the former one. *Held*, a sufficient memorandum within the Statute of Frauds. *Fyson v. Kitton*, xxx. 374.

3. *Letters—Variance in statement of contract.* In an action on a contract the plaintiff put in a letter from the defendant, dated November 20, 1852, offering to supply them with coals "for three years from this date" at a certain price. The plaintiff's answer was: "We agree to take our coals from you" (at same price) "commencing October 1, 1852." *Held*, that as the letters varied in their terms, there was no contract in writing. That the parol evidence, if it proved a contract, on the terms of the last letter, proved a contract for three years,—required to be in writing, under the Statute of Frauds. And, that, therefore, the plaintiffs could not recover. *Hayworth v. Barnes*, xxvi. 274.

4. *Reference to letters.* Where the memorandum in writing signed by the party charged is contained in several letters, they must be connected by written links; i. e. one must refer expressly to the other, and not merely to the subject of the contract. *Fyson v. Kitton*, xxx. 374.

5. *Sufficient signing.* A having agreed to sell B two parcels of goods, before they were delivered, B procured from C a letter as follows: "Upon your handing me your two drafts upon B respectively for 200*l.* and 146*l.* at two months from this date, I undertake to get them accepted by B, and to see them paid." This was signed by C. The goods were then delivered, but B, a few days afterwards, discovered that the goods charged 146*l.* should have been charged 150*l.* and drew two bills accordingly

for 200*l.* and 150*l.* respectively, which C procured B to accept, and C then wrote across the guarantee the following words: "I have received the two drafts, one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*, both accepted by B." Under this the plaintiff signed his own name. *Held*, that this was rightly described as an undertaking by C to see the two bills of 200*l.* and 150*l.* respectively paid by B, and that it was sufficiently signed within the Statute of Frauds. *Bluck v. Gompertz*, xiv. 345.

6. *Forbearance to sue.* Mortgagees having offered to give the defendant, the executor of the mortgagor, time for payment of the mortgage-money, provided a sum of 1,500*l.* should be made up on a day fixed, the defendant wrote them a letter asking for a year's time, but saying that he had 100*l.*, which he would pay over, and that he would engage by the beginning of April to have another 100*l.* ready, and other sums afterwards. The mortgagees sent an answer, saying they considered that 200*l.* would be paid by the first of April, but could not promise further time unless the amount was made up to 1,500*l.* The 200*l.* not having been paid by the 1st of April, an action was brought by the mortgagees against the defendant, seeking to charge him personally on a promise to pay that sum, made in consideration of forbearance to the 1st of April. *Held*, by Jervis, C. J., Williams, J., and Talfourd, J., that there was no sufficient promise in writing to bind the defendant personally, under the Statute of Frauds, the correspondence not showing any unqualified promise by the defendant; by Maule, J., *dissentiente*, that the letter of the 18th of December was separable into two parts, the first of which contained an unqualified offer as to the 200*l.* in consideration of forbearance till the 1st of April, which was accepted in the letter of the 3d of January, and that, therefore, the Statute of Frauds was satisfied. *Hamilton v. Terry*, x. 473.

7. *Entire contract must be in writing.* When in an entire contract, a part relating to a lease for seven years was required by the Statute of Frauds to be in writing, it was *held* that no part of it could be proved by parol. *Forquet v. Moore*, xvi. 466.

FRAUDULENT CONVEYANCES.

1. *Mortgage of settled chattel property by surviving widow.* A voluntary deed not actually fraudulent, by which husband and wife settled the wife's chattel interest, is not avoided, under the 27 Eliz. c. 4, by a mortgage made by the widow surviving her husband,—commenting on *Burrell's Case*, 6 Rep. 72. *Richards v. Lewis*, v. 400.

2. *Deed to defeat process of ecclesiastical court.* A deed executed by a husband, pending proceedings in the ecclesiastical court, for the purpose of preventing the suit, if successful, from affecting his property, declared void, and all arrears of alimony directed to be paid; but as to future payments, *quære*. *Blenkinsopp v. Blenkinsopp*, xi. 57.

3. *Conveyance in contemplation of marriage without the knowledge of the future husband.* A deed executed by S., in contemplation of marriage, without the knowledge of the future husband, by which S. gave herself an estate for life in certain leaseholds, with remainder to R. M., a son by a former marriage, and remainder over to an illegitimate son, is not avoided by the marriage under the 27 Eliz. c. 4, the husband not taking as a purchaser. *Quære*, whether the deed would have been bad, if it had been found as a fact that it was intended as a fraud upon the marital rights of the husband. *Doe d. Richards v. Lewis*, v. 400.

4. *Suffering a recovery and declaring uses to defraud creditors.* J. T. was tenant for life of a moiety of certain estates, with remainder to his wife for life, with remainder to his first and other sons successively in tail male, with other remainders over. J. C. T., the eldest son, and the father of the plaintiff, came of age in 1815. In the same year J. T., his wife, and J. C. T., joined in suffering a common recovery, and by indentures of lease and release of March, 1815, the said recovery was declared to enure to the use of the said J. C. T. and his heirs during the life of J. T., remainder

to J. T.'s wife for life, remainder to J. C. T. for life, remainder to his first and other sons in tail male, with several other remainders, and the ultimate remainder to J. T. in fee. J. T. was a trader subject to the bankrupt laws, and the said recovery and lease and release were made with the intent on his part to defraud his creditors, but J. C. T. was not in any way privy to such intent. In June, 1815, J. T. was duly declared a bankrupt, and a conveyance of all his estate was made to the assignees. On verdict of a jury, it was decreed in chancery that the recovery and the deeds of March, 1815, were fraudulent and void as against the creditors of J. T., that possession should be given to the assignees, and that the deeds should be delivered up to be cancelled, which was done. In 1821, the assignees sold the estate to J. C. T. for 30,000*l.*, and a recovery was thereupon suffered, and, by indentures the uses of such recovery were declared. Before 1843, J. T. and his wife died, and in April, 1849, J. C. T., for a large sum of money, sold and conveyed the estate in question to the defendant in fee. *Held*, that the recovery and deeds of March, 1815, were clearly fraudulent and void within the 13 Eliz. c. 5, as against J. T.'s creditors, and that no interest in J. T.'s estates ever passed to J. C. T. under them; that 13 Eliz. c. 5, s. 4, had not the effect of making the recovery valid as respected the uses declared in the same deeds by J. C. T. of his own previous estates in remainder; although the recovery was still to be treated as subsisting; that the deeds could not be considered as still subsisting and valid as to the uses declared to J. C. T. for life, with remainder to his son, the plaintiff, in tail male; but that all the uses thereby declared were void, and thereupon the recovery by construction of law enured to the use of J. T. for life and to J. C. T. in fee; that supposing the deeds were not altogether void, and that J. C. T. became tenant for life under the uses declared by them, with remainder to the plaintiff in tail male, still, as no consideration for his suffering the recovery ever existed, such uses must be considered voluntary; that the sale and conveyance in 1849 to the defendant for valuable consideration was to be considered as making void the uses in the voluntary deed of the 18th of March, 1815, under the 27 Eliz. c. 4, and the recovery as thereupon enuring to give J. C. T. a remainder in fee, after the death of J. T. and his wife, which passed to the defendant. *Tarleton v. Liddell*, vii. 360.

5. *Proviso in an assignment for the benefit of creditors for the employment of debtor by trustees.* An assignment by a debtor of all his estate and effects to a trustee, upon trust for sale for the benefit of creditors, contained a proviso enabling the trustee to employ the debtor, or any other person, in winding up the affairs of the debtor, and in collecting and getting in his estate and effects, and in carrying on his trade, if thought expedient by the trustee, and to allow the person so employed, out of the trust estate, such sum as the trustees should deem proper, is not a void deed, inasmuch as the carrying on the trade is only ancillary to winding up the affairs of the debtor. *Janes v. Whibread*, v. 431.

6. *Deed of arrangement between debtor and creditor with power of revocation.* A deed of arrangement between a debtor and one of his creditors, conveying all the property of the debtor to the creditor, and which deed the debtor has power to revoke and alter at any time, and attempts to use as a shield to protect himself against the claims of his other creditors, is fraudulent and void against creditors whose interests are affected by the deed, notwithstanding the deed upon the face of it purports to be for the benefit of all the creditors. Such a deed is, in truth, a deed for the benefit of the debtor; and if a creditor accepts it, he takes it not for his own benefit, but for the purpose of carrying out the views and objects of the debtor, in fraud of the other creditors. *Smith v. Hurst*, xv. 520.

7. *Conveyance for splitting votes.* The statutes 7 & 8 Will. III. c. 25, and 10 Anne, c. 23, are to be construed only as affecting the parliamentary law; the 7 & 8 Will. III. c. 25, invalidated fraudulent conveyances entered into for splitting votes only so far as to prevent the grantee from having a vote, and did not prevent the estate from passing; and the 10 Anne, c. 23, assuming that an estate passed under conveyances,

avoided by the statute 7 & 8 Will. III. c. 25, so far as the right to vote was concerned, made such conveyances free and absolute, notwithstanding secret trusts and conditions of defeasance, only preventing the grantor from voting, under a penalty. *Philpotts v. Philpotts*, i. 339.

8. *Voluntary conveyance and a subsequent devise by grantor—Sale by grantee.* The stat. 27 Eliz. c. 4, does not apply to the case of a purchase for valuable consideration from the heir or devisee of one who has made a voluntary conveyance of the same property in his lifetime. *Newman v. Rusham*, ix. 410.

9. The principle upon which voluntary conveyances have been held fraudulent and void as against subsequent purchasers for value is, that by the sale the vendor so entirely repudiates the former conveyance as that, against himself and the purchaser for value, it shall be conclusively taken that the intention to sell existed when he made the voluntary conveyance, and that it was made in order to defeat the subsequent purchaser. When the same person executes the voluntary conveyance, and afterwards sells and conveys the property, this principle applies; but *secus* where the seller is a different person from him who executed the voluntary conveyance, for the acts of one man cannot show the mind and intention of another. *Ib.*

10. A, being seised in fee of certain property in 1833, executed a voluntary conveyance to the lessor of the plaintiff in fee, and died in 1844, having in the same year devised the property to B. In 1847, B sold and conveyed the property to the defendant for 100*l.* Held, that the conveyance to the lessor of the plaintiff was not fraudulent and void as against the defendant. *Ib.*

11. *Conveyance to trustees by way of voluntary settlement upon the owner of the equitable fee and his family—Subsequent conveyance by such owner of "all his estate" to a creditor—Assignment of chattels.* By indenture of 25th March, 1850, reciting that A had contracted for the purchase of the B estate, that estate was conveyed, by A's direction, to trustees for sale, the sales moneys to be held upon trusts of indenture of even date, being a voluntary settlement for the benefit of A, and his wife and family. By the same indenture of even date, A assigned certain plate and furniture in the house at B to the same trustees, upon the same trusts. The trustees consented to act as trustees of the settlement of the realty; but it did not appear that they had ever seen the deeds, or executed them, or been informed of the particular contents, nor been communicated with as to the settlement of chattels, nor was any delivery made thereof. In 1851, A being indebted to C in a large sum, by indenture of November 29 of that year, reciting that fact, conveyed "all his real and personal estate" to C, to sell and pay his own debt, and then to pay the surplus to A, his executors, administrators, and assigns. C took immediate possession of the house at B, and of all the furniture and effects therein, which were substantially the same as those assigned by the indenture of March 25, 1850. A was, from a period anterior to 1850, down to his decease in December, 1851, practically insolvent. Held, 1. that the transaction of 1850 was clearly void as against the general creditors of A; 2. that it was void as against C, claiming under the indenture of 29th November, 1851, as a purchaser for valuable consideration, and without notice, within the stat. 27 Eliz. c. 4; 3. that the fact of the land having never been conveyed to A at all made no difference, the recital being that he contracted for the purchase, he was the equitable owner, and his equitable fee, therefore, would pass to C; 4. that the general description in the indenture of November 19, 1851, "all my real estate," would sufficiently include this equitable fee, and satisfy the words of 27 Eliz. as to a subsequent sale of the "same estate;" 5. that C could establish no good claim to the personal estate under the combined effect of 13 Eliz. c. 5, and the indenture of 29th November, 1851, but only make good his title to a right of action; and 6, that C, having taken possession of the personal effects, and the assignees, under the indenture of 1850, not having done so, made no difference. *Stone v. Van Heythuysen*, xxiii. 491.

12. *Family settlement.* The heiress-at-law of a supposed intestate and her husband,

and her illegitimate son, who had expected a devise from the deceased, for the purpose of avoiding differences between them, and amicably settling their claims touching the estate, settled their interests in trust for themselves and certain children of the heiress and her husband. *Held*, to be a valid family settlement, and not voluntary or void under the statute of Eliz. c. 4, as against subsequent mortgagees (without notice) and others claiming under the heiress and her husband. *Heap v. Tonge*, vii. 189.

13. *Deed declaring trusts.* A, largely in debt, made a voluntary conveyance to trustees for the benefit of his wife, vesting in himself, wife, and her father a power of sale which was afterwards executed. Still later the purchase-money was invested in the name of the trustees and a deed executed, declaring the trusts in due form in accordance with the previous settlement. Soon after, the plaintiff, a judgment creditor, sued out a writ of outlawry against A, and subsequently instituted a suit to set aside the deed declaring the trusts, but not attempting to disturb the previous deed. Subsequently to the institution of the suit A was made insolvent. *Held*, that the deed declaring the trusts was fraudulent, and that the suit was in the right form, and the objection of the outlawry was not valid, the settlement being valid against A. *Held*, also, that the insolvency having occurred subsequently to the filing of the bill, the jurisdiction was in the court of equity. *Goldsmith v. Russell*, xxxi. 603.

14. See, also, *In re Magawley's Trust*, vii. 268.

FREIGHT.

See SHIPS AND SHIPPING.

FRIENDLY SOCIETY.

1. *Partners doing business for individual benefit.* When several persons, being partners or shareholders, have subscribed money, and carry on business substantially for the benefit of the individual members among themselves, and not for the benefit of the society as such, that is not a partnership or company established "for any purpose of profit" within the meaning of sect. 2 of stat. 7 & 8 Vict. c. 110, so as to require registration. *Bear v. Bromley*, xi. 414.

2. *Money being paid to bankers does not constitute them officers.* Money which, by the rules of a friendly society, ought to have been deposited with a treasurer appointed by the society, was paid directly to the bankers of the society. *Held*, that the bankers were not officers within the 167th section. *Ex parte Orford*, xiii. 540.

3. *Treasurer.* The treasurer is not a person "appointed to or employed in any office of any society established under any of the acts relating to friendly societies." *Ex parte Bailey*, xxvii. 190.

4. *Friendly society's act*, 10 Geo. IV. c. 56—*Practice.* A petition cannot be presented under this act, for the purpose of appointing a person to assign, in the name of a trustee, property belonging to a friendly society which has been dissolved. *In re Eclipse Mutual Benefit Association*, xxiii. 309.

5. *Notice of meeting.* The members of a friendly society having signed a requisition for convening a general meeting, it was *held*, (ERLE, J., *dissentiente*,) that the signature of "the secretary, &c., of such society," required by 10 Geo. IV. c. 56, s. 9, was merely a formal act, and that one of such officers was bound to sign the public notice necessary to convene the meeting. *Regina v. Aldham and United Parishes Insurance Society*, viii. 368. See also *Regina v. Aldham*, vi. 365.

6. *Notice of meeting—Altering Rules of society.* The members of a benefit society whose rules have been duly confirmed according to the stat. 10 Geo. IV. c. 56, have no right to compel the secretary or other chief officer of the society to sign a notice pursuant to sect. 9, to convene a general meeting for considering the question of alter-

ing the rules of the society, such officers having a discretionary power to give or withhold their signatures to any such notice. *Regina v. Bannatyne*, iv. 188.

7. *Responsibility of treasurer.* The Friendly Societies Act, 10 Geo. IV. c. 56, ss. 20, 22, has not the effect of increasing the responsibility of a treasurer of such a society beyond that of a bailee, in respect of the loss of money immediately after its receipt. *Walker v. The British Guaranty Association*, xi. 375.

8. *Rules of society—Jurisdiction of justices—Arbitration.* Under the Friendly Societies Act, justices have no jurisdiction to decide disputes between a society and its members, if the rules provide for the settlement of such disputes by arbitration, unless the arbitrators neglect or refuse to make an award; and an erroneous decision by arbitrators duly appointed cannot be treated as a nullity, so as to give the magistrates jurisdiction to hear. *Ex parte Long*, xxix. 194.

9. Where the rules required that a member should be summoned before expulsion, and the affidavits stated that the complainant had been expelled without any summons, it was *held*, that this was no ground for an application to justices, after an award made by arbitrators who had heard and decided upon the objection. *Ib.*

10. By the 32d rule of a friendly society, established in 1836, it was provided that if any dispute should arise between any officers of the society, or between any other members and any officer, it should first be referred to the committee, and if their decision should not be satisfactory, then to arbitrators, pursuant to the 10 Geo. IV. c. 56, s. 27. In 1839, a reserved fund, consisting of subscriptions, was established, and was regulated by a new rule, called the 38th rule, which provided that every dispute should be referred to arbitration in the manner provided by the rule of the society. In 1850, this rule was expunged. The Friendly Societies Act, 13 & 14 Vict. c. 115, s. 22, enacts that if any dispute shall arise between the members or person claiming under or on account of any member of any society established under this act and the trustees, &c., or committee, it shall be settled as the rules of the society shall direct; but if the dispute be such that, for the settlement of it, recourse must be had to a court of equity, it may be referred to the judge of the county court. An action having been brought in the county court by the committee of the society against the trustees to recover the amount of the reserved fund, it was *held*, that this was a dispute provided for by the 27th section of the 13 & 14 Vict. c. 115, and that it might be referred to arbitration under the 32d rule of the society; that it was not a dispute requiring to be settled by a court of equity; that the county court, therefore, had no jurisdiction, and a writ of prohibition ought to be awarded. *Grinham v. Card*, xiv. 396.

11. *New rules—Barrister's certificate—Treasurer.* A new set of rules passed by a friendly society, at a meeting not duly summoned, were held valid, as having received the barrister's certificate, under 4 & 5 Will. IV. c. 40, s. 4, *Erle, J., dissent.* These rules provided that three trustees should be appointed, of whom one should be treasurer. A fourth person was in fact made treasurer, and the trustees sued the old treasurer for money in his hands. *Held*, that the plaintiffs had no right to maintain the action, as the new rules had not been pursued; and the treasurer was to hold the money until it was invested. *Deohurst v. Clarkson*, xxv. 191.

12. *Dissolution of society.* Under the 26th section of the 10 Geo. IV. c. 56, a friendly society may be dissolved with the consent, in writing, of five sixths in value of the members, without convening a general meeting as required by the 9th section for the alteration or repeal of any of the rules. *In re Eclipse Mutual Benefit Association*, xxiii. 308.

GAMING.

1. *Bill of exchange given for bet on horserace.* A and B jointly made bets with third persons on a horserace. B received the money, and gave A a bill accepted by C, (who was no party to the betting,) for his share. *Held*, that A was not precluded

by the 8 & 9 Vict. c. 109, s. 18, from suing C upon the bill; and *semble*, that that statute does not render betting on a horserace illegal. *Johnson v. Lansley*, xxii. 468.

2. *Action on check given to pay loss at billiards.* Declaration on a banker's check, with a count upon account stated. Plea, that the account and check were for the same sum, won by plaintiff of defendant, at billiards. *Held*, a good defence, under stat. 5 & 6 Will. IV. c. 41, s. 1. *Parsons v. Alexander*, xxx. 299.

3. The 8 & 9 Vict. c. 109, s. 18, applies to billiards, though a lawful game; and the proviso does not extend to money won by one of the players from the other. *Ib.*

4. *Action by stock broker*—8 & 9 Vict. c. 109—*Stock-Jobbing Act*. To an action for work done, commission, and money paid, the defendant pleaded that the plaintiff was a stock-broker, and as such made contracts for the defendant by way of gaming, contrary to the 8 & 9 Vict. c. 109, respecting the future market price of public and other stock, &c.; that the work done was in making the contracts; that the commission was claimed in respect of the same, and that the money was paid in discharging the differences. *Held*, first, that the plea was no defence under the 8 & 9 Vict. c. 109, s. 18; secondly, that it was no defence under the Stock-Jobbing Act, 7 Geo. II. c. 8, as it did not show that each contract related to the sale of public stock. *Quære*, per Jervis, C. J., whether the plea raised the defence under the latter act. *Knight v. Fitch*, xxix. 316.

5. *Action for money paid—Claims under wagering contracts.* To an action for money paid by the plaintiff for the defendant's use at his request, it is no answer that the money was paid in discharge of claims against the defendant under wagering contracts, void by the statute 8 & 9 Vict. c. 109, s. 18. *Knight v. Cambers*, xxix. 314.

6. *Repudiating wager—Recovery of deposit from stakeholder.* A party who repudiates a wager before the result of it is ascertained, is not precluded from recovering his deposit from the stakeholder by the 8 & 9 Vict. c. 109, s. 18, which avoids contracts by way of gaming, or wagering, and prohibits the maintenance of actions for money deposited in the hands of a stakeholder. *Martin v. Hewson*, xxix. 424.

7. *Contract for sale and purchase of railway shares—"Differences."* A colorable contract for the sale and purchase of railway shares, where neither party intends to deliver or to accept the shares, but merely to pay "differences" according to the rise or fall of the market—is gaming within the 8 & 9 Vict. c. 109, s. 18. *Grizewood v. Blane*, xx. 290.

8. *Dominoes—Bowling—Cockfighting.* The game of dominoes is not itself unlawful, and playing thereat does not necessarily amount to "gaming," within the meaning of 9 Geo. IV. c. 61, prohibiting unlawful games in public houses. *Regina v. Ashton*, xvi. 346. And see note to same case as to "bowling" and "cockfighting."

9. *Statutes restricting suits on wagers.* Statutes restrictive of suits on wagers are prospective only, and do not affect transactions which took place before the passing of the act. *Doolubdass v. Ramlohl*, iii. 39.

GARNISHMENT.

1. *After garnishee proceedings in the Lord Mayor's court, and payment of judgment, the garnishee cannot be called on to pay a second time—Debt on bond.* Plea, setting out the proceedings in foreign attachment against plaintiff in the Lord Mayor's court, and alleging a judgment and execution against defendant as garnishee, and that the sum so attached and taken in execution by virtue of such judgment, was the same sum, the non-payment whereof plaintiff, in his declaration, alleged as a breach of the condition of the bond. Replication, first, that the debt sued for in the Lord Mayor's court, did not arise within the jurisdiction of that court, and that plaintiff had no notice of the proceedings there; secondly, that, within the knowledge of defendant, before the suit was instituted in the Lord Mayor's court, the bond declared upon had been assigned by plaintiff for valuable consideration; that plaintiff only held it as

trustee for the assignee; that defendant allowed the judgment to pass in the said court, without setting up this matter as a defence; that this action was brought for the benefit of the assignee; and that the custom of foreign attachment did not apply to or include debts, the beneficial interest in which had become vested in a person other than the defendant sued in the said court, whereof the garnishee had notice; and that debts, the beneficial interest in which had become vested in a person other than the defendant sued in the said court, whereof the garnishee had notice, were not attachable under the said custom. *Held*, upon demurrer, first, that the garnishee, after a regular judgment and execution against him, having paid the debt, could not be compelled to pay it a second time, on proof, in this suit, that the debt did not arise within the jurisdiction of the Lord Mayor's court; and therefore that the first replication was no answer to the plea. Secondly, that upon demurrer, the custom must be taken to be qualified as stated in the second replication, and that such qualification was just and reasonable; and therefore that replication was a good answer to the plea, the plaintiff being entitled to sue upon the bond as trustee. *Westoby v. Day*, xxii. 261.

2. *What constitutes a "debt" under Common-law Procedure Act.* At D.'s request C. brought an action, as nominal plaintiff, against J., D. giving C. a bond to pay J. such costs as C. should be liable to in case he should be nonsuited, and to permit C. to apply any of D.'s money that might come into his hands to the costs of suit or to any liability therefrom. C. was nonsuited, costs being given to J. *Held*, that the bond did not constitute a "debt" from D. to C. within the 61st and 64th sections of the Common-law Procedure Act, 1854, and that the alleged debt in the hands of D. could not be attached by J. *Johnson v. Diamond*, xxx. 579.

3. An executor of a judgment creditor who has not revived the judgment, or entered a suggestion upon the roll in pursuance of sect. 129 of stat. 15 & 16 Vict. c. 76, is not a "creditor who has obtained judgment" within sect. 60 of the Common-law Procedure Act, 1854, (17 & 18 Vict. c. 125,) and therefore is not entitled to an order for attachment of a debt due to the judgment debtor under sect. 61. *Baynard v. Simmons*, xxx. 290.

GIFT.

1. *Incomplete gift of house—Injunction.* G. P. executed a document attested by two witnesses, giving to E. P., his wife, a house. G. P. afterwards died, intestate, and his heiress-at-law brought an action of ejectment against E. P. and obtained a verdict; upon which E. P. filed this bill. Upon a motion to dissolve an injunction, it was *held*, that the gift was incomplete; that the relationship of trustee and *cestui que trust* was not created; that this court would not assist either party, but leave them as it found them; and that the injunction must be dissolved. *Price v. Price*, viii. 271.

2. *Transfer of stock to save legacy duty—Survivorship.* F. D. transferred a sum of stock into her own name and that of her sister, saying that she did it for the purpose of saving the legacy duty; and the dividends were received by her sister, and transmitted to F. D. *Held*, that at the death of F. D. her sister became absolutely entitled to the stock for her own benefit. *Deacon v. Colquhoun*, xxiii. 530.

3. *By illiterate person, of all his estate—Burden of proof.* Where an illiterate person, who can neither read nor write, signs an instrument purporting to grant, in consideration of good will, all his estate, real and personal, to his wife as her sole and absolute property, it is incumbent on the wife, who tries to enforce this writing against the heir after her husband's death, to show that the grantor well understood the nature of the instrument; and if it appears that no one was present at its execution capable to explain its meaning, after it was read to him, it will not be set up in equity. *Price v. Price*, xii. 144.

GUARANTY.

1. *In writing, construction of—Sufficiency of consideration—Parol evidence to explain.* A declaration in assumpsit, after alleging that A. L. had requested the plaintiff to sell him goods upon credit, and that the plaintiff had agreed to do so, provided the defendant would guarantee the price of the said goods, further stated, that before the said A. L. was indebted to the plaintiff for any goods or chattels, and at a time when no money was due to the plaintiff from A. L., the defendant signed the following guaranty: "I hereby guarantee the payment of any sum or sums of money due to you from Mr. Andrew Little, of Richmond, the amount not to exceed at any time the sum of 100*l*." The declaration then alleged the subsequent sale and delivery to A. L. of divers goods and chattels upon credit to the amount of 100*l*. &c. *Held*, upon demurrer, that a future supply of goods sufficiently appeared, from the terms of the guaranty itself, to be the consideration of the defendant's promise; and that, at all events, supposing the terms of the guaranty to apply equally to a past as to a future consideration, evidence of the circumstances of the parties at the time when the guaranty was made, was admissible to explain its meaning; and that they, as appeared from the declaration, showed that a future consideration was meant. *Bainbridge v. Wade*, i. 236.

2. *Consideration sufficiently appearing on face of.* By a written agreement, T. bound himself to hire of plaintiff a house, paying a certain rent. The defendant thereby agreed to see the rent paid by T. or pay it himself. *Held*, on demurrer, that the consideration for the defendant's promise was the letting the house, and that it sufficiently appeared on the face of the agreement. *Caballero v. Slater*, xxv. 285.

3. The purchaser at an auction being unable to complete, and being pressed, his solicitor wrote to the vendor's solicitor that to save the purchaser's credit he would undertake to settle the purchase in two months, if that would be satisfactory to the vendor. A reply was sent accepting the offer. *Held*, that upon the face of the letter there was a sufficient statement of the consideration, the offer being conditional, and the acceptance of it tying up the plaintiff's hands for the extended period of two months. *Powers v. Fowler*, xxx. 225.

4. Plaintiffs wrote to defendant: "We are doing business with B., and require a guaranty to 200*l*., and they refer us to you." Defendant wrote in answer: "I have no objection to become security for B., and subjoin a memorandum to that effect." The memorandum was: "I hereby engage to guarantee to Messrs. Colbourn, iron masters, 200*l*. for iron received from them from B. as annexed." *Held*, that these documents were to be read together, and that the words, "we are doing business," taken with the rest, showed that the consideration for the defendant's undertaking was that the plaintiffs should continue to supply B. with goods; and that there was, therefore, a good consideration. *Colbourn v. Dawson*, iv. 378.

GUARDIAN AND WARD.

1. *Practice in appointment of guardian.* A guardian may, under special circumstances, be appointed for an infant without his appearance in court and without commission. *Benison v. Worsley*, xv. 317.

2. *Inquiries before appointment.* The court will not appoint a mother to be the guardian of her children without having some information as to the family of the father. *In re Cook*, vi. 47.

3. *Appointment of guardian to infants—Mother residing in England.* Two infants having been sent to England for their education, by their father, who was resident in India, the court appointed a guardian of the children, to act for the father during his absence abroad, notwithstanding that their mother was residing in this country. *In re Thomas*, xxi. 524.

4. *English guardian to infant residing with his mother in America.* The court refused to appoint an English guardian to an infant residing with his mother in America,

without associating the mother in the guardianship, or to order the payment of an annual sum to the English guardian, until a communication had first been made with the mother on the subject. *Lockwood v. Fenton*, xvii. 90.

5. *Appointment of uncle and aunt.* Uncle and aunt appointed guardians of the person of an infant, on petition, without suit or reference, no allowance being asked. *In re Neale*, xix. 284.

6. *Matrimonial suit by guardian—Duties and liabilities of guardian.* The guardian of a minor, a married woman, in a matrimonial suit, is bound to exercise due caution before instituting proceedings against the husband, and is not exempt from liability to condemnation in costs if the suit proves a mere fishing suit. But the wife, on coming of age and adopting such suit, will not be condemned in the costs incurred by her. *Brown v. Brown*, v. 567.

7. *Jurisdiction of Lord Chancellor as to infant ward going out of England.* Although the court will, under special circumstances, allow an infant ward to go out of the jurisdiction, yet it will not compel the removal of an infant ward out of the jurisdiction. *Dawson v. Jay*, xxvii. 451.

8. An infant, being a British subject and also an American citizen, and having lost both parents, was brought over to England from the United States, where her property was situated, by a paternal aunt with whom she resided; an application was then made by a maternal aunt, who had been appointed her guardian by the court in America, to have the custody of the infant delivered to her, with the view of taking the infant back to America. The Lord Chancellor refused to interfere, being of opinion that he had no right to make such an order, even if on other grounds he had thought proper to accede to the application. *Ib.*

GUARDIAN AD LITEM.

1. *Motion to appoint—Non-appearance of infants.* In case of a motion for the appointment of a guardian *ad litem* for infant defendants not appearing, good reasons must be given for their not appearing. *Crabbe v. Mozhay*, xi. 156.

2. *No appearance or commission.* Guardian *ad litem* appointed to an infant defendant within the jurisdiction, without his appearing in court, and without a commission. *Egremont v. Egremont*, xvii. 81. See, also, *Piddocke v. Smith*, viii. 95.

3. *Application to appoint—Infant lunatic.* An application for the appointment of a guardian *ad litem* to an infant defendant, a lunatic, not found so by inquisition, should be made in chancery, and not in lunacy. *Pidcock v. Boulbee*, xix. 428.

4. *Proper person to be appointed.* A party to the cause, not having an adverse interest to that of an infant defendant, is a more proper person than a solicitor or stranger to be appointed guardian *ad litem* to the infant. *Anonymous*, xv. 518.

5. The court will not appoint, as guardian *ad litem* of an infant defendant, a person unconnected with the infant, and not interested in the suit. *Foster v. Caulley*, xix. 437.

6. *Co-defendant appointed.* A co-defendant appointed guardian *ad litem* for seven infant co-defendants, without their attendance. *Peascod v. Tully*, v. 127.

7. *Affidavit of service of writ of summons.* Where an infant defendant has appeared to a claim, the court will not, on motion by the plaintiff to appoint a guardian *ad litem*, require an affidavit of service of the writ of summons. *Wood v. Logdsden*, xv. 476.

HABEAS CORPUS.

I. WHEN GRANTED AND NOT GRANTED.

II. PRACTICE, &c.

I. When granted and not granted.

1. *To discharge prisoner convicted and sentenced.* A writ of habeas corpus was

applied for to discharge a prisoner convicted and sentenced, on an affidavit that the offence was not committed within the jurisdiction alleged in the indictment. *Held* that the record was an estoppel. Writ refused. *Ex parte Newton*, xxx. 432.

2. *To discharge from imprisonment a person privileged from arrest.* The proper mode of obtaining a discharge from imprisonment of a person privileged from arrest is by *habeas corpus* from one of the superior courts; and where the return to the writ shows that the prisoner is legally detained on a civil process, the prisoner may, by affidavit, show that he is privileged from arrest. *Ex parte Dakins*, xxix. 331.

3. *Party in custody under commission of rebellion.* A party in custody under a commission of rebellion, issued by a court of equity for not appearing to a suit, is not a person in custody for a criminal or supposed criminal matter, within the meaning of the Habeas Corpus Act, 31 Car. II. c. 2. *Cobbett v. Slowman*, xxv. 443.

4. *Warrant of commitment founded on previous conviction which may be removed by certiorari.* If upon an objection to a warrant of commitment for omitting to show that the justices had jurisdiction to convict, it appears to be founded upon a previous conviction, which the party may remove by *certiorari*, a rule for a *habeas corpus* to discharge him will not be granted. *In re Allison*, xxviii. 281.

5. Therefore, where a warrant of commitment reciting a conviction under stat. 16 & 17 Vict. c. 30, s. 1, did not state that the convicting justices were sitting at a place where petty sessions were usually held, the court refused an application for a *habeas corpus*. *Ib.*

II. Practice, &c.

1. *Royal court of Jersey—Contempt of habeas corpus.* The royal court of Jersey were ordered to register and assist in executing warrants of arrest for contempt of a writ of *habeas corpus*; which writ had been issued by the Lord Chancellor, under the seal of the clerk of records and writs to run into Jersey. *In re Belson*, iii. 49.

2. *Lunatic, habeas corpus to bring up—Authority.* A rule having been obtained for a *habeas corpus* to bring up a lunatic, the court discharged it with costs, there being no affidavit to show that the party promoting the application was duly authorized by the lunatic. *Ex parte Child*, xxix. 259.

3. *Wife absenting herself from her husband—Jurisdiction.* Where a wife is voluntarily and without any restraint absent from her husband, a court of common law has no jurisdiction upon his application to issue a writ of *habeas corpus* to bring up her body. *Ex parte Sandilands*, xii. 463.

4. *Warrant of commitment a good return to habeas corpus—Affidavits.* Under 4 Geo. IV. c. 34, s. 3, the conviction and warrant of commitment may be distinct; the latter is a good return to a *habeas corpus*, and need not state the evidence before the justice, nor that it was taken before the prisoner or on oath. Affidavits are admissible to show there was no evidence to give the justice jurisdiction, but nothing more. *In re Bailey*, xxv. 240.

5. *Return, when received—Service.* The court will receive the return to a writ of *habeas corpus*, although the party called upon to make it, is not present. Service of the writ by leaving it with "the brother and agent" of the party called upon, at his place of abode, is sufficient. *In re Hakewill*, xxii. 395.

6. *Return—Affidavit.* Where a return to a *habeas corpus* states that a prisoner is detained under civil process, it is competent to him to show, by affidavit, that he was originally arrested on a Sunday. *Ex parte Eggington*, xxiv. 146.

7. *Discretion of court.* It is entirely in the discretion of a judge, to grant or refuse a *habeas corpus*, to enable a prisoner to attend to show cause against a summons. *Semble*, that a special ground should be laid for such an application. *Ford v. Graham*, xi. 528.

HARBOR DUTIES.

1. *Ramsgate harbor acts*, 32 Geo. III. c. 74, and 55 Geo. III. c. 84—*Colliers*. Colliers employed solely in the coasting trade in carrying coals from Sunderland and other places to the ports on the south coast of England, and passing by Ramsgate, are liable to pay Ramsgate harbor duty once only in each year, and such duty is to be calculated upon the cargo laden on board in the vessel's first voyage, and not upon her tonnage. *Moore v. Shepherd*, xxii. 108, and xxviii. 478.

2. *Berwick harbor*—Stat. 48 Geo. III. c. 104, s. 33. A duty is imposed by act of parliament on all goods imported into B. harbor, which is defined as extending from the bridge down the river to the sea. Goods were brought up the river and through the bridge, in a sea-going vessel, and landed just above it. *Held*, that they were not "imported into the harbor" so as to be liable to duties, although the vessel used certain rings and posts erected in the harbor by the commissioners. *Wilson v. Robertson*, xxx. 242.

HUSBAND AND WIFE.

I. RIGHTS AND POWERS OF HUSBAND OVER WIFE'S PROPERTY.

II. HUSBAND'S LIABILITY FOR WIFE'S NECESSARIES.

III. RIGHTS, POWERS, AND LIABILITIES OF MARRIED WOMEN.

IV. GIFTS AND DEEDS BETWEEN HUSBAND AND WIFE.

V. WIFE'S EQUITY TO A SETTLEMENT.

VI. SEPARATE ESTATE OF WIFE; WHAT CONSTITUTES, AND LIABILITIES OF.

VII. CONVEYANCE OF WIFE'S PROPERTY.

VIII. SEPARATION AND CONDONATION.

IX. MISCELLANEOUS CASES.

I. *Rights and Powers of Husband over Wife's Property.*

1. *Right to wife's reversionary interest not reduced into possession.* Gift in trust for one for life and then the capital to be divided among the testator's three daughters; one of the daughters married and died; the husband became bankrupt and died, the tenant for life yet living. In such case the husband is absolutely entitled in right of his wife, to the reversionary interest expectant, though that interest be not reduced into possession and his assignees have the same right that the husband would have had. *Effect of Bankruptcy Act*, 12 & 13 Vict. c. 106. *Drew v. Long*, xxi. 339.

2. *When husband may dispose of wife's reversionary interest in chattels real.* The power of the husband to dispose of the reversionary interest of the wife in chattels real depends upon the circumstance whether such interest could have vested in possession during the coverture. If it could not, then the husband has no power to dispose of it. *Duberly v. Day*, xii. 268.

3. *Wife's right to maintenance.* A married woman, whose husband did not maintain her, was *held*, not to be entitled, as against a particular assignee of the husband, to maintenance out of the income of the real and personal estate to which she was entitled in equity for her life. *Tidd v. Lister*, xvii. 560, and xxiii. 278.

4. *Purchasers for value from husband, of wife's life-interest.* As against purchasers for value from the husband, of the life-interest of the wife, equity will follow the law, which gives to the husband the power of dealing with the income of his wife's property, and will not put in force the rule that he who comes into equity must do equity, whereby purchasers would be involved in inquiries into the relations between husband and wife, their property and means of maintenance. *Id.*

5. *Scottish law, assignment to husband under, valid in England.* The law in Scotland

being that the baron is entitled absolutely to the feme's personal estate, an assignment by him is valid in England, both parties being domiciled in Scotland. *M' Cormick v. Garnett*, xxvii. 339.

6. *Order to pay wife's life income of fund in court to husband—Bankruptcy of husband.* An order had been made for payment of the wife's life income of a fund in court to the husband, with liberty to apply. The husband separated from his wife, and became bankrupt. The husband having besides received a considerable sum, two thirds of the income were directed to be paid to the wife, the other third to the assignees of the husband. *Vaughan v. Buck*, iii. 135.

II. Husband's Liability for Wife's Necessaries, &c.

1. *Evidence in action for goods sold to wife.* In an action for goods supplied to the wife on her order alone, the question is, (in the absence of such evidence of necessity as may show an agency in law,) whether there was an agency or authority in fact; and where the question had been left to the jury solely on the point whether the goods were necessaries, it was held a misdirection, and a new trial granted. *Read v. Teakle*, xxiv. 332.

2. *Wife of lunatic may pledge his credit.* The wife of a lunatic, confined in an asylum as dangerous, may pledge his credit for necessaries for herself; and the persons who have supplied her with such may sue the husband in an action of debt. *Read v. Legard*, iv. 523.

3. *Funeral expenses.* When a wife dies, although living separate from her husband, her husband is bound to provide a funeral at a reasonable expense; and if he does not, any person who voluntarily pays for such a funeral, is entitled to recover from the husband the sum so expended. *Ambrose v. Kerrison*, iv. 361.

4. *Allowance for dress—Evidence.* A married woman living with her husband, who made her an allowance for dress, incurred without his authority a bill for dress. An action having been brought against the husband for the amount, it was held, first, that evidence was receivable on the part of the husband to show that she had incurred other debts of the same kind with other parties, and therefore that the articles in this case were not necessary. Secondly, that it was improperly left to the jury to say whether the goods in respect of which the action was brought, were fitting for her station in life. *Renaux v. Teakle*, xx. 345.

III. Rights, Powers, and Liabilities of Married Women.

1. *Wife cannot assign by deed, as administratrix, without husband's concurrence.* A wife is incapable of assigning by deed, even as administratrix, without the valid concurrence of her husband, and an infant husband cannot make a valid concurrence. *Derbishire v. Home*, xix. 325.

2. *Cannot contract for rehearing—Right to dispute will.* A married woman cannot contract not to have her cause reheard. And where the wife was the heiress at law, and she and her husband consented to the establishment of a will and a decree was made accordingly, the decree was modified by inserting a proviso that, in the event of her surviving her husband, she should then have the right to dispute the will. But the decree was held conclusive against the husband as tenant by curtesy. *Turner v. Turner*, xi. 75.

3. *Right to alienate life interest.* In case of a gift in trust for A for life, for her separate use, the interest to be paid to her "on her personal appearance," and A marries, she has still the right to alienate the life interest, and the assignee has a right to the dividends during her life. *Ross's Trust*, ii. 148.

4. *Right to revoke consent.* A feme covert will be allowed to revoke a consent improvidently given to the payment of her funds in court to her husband, when the

object of that consent may be defeated by his previous insolvency. *Watson v. Marshall*, xix. 569.

5. A married woman can do no act to affect her reversionary interest in a sum of money charged upon land, during the lifetime of the tenant for life. *Hobby v. Allen*, iii. 166.

6. *Responsibility of wife for torts.* Although a married woman is responsible for torts, and consequently for frauds, committed by her during coverture, yet it is otherwise when the fraud is directly connected with a contract by her, and is the means of effecting it, and parcel of the same transaction; a married woman having no power to contract. *Fairhurst v. Liverpool Adelphi Loan Association*, xxvi. 393.

7. *Custody of children—Next friend.* A married woman permitted to present, without the intervention of a next friend, a petition, under the 2 & 3 Vict. c. 54, for access to some, and the custody of others, of her children. *Re Hakevill*, xv. 599.

8. A married woman cannot institute a suit *in formâ pauperis*, without the intervention of a next friend. *In re Page*, xvii. 309.

9. *Suit as to her separate estate.* A *feme covert* may bring a suit in the court of chancery, in respect of her separate estate, even when her husband is out of the jurisdiction; but she must, in some way, make her husband a party to the suit. *Monday v. Waghorn*, xi. 1.

10. A wife, in person, has no right to be heard on behalf of her husband upon an application by him to the court. *Oldfield v. Cobbett*, vii. 56.

11. *Distinct interests of husband and wife.* Wherever husband and wife have distinct interests, and the wife is induced, in dealing with those interests, to act under the advice of an attorney employed and paid by the husband, the attorney ought to be deemed to act as the attorney of both husband and wife, and she has a right to inquire into, or inspect the documents which are the foundation of the advice so given. *Warde v. Warde*, v. 217.

12. *Purchase of annuities from—Conveyance of rents by.* An assurance company, through B., the medical attendant of a married woman, who was also the trustee of the deed made upon her separation from her husband, purchased of her, with a knowledge of these facts, four annuities; each of these was secured by B.'s warrant of attorney, and also by her conveying to trustees for the company the rents of certain real estates settled to her separate use. B. received, if not the whole, certainly very large benefits from the transactions. *Held*, that these purchases were valid; that she had competent advice, and that the court in its discretion, under the 53 Geo. III. c. 141, s. 6, could direct allowance to be made to her in account for sums deducted from the purchase-money for the last two annuities for insuring the life of B., the medical attendant, and for compound interest upon the arrears of the previous annuities, and that such deduction did not invalidate either of the last two transactions. *Blakie v. Clark*, xvii. 371.

13. *Criminal liability.* A wife cannot be convicted of feloniously receiving from her husband goods stolen by him. *Regina v. Brooks*, xiv. 580.

14. On an indictment against a husband and wife for jointly receiving stolen goods, if the jury find both guilty, the conviction may be affirmed as to the husband and reversed as to the wife. *Regina v. Mathews*, i. 549.

IV. Gifts and Deeds between Husband and Wife.

1. *What constitutes gift—Equitable mortgage of wife paid by husband.* Previously to a marriage, the intended husband paid off two equitable mortgage debts of the intended wife, secured by deposit of title-deeds. The title-deeds remained with the mortgagees. There was no settlement, and no issue of the marriage. The husband predeceased the wife intestate. *Held*, that the husband did not intend to make a gift to the wife of the money which he had paid for her, and that the debt still existed on the security

of the equitable mortgage in favor of the personal estate of the deceased husband. *Gooch v. Gooch*, viii. 141.

2. *Must be a clear gift to trustees, or distinct acts of husband.* To constitute a gift between husband and wife, there must either be a clear irrevocable gift to a trustee for the wife, or some clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife. If a man were to deposit money with bankers, directing them to hold it for his wife, that would probably be sufficient. *Mews v. Mews*, xxi. 556.

3. *By husband to wife good in equity though bad in law.* A gift may be made by a husband to his wife, which, though bad in law, will be supported in equity. Though the property does not pass at law, yet, in equity, a husband, being the legal owner, may become a trustee for his wife, and if by clear and irrevocable acts he has made himself a trustee, the gift to his wife will be conclusive. *Id.*

4. *Gift by a wife to her husband.* Deeds of gift by a wife to her husband of property over which she has power of appointment, are regarded by the court with jealousy, and inquiries will be directed as to the circumstances under which they were executed. Where a wife makes a deed of gift to her husband of property over which she has a power of appointment, and the deed is afterwards impeached by her, the burden lies on her of showing that the circumstances were such as ought to invalidate it, and the burden does not lie on the husband of showing that the circumstances were such that it ought to be supported. *Nedby v. Nedby*, xi. 106.

5. *Conveyance to wife by illiterate husband—Rights of his heirs.* A, who could neither read nor write, executed an instrument purporting, in consideration of good will, to convey all his estate real and personal to his wife as her sole and absolute property. *Held*, that she could not set up such instrument in equity against the heirs, without fully satisfying the court that the grantor well understood its nature and import at the time of its execution. It must appear that it was read and explained to him by some competent person. *Price v. Price*, xii. 144.

V. Wife's Equity to a Settlement.

1. *On foreclosure of mortgage of wife's legal interest in term of years.* If a husband mortgage the legal interest in a term of years belonging to him in right of his wife, on a claim to foreclose this mortgage against the husband and wife, as defendants, no equity for a settlement upon the wife arises. *Hill v. Edmonds*, xv. 280.

2. *Does not include reversionary interest in stock.* A wife's equity to a settlement does not extend to include a reversionary interest in stock. The settlement of that fund cannot be asked for until it falls into possession, *i. e.* until the husband has a right (subject to this equity) to receive it. *Osborn v. Morgan*, viii. 192.

3. *Assignment of wife's interest in testator's residuary estate—Proper terms of settlement.* A, the husband of B, to whom a share of the residue of a testator's estate had been bequeathed, assigned it to C for valuable consideration. A sum of stock representing this share was carried to the account of B in a suit. The proper terms of a settlement of the part allowed to B, by way of equity of settlement, were held to be to B for life, with remainder to her children as she should appoint, with remainder to the children in default of appointment, and, in default of children, if B should survive A, to B, absolutely; but, if A should survive B, to C. The court has the power of directing that, in the last event, the fund shall be at the disposal of the wife by will; and that, in default of such disposition, it shall go to the next of kin of B; but a special case must be made for such a settlement, and the circumstance that B had needy relatives was held not sufficient to justify it. *Carter v. Taggart*, ix. 167.

4. *Discretion of court.* There is no rule of law or practice against this court decreeing the whole residue of a wife's fortune to be settled upon the wife and her children, but it is a matter purely in the discretion of the court. *Dunkley v. Dunkley*, xiii. 318.

5. *No settlement on marriage—Bankruptcy of husband.* A married woman, whose husband was a bankrupt, became entitled to a fund under 200*l.* There was an affidavit of no settlement upon the marriage, and that the wife had no other fund out of which to maintain herself or her children. *Held*, that the smallness of the amount did not prevent the wife's right to a settlement, and that the special circumstances were sufficient to induce the court to settle the whole fund upon her and her children; the husband's assignees being excluded from any share. *In re Kincaid's Trust*, xvii. 396.

6. *Insolvency of husband.* Where the husband was insolvent, and there had been no settlement on the wife, nor had the husband received any thing in right of his wife previously, the court directed the settlement for her separate use for life of one clear moiety of the sum of 1,000*l.* coming to the wife; the costs to come out of the other half, and the residue thereof to go to the assignees of the husband. *Bagshaw v. Winter*, xi. 272.

7. *Assignment of wife's reversionary interest—Insolvency of husband.* A married woman, being entitled to a reversionary interest in the residuary estate of a testator, joined her husband in assigning it, as a collateral security, for the payment of 4,000*l.*, &c. He afterwards became utterly insolvent, and unable to maintain his wife and family. A sum of more than 2,000*l.*, part of the fund fell into possession; and, upon the application of the wife, the court, after payment of costs of all parties, ordered it to be settled for the benefit of the wife and her children, with liberty to apply upon the remaining part of the fund falling into possession. *Marshall v. Fowler*, xv. 430.

8. *Bequest of certain sum and of annuity to married woman—Assignment of reversionary interest in annuity fund—Insolvency of husband.* A testator by will, bequeathed a certain sum of money to a married woman, and a share in a sum set apart to answer a life annuity. In an administration suit, the sum first mentioned was paid to the husband, the wife assenting. The husband and wife then joined in assigning their reversionary interest in the annuity fund for value, and the assignees procured a stop-order upon the fund. On the death of the annuitant, the wife petitioned for a settlement of the fund, and it was *held*, reversing the order of the court below, dismissing the petition, that the wife was entitled to have the whole fund settled on herself and children, the husband being insolvent and having made no settlement upon her; that the claim of the wife was properly raised by petition; and that the assignees, though no parties to the administration suit, had, by obtaining the stop-order, sufficiently brought themselves before the court to enable it to deal with the fund upon petition. *Scott v. Spashett*, ix. 265.

9. *Second marriage and new settlement—Dividends under former settlement.* A widow entitled, under a former settlement, to the dividends of a sum for life, which she believed to be settled to her separate use, married again; in the new settlement she required all her property to be settled on herself, and all was comprised except the said dividends. A separation took place soon after marriage, and the wife obtained a divorce *a mensâ et thoro* on the ground of the adultery of the husband. The wife filed a bill to enforce her equity for a settlement. *Held*, that the wife was entitled to the whole of the dividends. *Barrow v. Barrow*, xxxi. 241.

VI. *Separate Estate of Wife; what constitutes, and Liabilities of.*

1. *Lunacy and death of wife—Who entitled to her property—Paraphernalia.* Where a lady was possessed of jewels and ornaments of the person before her marriage, and after her marriage they were in all writings spoken of by her husband as hers, and were deposited with bankers, with whom she, with his consent, kept a separate account, and after her lunacy the husband made his will, giving her the use of his plate, furniture, linen, jewels, and household effects, including the jewels and effects "which belonged to her before her marriage," and which he "had assumed by marital right"

during her life, upon the death of the lunatic who survived her husband, it was *held*, that the next of kin of the husband were entitled to such of the articles as did not consist of paraphernalia, as their property, but as to such as formed paraphernalia, the next of kin of the wife were entitled to elect whether they would take them or the benefits given by the will. *In re Hewson*, xxiii. 283.

2. *Wife's separate banker's account—Loan to her husband—Declaration of trust.* M. allowed his wife to have a separate banker's account, to which moneys belonging to her settled to her separate use, and also moneys not so settled, were paid in. M. also allowed her to draw checks upon such account in her own name. She from time to time paid such checks to her husband, who always gave her a memorandum at the time, and at the end of the year gave a promissory note, including all the amounts so received. The last of such promissory notes was dated the 1st January, 1848. M. died in August, 1848, having left all his property to trustees to convert into money, at such times as they might think proper, with full power to postpone such sale; and his wife was made tenant for life in the proceeds of such sale, and in the other items of his estate, until the same should be so converted into money. Part of the property consisted of Mexican mint shares not yet sold. *Held*, first, that such promissory note operated as a good declaration of trust by the husband in favor of the wife. Secondly, that the wife was entitled to have the dividends and bonuses (the same having arisen out of profits) declared since the testator's decease. Thirdly, that she was not entitled to insist upon the said Mexican shares being left in their then state of investment, against the wish of the trustees. *Murray v. Glasse*, xxi. 51.

3. *Property of wife for her "separate use" transferred to husband—Savings from wife's separate estate.* Personal securities, to which a *feme sole* was entitled under the will of a testatrix for her separate use, were, on her marriage, transferred into the name of her husband; the husband received the income of this property, and of other property settled to the separate use of the wife, but had entered the receipts in a book as on her account; and on one occasion she had signed the book for the income. The savings were invested in consols, in their joint names; a portion of the stock was afterwards sold out and applied in the purchase of a piece of land, and the erection of a house upon it; the land was conveyed to the husband to uses to bar dower, upon the husband agreeing to devise the land to the wife in fee. This will in her favor was subsequently revoked by a will devising all his property to his brother. *Held*, that the land and also the personal securities remained the separate estate of the wife. *Darkin v. Darkin*, xxiii. 593.

4. *Living separate from her husband—Her estate liable for rent.* Bill against a married woman, living separate from her husband, seeking to charge her separate property in respect of rent accrued due for actual occupation under an agreement to take a lease, and in respect of rent to accrue in future under the agreement, was treated by the court below as a bill for specific performance; and a reference of title was ordered. On appeal, the relief as to future rent was abandoned at the bar, and the court reversed the order for a reference, and declared the separate estate liable to the past rent. *Gaston v. Frankum*, xi. 226.

5. *Husband incapacitated to do business—Wife employs a solicitor.* If a married woman whose husband is incapacitated from any cause from attending to business, applies to a solicitor to take charge of a suit in which her children, by their next friend and her husband are parties, her separate estate is not liable for costs in the suit. *In re Pugh*, xxiii. 169.

VII. Conveyance of Wife's Property.

1. *Settlement of wife's estates—Mortgage—Acknowledgment—Consideration.* Husband and wife joined in settling freehold and copyhold estates to which she was entitled in reversion expectant upon the decease of her mother, for the benefit of herself, her

husband and children; she afterwards joined her husband in mortgaging the estates to the plaintiff; both the deeds were acknowledged by her. *Held*, that the husband's giving up his interest in his wife's estates was a good consideration for the settlement, and that it was valid against the mortgagee. *Hewison v. Negus*, xix. 446.

2. *Assignment to secure money advanced to husband.* Where a woman is entitled to an estate for life in a freehold and a copyhold, and she joins her husband in assigning both to A, as security for money advanced to the husband, and afterwards joins in assigning the freehold to B for the same purpose, then B is entitled to have A's charge satisfied out of the copyhold, as far as it will go. *Quære*, whether the wife could be regarded as surety only in respect of her husband's debts. *Tidd v. Lister*, xxiii. 278.

3. *Death of wife after contract for sale.* A *feme covert* entitled to real estate for her separate use, and her husband entered into a contract for the sale of the property. Before the contract was completed the wife died, having devised the estate to her husband. *Held*, on claim filed by the husband surviving to enforce the contract, that a decree to that effect could not be made in the absence of the wife's heir. *Semble*, such a contract could not be enforced by the husband. *Harris v. Mott*, vii. 245.

4. *Wife's interest in a chose in action—Release by husband and wife.* The release by husband and wife of a sum of money secured by bond to A, and payable to the wife after A's death, *held* not binding on the wife on her surviving both A and her husband. When a *feme covert* is entitled to a reversionary interest in a *chose in action*, the release of the husband is as inoperative as his assignment, to bind his wife's right by survivorship. *Rogers v. Acaster*, xi. 300.

5. *When husband's concurrence dispensed with—Sufficiency of application.* In an application by a married woman, under 3 & 4 Will. IV. c. 74, for leave to dispense with the concurrence of her husband in a conveyance, it is not enough to state that some years ago he left her, and has since lived with another woman, (in this country,) without showing some direct application to him for his concurrence. *Ex parte Parker*, xxx. 493.

6. *Husband sent abroad.* It is sufficient to support an application on the part of a married woman for leave to execute conveyances, under the 3 & 4 Will. IV. c. 74, that her husband was sent abroad under a sentence of transportation for a term of years; and for aught she knows is still abroad. *Ex parte Wimbush*, xxx. 512.

7. *Sale necessary for children's support.* A rule was granted to dispense with the concurrence of the husband of a married woman in selling and conveying property settled on her for the support of her children by a former husband, on an affidavit stating that her present husband had deserted her seven months ago, leaving her destitute; that it was necessary to sell the property for the support of her children by the first marriage, and that she had never heard from her present husband since his desertion, nor knew where he was. *In re Lord*, xxx. 519.

8. *Husband living separate.* Where a husband living separate from his wife refused to join with her in a conveyance of property, in which, under her father's will, she had a separate interest, the court, acting under stat. 3 & 4 Will. IV. c. 74, s. 91, made an order dispensing with his concurrence. *In re Perrin*, xxvi. 292.

VIII. Separation and Condonation.

1. *Deed of separation—Future property—Sole receipt by wife.* By a deed of separation between a husband and wife residing in America, who agreed to live apart, it was agreed that the wife should be at liberty to carry on business, and retain for her own use all her present and future property. Under the will of R. W., she became entitled to a sum of 8l. per cent. consols, which, by an order of the court, made after the separation, was carried to the account of the share of the husband and wife. Nothing having been heard of, though inquiries had been made for, the husband during a period of fourteen years, the court, on a petition presented by the wife,

asking for the transfer into her name of the consols, directed that they should be sold, and the proceeds paid to her on her sole receipt. *Whillow v. Dilworth*, xxiii. 508.

2. *Covenant in deed of separation respecting division of property.* A covenant in a deed of separation, wherein the husband covenants with a trustee chosen for the wife, to assign a moiety of all property, which should afterwards come to her, or him in his marital right, the other moiety to belong to the husband, does not extend to property afterwards given by the trustee to the wife for her separate use, so as to entitle the husband to a moiety of such property. *Ker v. Ruxton*, xi. 220.

3. *Husband restrained from breach of covenant in deed of separation.* If a husband enter into a covenant, in a deed of separation, that he will permit his wife to live separate from him, and will not molest her for so doing, nor visit her without her consent, the court will restrain him from infringing such a covenant. *Sanders v. Rodway*, xiii. 463.

4. *Enforcement of agreement to execute a deed of separation.* The court of chancery has jurisdiction to enforce an agreement to execute a deed of separation between husband and wife. *Wilson v. Wilson*, xxxi. 29.

5. *Recohabitation, effect of.* Although generally the provisions of a separation deed are annulled by reconciliation and recohabitation, yet if a husband agrees, as an inducement for the wife to return, that the annuity shall be continued, such agreement is binding. *Webster v. Webster*, xxiii. 216.

6. *Provision in marriage settlement respecting separation—Proceedings by husband a wrongdoer to deprive wife of allowance under settlement.* On the marriage of T. C., in 1839, his father settled lands upon certain trusts, and, among others, in trust for his intended wife, for life, for her benefit, and for the maintenance of the children of the marriage. There was a provision in the deed, that in case of a separation, from any cause whatever, the interests thereby given to the wife should cease and go to the husband. The husband and wife went to live with the settlor, (who was married to the mother of his son's wife,) but after a short time, in consequence of the state of the lady's health, occupied separate apartments. In 1846, the father-in-law being extremely violent in his language and demeanor to both his wife and daughter-in-law, they went, with the knowledge and assent of T. C. to live at D. T. C. continued to live with his father, but kept up a friendly intercourse with his wife by letter. The father and mother both died in 1849. In 1850, T. C. requested his wife to return to cohabitation, but she refused, and on inquiry discovered, for the first time, that he had committed adultery in 1848. This fact she set up in the ecclesiastical court, to prevent compulsory return to cohabitation. T. C. thereupon took the present proceedings to deprive her of the allowance under the settlement; but the court refused to interfere, considering that it would be interfering on behalf of a wrongdoer, to enable him to take advantage of his own wrongful acts. *Cartwright v. Cartwright*, xix. 46.

7. A separation within the meaning of the above proviso must be a separation capable of being enforced against the husband; therefore, not a voluntary separation for temporary purposes, but either by deed, to which the husband is a party, or by sentence of a competent court, in which case, if the sentence is grounded upon the criminal act of the husband himself, he cannot come to a court of equity and obtain relief founded upon that sentence. *Ib.*

8. *Condonation.* Principles which govern the condonation of injuries between husband and wife. *Ib.*

IX. Miscellaneous Cases.

1. *Suit by wife as executrix—Stay of proceedings—Indemnifying husband against costs.* An action having been brought by a married woman as executrix, in which her husband was made co-plaintiff, the court refused to order the proceedings to be stayed altogether, but ordered they should be stayed until security was given to the husband

by the attorney against the costs of the action, the affidavits showing that the husband and wife were living separate, and that the action was brought without his sanction and against his will. *Proctor v. Brotherton*, xxiv. 518.

2. *Suit for dividends on wife's stock—Joinder.* Husband and wife may sue jointly against a railway company for dividends on stock of the company purchased by the wife out of her own earnings, and of which stock she is the registered owner in the books of the company; and if the wife sues alone, the non-joinder of the husband is only a plea in abatement. *Dalton v. The Midland Railway Co.* xx. 273.

3. *Action by husband and wife—Account stated.* The declaration by husband and wife on an account stated, should aver that the account was stated in respect of money due in right of the wife. *Johnson v. Lucas*, xvi. 290.

4. *Wife's shares in joint-stock company.* As to what will constitute the husband a member of a joint-stock company in respect of the shares of his wife vested in him by the marriage, see *Dodgson v. Bell*, iii. 542.

5. *Antenuptial transfer—Fraud.* As to an antenuptial transfer of the wife's property in fraud of the husband's marital rights, see *Lewellin v. Cobbold*, xix. 43; *Richards v. Lewis*, v. 400.

6. See, also, *Duncan v. Cannan*, xxiii. 288.

INDECENT EXPOSURE.

An indictment for indecent exposure laid the offence in an omnibus, by one count—and in a public highway, by a second count. Neither count concluded *ad commune nocumentum*. Held, that an omnibus was a public place; that the defective conclusion was cured by 14 & 15 Vict. c. 100, s. 24. *Regina v. Holmes*, xx. 597.

INDECENT PRINTS.

In some counts of an indictment, the defendant was charged with unlawfully and knowingly obtaining and procuring indecent and obscene prints and libels, in order and for the purpose of afterwards publishing and disseminating them. In other counts with unlawfully and knowingly preserving and keeping in his possession, indecent and obscene prints and libels, with the intent and for the purpose of afterwards publishing and disseminating them. Held, on writ of error, that the former counts were good, as the obtaining and procuring the indecent prints and libels, for the purpose alleged, was an act done in commencing a misdemeanor, and, therefore, an indictable offence. But that the latter counts were bad, as they alleged no act done, and the possession of the prints and libels may have been come by innocently. *Dugdale v. Regina*, xvi. 380.

INDICTMENT.

I. WHEN AN INDICTMENT WILL LIE.

II. MATERIAL ALLEGATIONS; DESCRIPTION; SURPLUSAGE, &C.

III. AMENDMENT.

IV. VARIANCE.

V. CONVICTION; JUDGMENT.

I. When an Indictment will lie.

1. *Against a soldier for disobeying order of justices.* A soldier is liable to an indictment for disobeying an order of justices requiring him to pay for the maintenance of a bastard child, notwithstanding the provisions of the 52d section of the Mutiny Act, such an indictment being "a criminal matter" within the exception in that statute. *Regina v. Ferrall*, i. 575.

2. *For bringing glandered horse into public place.* To bring a horse infected with the glanders into a public place to the danger of infecting the queen's subjects is a

misdeemeanor at common law; and it was *held*, that an indictment which stated that the defendant knew that a mare which he brought into a fair was glandered, was, after verdict, good, without an averment that the defendant knew that the glanders was a disease communicable to man. *Regina v. Henson*, xviii. 107.

3. *For not paying over moiety of penalty under alehouse act.* A person may be convicted under an indictment for not paying over to the county treasurer a moiety of a penalty imposed under the alehouse act. *Regina v. Dale*, xiv. 552.

4. *Maliciously injuring trees.* On an indictment for maliciously injuring trees, thereby doing injury to an amount exceeding 5*l.*, it appeared, that the injury to the trees amounted to 1*l.*, but that the cost of replacing the hedge in which they stood would bring the amount up to over 5*l.* *Held*, that the latter was consequential injury, and therefore the indictment could not be supported. *Regina v. Whiteman*, xxv. 590.

II. *Material Allegations ; Description ; Surplusage, &c.*

1. *For aiding an escape must set out the means.* In an indictment under the 43d sect. of stat. 4 Geo. IV. c. 64, for aiding and abetting the escape of a prisoner, it is not necessary to set out the means which have been used by the defendant in assisting the prisoner to escape. *Regina v. Holloway*, v. 310.

2. *For perjury—Phrases “one M.” and “Mr. M.”* An indictment for perjury alleged it to be material whether or not the prisoner ever got “one Milo Williams” to write “a letter” for her; and the averments, negating the truth of what was sworn, alleged that, “in truth and in fact, the said Mary Ann Bennett did get the said Milo Williams, and that on her cross-examination, when the alleged perjury was committed, she was asked whether she had ever got ‘a Mr. Milo Williams’ (who was then pointed out to her in court) to write a letter for her.” *Held*, that the averments were sufficient, without any allegation connecting the “one Milo Williams” with the “Mr. Milo Williams” named in the subsequent part of the indictment. *Regina v. Bennett*, iv. 560.

3. *Description of court.* An indictment for perjury alleged that in the W. county court of Middlesex, holden, &c., before J. M., &c., then and there being the judge of the said court, a certain action on contract then pending in the said court between A. L., &c., and R. H., &c., came on to be tried, and was then and there in due form of law heard and tried by and before the said J. M., then and there being the judge of the said county court, as aforesaid; upon which said hearing and trial the said A. L., &c., tendered herself as a witness on her own behalf, and was then and there, &c., duly sworn, &c., before the said J. M., then and there being judge of the said court, as aforesaid, and then and there having sufficient and competent authority to administer the said oath to the said A. L. in that behalf. *Held*, that the indictment sufficiently showed that the court was a county court constituted under the statute 9 & 10 Vict. c. 95, and that the jurisdiction of the court over the action sufficiently appeared from the allegations that the action was pending in the court and came on to be tried; that it was one of contract, (of which the court may have cognizance,) and that the witness was sworn before a judge of competent authority to administer the oath. *Lavey v. Regina*, vii. 401.

4. *Bastard child—Abandonment.* An indictment against a person for abandoning his bastard child, must aver that he had the means of supporting the child, and that the child had sustained injury by the abandonment. *Regina v. Hogan*, v. 553.

5. *For obtaining money, &c., by false pretences must allege ownership.* An indictment for obtaining money, &c., by false pretences, must allege whose property the money, &c., was at the time, and the omission of such an allegation, is not a formal defect which is cured by sect. 25 of 14 & 15 Vict. c. 100; nor does sect. 8 of the same statute which enacts that such indictments need only allege an intent to defraud,

without alleging the intention to be to defraud any particular person, obviate the necessity of alleging the ownership of the money, &c. *Sill v. Regina*, xvi. 375.

6. *One count may refer to another.* One count of an indictment may refer to another, and then the maxim applies, "*Verba relata inesse videntur.*" *Regina v. The Inhabitants of Waverton*, viii. 348.

7. *For larceny—Repugnancy.* An indictment charged the prisoner with larceny, on which the jury found a verdict of not guilty; in a subsequent count, the prisoner was charged with having received the article "so as aforesaid feloniously stolen," on which the jury found a verdict of guilty. *Held*, that there was no repugnancy, that, although the word "aforesaid," in a subsequent count, virtually incorporates all the necessary averments as to time and place in that count, the words "so as aforesaid feloniously stolen" did not necessarily mean that the article had been stolen by the person named in the first count, but only that it had before then been feloniously stolen by some person. *Regina v. Craddock*, i. 563.

8. Any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner. *Regina v. Clark*, xx. 582.

9. *Arson—Description of building.* A building about twenty-four feet square, with slated roof, wooden sides and glass windows, used as a storehouse for seasoned timber, as a place of deposit for tools, and as a workshop, where timber was worked up into proper form for building and prepared for use, it was *held*, to be correctly described as a "shed," in an indictment for arson. *Regina v. Amos*, i. 592.

10. *Description must be proved.* Whatever is averred in an indictment as a matter of description, must be proved. *Regina v. Frost*, xxix. 546.

11. *Description of forged instrument.* If an instrument alleged to have been forged is set out in full in the indictment, the description of the instrument set out in other parts is not material. In this case a forged request for the delivery of goods was set out in full, but was called a "warrant, order, and request." *Regina v. Williams*, ii. 533.

12. Where the setting out of an instrument in an indictment can give no information to the court, it is unnecessary to set it out. *Regina v. Coulson*, i. 550.

13. *Misdescription—Reference of one count to another.* The first count of an indictment alleged: "That a certain part of the highway, situate in the township of W., leading from and out of the highway from the village of W., towards M., at or near a place called Parkside, on the said last-mentioned highway," &c., "was ruinous," &c. The second count alleged, that the inhabitants of W. had immemorially repaired their highways, and that the said highway, alleged to be ruinous, was a common highway, and that the defendants ought to repair the same. There was no place called Parkside, but the place intended was called Parkgate. Verdict of acquittal on the first count, of guilty on the second. *Held*, that the misdescription was immaterial; that though the second count did not of itself sufficiently charge that the part of the road was out of repair, it did so by clear and distinct reference to the first count; and that the part of the road out of repair having been alleged in the first count to be in W., the second count was sufficient by reference to the first, without a repetition of the allegation. *Regina v. The Inhabitants of Waverly*, viii. 344.

14. *Counting-house, meaning of.* The prisoner was indicted for stealing money from a counting-house. The proof was that he stole money from a building called "the machine-house," on the premises of a person who had large chemical works. All goods sent out were weighed in this building, and in it the men's time was taken and wages paid. The books in which the men's time was entered were brought to the building for the purpose of making the entries, but kept in another building on the premises called "the office," where the general books and accounts of the concern were kept. *Held*, that the building was a counting-house within the act 7 & 8 Geo. IV. c. 29, s. 15. *Regina v. Potter*, iv. 575.

15. *Night poaching—Indictment need not set out the close.* If three or more persons

are together in one party armed, by night, in any land for the purpose of destroying game there, and the land consists of several closes, and they be in different closes of the land, they may be convicted under the stat. 9 Geo. IV. c. 69, s. 9, and the indictment need not describe any particular close, it is sufficient if it describe the land in which the persons were. *Regina v. Uzzell*, iv. 568.

16. *Surplusage—Allegation of immemoriality—Averment of time.* An indictment against a parish for non-repair of a highway, alleged "that from the time whereof the memory of men runneth not to the contrary, there was, and yet is, a common and ancient highway," &c.; and the only other allegation that it contained as to time was, that a part of said highway, situate, &c., "on the 1st day of January, in the twelfth year aforesaid, and continually afterwards, until the taking of this inquisition, was and yet is" out of repair, so that the liege subjects of the queen could not, during the time aforesaid, nor yet can go, return, pass, &c. *Held*, that the allegation of immemoriality might be rejected as surplusage, and that, without it, sufficient appeared on the face of the indictment, as to time, to support the liability charged. *Regina v. The Inhabitants of Turweston*, i. 317.

17. See *Dugdale v. Regina*, xvi. 380; *Regina v. Hewgill*, xxiv. 556; *Regina v. Oates*, xxix. 552.

III. Amendment.

1. *Discretion of court—Striking out Christian names.* The court of quarter sessions has a discretionary power of amendment of indictments. And where an indictment alleged that the lord of a certain manor had four Christian names, but only two were proved, and a motion was made to strike out the other two, which was refused, it was *held*, that the court might have allowed the erasure of all four, but that it was right in refusing the motion to amend by striking out only two. *Regina v. Frost*, xxix. 546.

2. *Amendment after verdict—Record restored to its original state.* A count for receiving stolen goods alleged that the prisoner received the goods of A. B., "he, the said A. B., then knowing them to have been stolen." After a verdict of guilty, the counsel moved in arrest of judgment, on the ground that the *scienter* was omitted; but the court amended the count, by striking out "A. B." and substituting the name of the prisoner. *Held*, first, that the count was bad as it was originally framed. Secondly, that the objection was taken at the proper time. Thirdly, that the indictment was not amendable after verdict, and the court ordered the record to be restored to its original state. *Regina v. Larkin*, xxvi. 572.

3. *Misdescription of a way.* An indictment for obstructing a highway, described it as a footway leading from A to B. It appeared in evidence, that the way in question passed from A to B through C, and that from A to C it was a carriage-way, and from C to B only a footway. The obstruction complained of was between C and B. *Held*, that this might be amended under the 14 & 15 Vict. c. 100, s. 1. *Regina v. Sturge*, xxvi. 171.

IV. Variance.

1. An indictment charged the prisoner with attempting, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial, it was proved that the prisoner made the false pretence set forth in the indictment to J. B. only, with intent to defraud J. B. and others, his partners, of property belonging to their firm. *Held*, that there was no variance between the indictment and proof, as the words "and others," in the allegation that the false pretence was made "to J. B. and others," might be rejected as surplusage. *Regina v. Kealey*, i. 585.

2. *Conspiracy*—Phrase “other persons to the jurors unknown.” A, B, and C were charged with conspiring together and “with divers other persons to the jurors unknown; the evidence applied only to them, and the jury found that A had conspired with either B or C, they could not say with which—the judge directed a verdict of guilty against A. *Held*, that he was entitled to an acquittal, and that “persons to the jurors unknown” could not be referred to those named in the indictment. *Regina v. Thompson*, iv. 287.

3. *Receiving stolen goods*—Single count against two—Separate acts. Two persons cannot be convicted of separate acts of receiving stolen goods upon a single count charging a joint receipt by the two. In this case the conviction was held good only against the one proved to have first received. *Regina v. Dovey*, ii. 532.

4. *Description of prosecutor*—*Idem sonans*. An indictment for larceny described the prosecutor as Darius C., the evidence was that his name was Trius C. *Held*, that it was a question of fact for the jury, and not of law for the court, whether the two words were *idem sonantia*. *Regina v. Davis*, iv. 564.

V. Conviction; Judgment.

1. *Indictment for robbing and beating*—Conviction for an assault with intent to rob. An indictment for robbing and beating the prosecutor, where the jury found the prisoner guilty of an assault with intent to rob, will not support a conviction for the felony of assaulting with intent to rob; nor will the verdict justify a conviction for the assault alone. *Regina v. Reid*, i. 595.

2. *Robbing under aggravated circumstances*. Where prisoners are indicted for robbery under aggravated circumstances, it is competent for the jury to find the prisoners guilty of an aggravated assault with intent to rob, the assault following the nature of the robbery charged. *Regina v. Mitchell*, xii. 588.

3. A constable, for the purpose of arresting a man who had committed a felony, fired at him and wounded him in the leg. *Held*, that the constable was properly convicted of shooting with intent to do grievous bodily harm, as, at the time he fired, the fact that a felony had been committed was unknown to him. *Regina v. Dadson*, i. 566.

4. *Husband and wife*—Affirming conviction as to one and reversing as to the other. On an indictment against husband and wife for jointly receiving stolen goods, if the jury find both guilty the conviction may be affirmed as to the husband and reversed as to the wife. *Regina v. Mathews*, i. 549.

5. *For aiding an escape, good and bad counts*—Proper judgment may be rendered by appellate court. If an indictment for aiding an escape contains one good count, though all the others are bad, the appellate court, after a verdict for the crown on all the counts, is bound, under sect. 5 of stat. 11 & 12 Vict. c. 78, to pronounce the judgment which the court below should have pronounced, or remit the record so that such court may pronounce the proper judgment. *Regina v. Holloway*, v. 310.

INFANCY.

I. CONTRACTS OF INFANTS, &C.

II. JURISDICTION OF CHANCERY OVER INFANTS' ESTATES, &C.

I. Contracts of Infants, &c.

1. *Ratification of contract*. An infant having accepted a bill of exchange, was applied to after coming of age, by the holder; he replied by letter: “Pray make yourself easy about it, as I will take care that it is paid, and Sir H. P. comes to England in June.” *Held*, not a ratification within act 9 Geo. IV. c. 14. *Mawson v. Blane*, xxvi. 560.

2. *Acquiescence.* The plaintiff acquiesced for three years after he attained his majority in the sale of his lands, while he was a minor, by his attorney. *Held*, that it was too late to file a bill praying that the sale might be declared void. *Salmon v. Cutts*, v. 93.

3. *Infant shareholder—Calls—Plea.* In an action under the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 26, for calls on shares in a railway company, which the defendant has obtained by original agreement with the company, and his name entered in their register of shares as proprietor thereof; it is no answer to plead that the defendant was an infant at the time of the agreement for the shares, and of entering his name on the register, and of making the calls, that he never ratified or confirmed the purchase, and that the bargain was a disadvantageous one to him. To make such a plea good where no disclaimer is averred, it ought to appear that the infant is not yet of age. *The Northwestern Railway Co. v. M'Michael*, i. 522.

4. *Plea must allege disaffirmance within reasonable time.* When it is sought to avoid a contract on the ground of infancy, the plea must show that there was a disaffirmance, and that this was within a reasonable time after the defendant's majority. *Dublin, &c. Railway Co. v. Black*, xvi. 556.

5. *Concurrence by infant husband.* An infant husband cannot make a valid concurrence in an assignment by deed by his wife as administratrix. *Derbshire v. Home*, xix. 325.

6. *Infant deputy steward.* A surrender taken out of court of copyhold lands of a married woman, and requiring therefore her separate examination and consent, may be well taken by a deputy steward who is an infant. *Edlestone v. Collins*, xiii. 331, and xvii. 296.

7. *Action for deceit against.* Whether an action on the case for deceit will lie against an infant who, by falsely representing himself of full age, obtained money of the plaintiff, see *Price v. Hewett*, xviii. 522. See the conflicting authorities collected in note. See, also, *Newton v. Farrall*, iv. 430.

8. As to the enlistment of an infant ward of court, see *Rochford v. Hackman*, xxiii. 285.

II. Jurisdiction of Chancery over Infants' Estates, &c.

1. *Payment out of court of infants' funds.* Part of the principal in court, to which infants were entitled, advanced towards enabling the infants to emigrate with their guardian. *Clarke, in re*, xvii. 599.

2. *Payment to his solicitor.* The whole of a small legacy and its accumulations were paid out of court to the solicitor of an infant who had no other property, upon his undertaking to apply it in discharging a sum claimed for past maintenance and for a prospective outfit, and, after deducting the costs, to pay any remaining balance to the infant at majority. *In re Welch*, xxiii. 334.

3. *To his father.* An infant's legacy of small amount paid to the father under special circumstances. *Walsh v. Walsh*, xv. 249.

4. The court will not give a direct benefit out of an infant's income to his father. *In re Stables*, xiii. 61.

5. *Rehearing in foreclosure case.* Where a decree of foreclosure has been made against the defendants, subsequently discovered to be infants, the court will not rehear the cause, nor expedite the foreclosure of their equity of redemption, but a supplemental suit must be filed or another suit instituted. *Scawen v. Nicholson*, xix. 436.

INFORMATION.

1. *Criminal information against judge of county court.* Upon application for a criminal information against the judge of a county court for misconduct in his office, it appeared that the applicant had addressed a memorial to the Lord Chancellor to remove the judge from his office for the same misconduct, and that the Lord Chan-

cellor had declined to interfere. *Held*, that the applicant was disqualified from making this application. *Regina v. Marshall*, xxx. 204.

2. *For breach of revenue laws—Defendant a competent witness.* An information for breach of the revenue laws is not a criminal proceeding within the third section of the act 14 & 15 Vict. c. 99, and the defendant is a competent witness under that act. *Pollock, C. B., and Parke, B., contra. Attorney-General v. Radloff*, xxvi. 418.

3. *By attorney-general against a public company.* The Attorney-General has no right to file an information to restrain a company from doing what it is authorized to do, as a means of compelling it to complete that, the abandonment of which is alleged to be an injury to the public. *Attorney-General v. Birmingham and Oxford Junction Railway Co.* viii. 243.

4. *Letters between private individuals containing abusive matter.* A letter between private individuals containing abusive matter but not inciting to a breach of the peace will not support an application for a criminal information. *Ex parte Dale*, xxviii. 165.

5. *For inquiries as to rents of parish property.* An information was filed against A and B by name, they being churchwardens of a certain parish. The object of the information was for inquiries into the application of the rents and profits of the property of the parish, and for a scheme for the future management of the estate. The court made the order, notwithstanding that the churchwardens were not parties in their official character. *Attorney-General v. Salkeld*, xvii. 160.

6. *Death of relator.* Where all the relators in an information are dead, it is irregular and improper to proceed without having a new relator or relators appointed, and the court will restrain all further proceedings in the suit until new relators, or a new relator, shall have been appointed. *Attorney-General v. Haberdashers Company*, xiii. 273.

7. *Upon oath or in writing.* No magistrate can proceed without an information; but unless the statute requires the information to be in writing or upon oath, it is not necessary that it should be so. *Per Parke, B. Regina v. Millard*, xx. 595.

8. *As to proceedings by information against railway companies, praying for a declaration that they were bound to construct the whole of certain lines of railway and open the whole simultaneously, see Attorney-General v. The Birmingham and Oxford Junction Railway Co.* vii. 288.

INJUNCTION.

I. GENERAL PRINCIPLES AS TO GRANTING INJUNCTIONS.

II. SPECIAL CASES IN WHICH AN INJUNCTION WAS GRANTED OR REFUSED.

III. BREACH OF INJUNCTION.

IV. DISSOLUTION OF INJUNCTION; PRACTICE.

I. General Principles as to granting Injunctions.

1. *Affirmative and negative covenants.* Where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction to specifically perform the affirmative covenants. But in such cases the court will decline to interfere where the jurisdiction cannot be beneficially exercised, or where its exercise would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the court cannot specifically perform. *Lumley v. Wagner*, xiii. 252.

2. *Doubt as to party's legal rights.* The mere existence of a doubt as to the legal rights of a party applying for an injunction, is not in all cases sufficient to prevent the injunction from being issued. *Ollendorff v. Black*, i. 114.

3. *Discretionary power not interfered with.* In the absence of special circumstances, equity will not interfere to control or limit the exercise of a discretionary power. A granted lands to the use of trustees for a term *sans waste*, and, subject thereto, to the use of herself for life *sans waste*, with remainder to the use of B for life *sans waste*, with remainders over, with remainder to B in fee. The trusts of the term were, by cutting and selling timber, or by demising, mortgaging, and selling the premises, to raise three sums, the first of which was to be raised forthwith and paid to A. A died before any money had been raised. Six years after the date of the grant, B, as tenant for life in possession, advertised a sale of timber. *Held*, on a bill by the trustees for an injunction against B, that by the terms of the grant the trustees had, as to the mode of raising the moneys, a discretion with which the court could not interfere, and therefore a right to enter and cut timber, to which right B's estate, though *sans waste*, was subordinate; and B was restrained from cutting or selling the timber while the moneys remained to be raised. *Kekewich v. Marker*, v. 129.

4. *Interlocutory application.* Where, upon an interlocutory application, there is a *prima facie* case made out for an injunction, it will, as a general rule, be granted by the court, if more mischief will be done by withholding than by granting it. *Cole v. Sims*, xxiii. 584.

5. *Status of property protected.* The court of chancery will, where the necessity of the case requires it, interfere by injunction, during litigation, not only to preserve property *in statu quo*, but sometimes, also, to prevent the defendant from affecting it by contracts, or conveyances, or other acts. *The Shrewsbury and Chester Railway Co. v. The Shrewsbury and Birmingham Railway Co.* iv. 171.

6. The court will restrain a party from enforcing a legal claim where promises have been made to the person legally liable, not to enforce it, upon the faith whereof obligations have been entered into. *Money v. Jorden*, xi. 182.

II. *Special Cases in which an Injunction was granted or refused.*

1. *To restrain foreign corporation.* In a suit for the administration of the estate of a testator domiciled in England, and having real and personal estate both in England and Scotland, an injunction will be granted, after a decree, to restrain a Scotch corporation having large real estates in England from continuing proceedings in the court of session, in Scotland, to obtain payment of a debt which the company claimed against the testator as their agent; and that, though by the articles of partnership the company were entitled to a preferable lien upon the shares of the testator in the company. Service of the notice of motion at the office in London is, for the purposes of the corporation, a good service, where it is admitted that at the head office in Scotland the corporation had notice. *Maclaren v. Stainton*, xv. 500.

2. *To compel a company to keep open a canal.* The defendant railway company owned a canal which they were bound to keep open. They built a wall across a sort of bay which the plaintiff alleged was part of the canal. The plaintiff filed his bill for an injunction to make the defendants undo what had been done, and to prevent them from doing more. *Held*, that the court could not make the defendants undo any thing done, but that the plaintiff was entitled to an injunction to restrain them from proceeding to do more, on the plaintiff undertaking to bring an action at law to try the disputed right. *Bradbury v. The Manchester, Sheffield, and Lincolnshire Railway Co.* viii. 143.

3. *To restrain from burning bricks.* A land owner having built a house, and laid out grounds, shrubberies, and gardens adjacent thereto, before 1829, and let the same to a tenant, the house was continuously occupied as a dwelling down to 1851. Early in 1850, the owner of adjoining land began to manufacture bricks of the clay or earth of the same land, by burning in clamp, within 144 feet of the house and 15 feet of the stable. On a bill by the land owner and his tenant, praying an injunction to restrain

the manufacture of the bricks, it was *held*, that the brickmaking was a private nuisance, and (both parties requesting the court not to send the case to a court of law) an injunction was granted to restrain the defendant from burning bricks on his ground so as to occasion damage or annoyance to the owner or occupier of the house and grounds until further order. *Walter v. Selfe*, iv. 15.

4. *To restrain commissioners under the Inclosure Act from making their award.* The inclosure commissioners, under the General Inclosure Act, 8 & 9 Vict. c. 118, having made provisional orders, and being about to confirm the valuer's report, pursuant to a local act, a bill was filed by parties alleging certain particular lands in the report to be lands not subject to inclosure, praying an injunction. Upon the evidence it appeared that the lands were commonable, and the court *held*, affirming a decision of the court below, that it had no authority to interfere by injunction to restrain the commissioners from making their award. *Turner v. Blamire*, xix. 521.

5. *Publication of foreign music—Foreign copyright.* At a time when there were conflicting decisions on the question of foreign copyright, the plaintiff gave the defendant notice to desist from publishing some foreign music that the plaintiff had bought; after the question was settled favorably to the plaintiff, he gave the defendant another notice to desist, and, on his disregarding it, filed this bill for an injunction. On motion the injunction was granted, and the plaintiff was put on terms to bring an action to try his right, if the defendant required him. *Buxton v. James*, viii. 155.

6. *Against the transfer of stock.* An old woman was induced, without consideration, to transfer her stock into the name of another, who, by his answer, swore that there had been a gift of it to him, subject to a trust for the transferrer for life. An injunction to restrain the transfer and receipt of the dividends was continued. *Custance v. Cunningham*, xvii. 501.

7. *Granted without proof of actual damage.* A contract was entered into between a canal company and the plaintiffs, the owners of paper mills, as to the mode of enjoyment of the waters by which both were supplied. The company did acts in violation of the contract. *Held*, that it was no answer, to say that the acts proposed would not be injurious, or even to prove that they were beneficial to the plaintiffs, and an injunction was granted without proof of actual damage. *Dickenson v. Grand Junction Canal Co.* xix. 287.

8. *To prevent interference with incorporeal hereditament.* The local board of health, having commenced the construction of a sewer under certain fields on the banks of the River Avon, belonging to the plaintiffs, who were also entitled to a several fishery and to watering-places for cattle in the river, but were not owners of the water or of the bed of the river, the outlet to such sewer being intended to open into the river within the limits of the free fishery, were restrained by injunction at the suit of the plaintiffs from prosecuting such works. *Oldaker v. Hunt*, xxxi. 503.

9. *To prevent an adjoining proprietor from making a tunnel under a turnpike road—Easement.* The trustees of a turnpike road, which passed over a hill, were empowered to lower it when necessary. They applied to restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road. The court, however, *held*, that it had no authority to interfere, and refused the application. *Cuntiffe v. Whalley*, xvii. 503.

10. *To prevent prosecution against receivers acting under leave of court.* The agents of the receiver in a cause, acting under leave of the court, took forcible possession of a house occupied by a servant of one of the defendants. An order was made restraining that defendant from prosecuting an indictment against the agents. *Turner v. Turner*, ii. 130.

11. *To prevent possible mischief.* Plaintiff claimed to be entitled to a beach by crown grant. Defendants, highway surveyors, having taken stones from it to mend the ways, alleged their right to do so by custom, by prescription, and by statute. *Held*, that the rights claimed by the plaintiff were legal, and must be decided by an

action; that the court must consider which of the two parties were likely to sustain most injury; that, notwithstanding the want of distinct evidence respecting injury, the court, to prevent a possible mischief, would grant an injunction, and give the plaintiff leave to bring an action, but it refused to say that he must do so. *Clowes v. Beck*, vii. 42.

12. *Against a railway company whose shares were held by individuals in trust for another railway company.* A railway company, for whom shares in another company are held in trust by individuals, have such an equitable interest as to enable them to maintain a bill for an injunction against the doings of the company whose shares are held in trust for them, making their trustees defendants. *The Great Western Railway Co. v. Rushout*, x. 72.

13. *To restrain the execution of a deed.* Where the trustees of a chapel were proceeding to mortgage it for a small sum, without any apparent necessity for such a course, the court granted an injunction to restrain them from executing such mortgage, the plaintiff undertaking to abide any order which the court might make as to the payment of the debt proposed to be secured. *Rigall v. Foster*, xxiii. 71.

14. *An agent or joint owner restrained from dealing with the property of his principal, or co-owner.* The directors of a provisionally registered company purchased a lease of a mine, for 2,000 shares, to be considered as paid up, from the defendant S., acting on behalf of himself and the plaintiff. The lease was assigned to trustees for the company, and 2,000 free shares were allotted to S. in his own name. The company was completely registered, but S. never executed the deed of settlement, or registered as a shareholder in respect of these shares. S. had made advances on the shares for the plaintiff, and had brought an action for the same. On motion for an injunction, it appeared that S. had refused to deliver to the plaintiff his shares, alleging fraud on the part of the plaintiff in the projection of the company, and that the mine was worthless, and that S. had exchanged the 2,000 free shares for others. An injunction was nevertheless granted, (on payment of the balance of advances into court,) to restrain S. from executing the deed of settlement, or registering the 2,000 shares, and to restrain the company from allowing any such execution or registry. *Fyfe v. Swaby*, viii. 184.

15. *Remedy at law—Distress—Vendor and purchaser.* Where a vendor has executed a legal assignment of property to a purchaser, the court of chancery will not, on the application of the latter, interfere by injunction to restrain the former from illegally distraining upon the tenants of the property assigned, for alleged arrears of rent accrued since the assignment. *Drake v. West*, xvii. 367.

16. *To restrain proceedings for damages under Lands Clauses Act.* A obtained an injunction to restrain B from proceeding for damages under the Lands Clauses Act, alleging that the damage was not within the act. Injunction dissolved. *The South Staffordshire Railway Co. v. Hall*, iii. 105. See, also, *The East and W. I. Docks Railway Co. v. Gatlke*, iii. 59.

17. A, proceeding under authority of a special act of parliament, injured the business of B. B claimed compensation, gave notice, and proceeded to appoint an arbitrator, under the 68th section of the 8 Vict. c. 18, (the Lands Clauses Consolidation Act, 1845.) Upon a bill filed by A, an injunction was granted to restrain the further proceedings of B until he established his right at law, but on appeal it was dissolved. *The Sutton Harbor Improvement Company v. Hitchins*, ix. 41.

18. *Misapplication of rates—Lapse of time.* Where commissioners were appointed to execute the several provisions of the statute by which they were constituted, with powers to raise money, by levying rates, &c., which was to be applied to certain enumerated purposes and to none other, they cannot apply the money so raised to the costs of soliciting a new act with enlarged powers, such application not being expressly authorized by the act; and if the objects of the act are of a general and public nature, the attorney-general may appear against them. A delay of four months, in

such a case, will not preclude a motion for an injunction, while any of such funds continue to be misapplied. *The Attorney-General v. Eastlake, (Plymouth Paving Commissioners,)* xxi. 43.

19. *To restrain the pollution of the waters of a river—Acquiescence.* Parties having works on a river, and having established their right to have the water come to their works in a pure state, applied for an injunction to restrain the defendants, (who were employed in dyeing, higher up the stream,) from polluting the water thereby, to the damage of the plaintiffs. *Held*, that the court is not guided by the amount of damages given at law; that the passive acquiescence of the plaintiffs in such employment of defendants for five years, was enough ground for refusing an injunction. *Wood v. Sutcliffe*, viii. 217.

20. *Semble*, that the fact that an injury may be compensated by money, and that granting an injunction would seriously damage the defendant without doing any practical good to the plaintiff, would be sufficient ground for refusing an injunction. *Ib.*

21. *Mill owners—Use of water in canal—Acquiescence.* Where a canal company has encouraged another party to construct a mill in such a manner as to derive an unauthorized use of water from the canal, and such use has been continued, with the knowledge of the company for the space of eighteen years, the court will not then grant an injunction to restrain such use. But where the company have not known of, nor assented to, such unauthorized use, or where they have assented to the construction of a mill and the use of water only for authorized purposes, any such unauthorized use, though continued for several years after notice that the company will not permit the same, will not bar their rights, and an injunction restraining such use will be granted. *The Rochdale Canal Co. v. King*, vii. 208; and xxi. 177.

22. *To restrain a former servant from imitating and selling a grate contrived by his master.* F. contrived a grate, which he termed "F.'s Patent Kitchener," but no patent was ever taken out. H., formerly a servant of F., obtained, surreptitiously, lists of his customers, and copies of his plans, &c., and used them in constructing an exactly similar article, which he sold under the name of "F.'s Patent Kitchener," but there was no proof that he represented the articles so sold by him as having been actually made by F. Plaintiff suffered four months to elapse without taking any steps. *Held*, that the misrepresentation as to the article being patent was so far fraudulent, that, looking also to the lapse of time, the court would not interfere summarily by injunction to prevent defendant using plaintiff's name in such manner; and, therefore, the bill was retained for six months, with liberty to bring an action in the mean time. *Flavell v. Harrison*, xix. 15.

23. *Secret of compounding medicines.* A party was restrained from using the secret of compounding a medicine not protected by patent, it appearing that the secret was imparted to him, to his knowledge, in breach of faith or contract. *Morison v. Moat*, vi. 14.

24. *Secret of trade.* A party who has a secret in a trade and employs persons under contract express or implied, or under a duty express or implied, can restrain by injunction such of those persons as have gained a knowledge of the secret from setting it up against the employer. *Morison v. Moat*, ix. 182.

25. *What is taking possession of land within the Lands Clauses Act—Acts of contractor binding on employer.* A corporation having, under the act of parliament, right to take land for the purposes of certain public works, gave notice to the owner of the inheritance of an intention to take it. They entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the consent of the occupying tenants, brought some wagons, mills, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants,

he filed a bill for an injunction to restrain them from allowing the wagons, &c., to remain on the land, and from taking possession of the land until they had complied with the provisions of the Lands Clauses Act. *Held*, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the act, and the bill was improperly filed. *Standish v. The Mayor, &c. of Liverpool*, xv. 255.

26. *Land paid for by railway company claimed by third person.* A railway company paid for and took a conveyance of a piece of land from A. B afterwards claimed the land, and moved to restrain the company from taking it, their compulsory powers having expired. The evidence of title was conflicting between A and B. *Held*, that B had his remedy by ejectment; and injunction refused. *Webster v. The Southeastern Railway Co.* i. 204.

27. *Directors restrained from expending money till validity of contract was settled at law.* Where the directors of a railway company had entered into a contract, the legality of which was doubtful, to expend money in laying down rails, they were restrained, at the suit of some of the shareholders, from laying down the rails till the validity of the contract had been decided upon at law. *Beman v. Rufford*, vi. 106.

28. *Building part of railway line and abandoning remainder—Application of funds—Bill by shareholder against directors.* Though a shareholder in a railway company has an equity to have an injunction to restrain the directors from applying the funds of the company in the completion of a part only of the line with a view to the abandonment of the remainder, yet where he, with a knowledge of the intention to abandon the greater part of the line, remained passive for eighteen months, while the directors were expending large sums in the completion of the remainder, the court refused to interfere by injunction. *Graham v. The Birkenhead, &c. Junction Railway Co.* vi. 132.

29. For other cases touching the interference by injunction to restrain the directors of railway companies, with reference to the application of the funds of their companies, see *Stevens v. The South Devon Railway Co.* ii. 138; *Munt v. The Shrewsbury, &c. Railway Co.* iii. 144; *Hodgson v. The Earl of Powis*, viii. 257; *Logan v. Courtown*, v. 171.

III. Breach of Injunction.

1. On a bill filed to restrain proceedings at law brought by three of defendants, the common injunction was obtained against the three. Two answered, and obtained an order to dissolve the injunction generally, which was made absolute, the third party not having answered. The defendants who had answered then issued execution against the plaintiff. *Held*, that they were not guilty of contempt of court in issuing execution, but that, under the circumstances, the orders *nisi* and absolute for dissolving the injunction ought to have been confined to the defendants who had answered. *Money v. Jorden*, i. 146.

2. Defendants, who claimed to be equitable mortgagees, in possession of certain houses, had commenced pulling down the wall of one of them. Plaintiff, who claimed the legal estate, obtained an *ex parte* injunction to restrain them from waste, injury, &c. Plaintiff afterwards put workmen into the houses, who locked out the defendants, and they thereupon entered by breaking a window, and ejected the workmen. *Held*, no breach of injunction. Costs for defendants, though they had used personal violence. *Loder v. Arnold*, ii. 87.

3. *Sequestration for breach of an injunction.* A railway company was enjoined from further interfering with, obstructing, &c., a particular road. They then laid their rails over the road on a level, and by the direction of the commissioners of railways had erected gates, and opened the line. The court ordered a sequestration to issue for breach of the injunction, and refused to suspend process to wait for an appeal. *The Attorney-General v. The Great Northern Railway Co.* iii. 263.

IV. *Dissolution of Injunction ; Practice.*

1. *Dissolution on the merits of answer.* Where the common injunction has been dissolved on the merits in the answer, and the bill is afterwards amended, a like injunction cannot be obtained, as of course, for want of appearance to the amended bill. *Zulueta v. Vinent*, vii. 185.

2. *Plaintiff's legal right doubtful.* The plaintiff's legal title being doubtful, and the continuance of the injunction being unnecessary for the protection of plaintiffs, and injurious to the defendants, the injunction was dissolved, and an account ordered as sufficient to protect plaintiff's interests. *The Shrewsbury and Birmingham Railway Co. v. The London and Northwestern Railway Co.* i. 122.

3. *Affidavits used against answer after dissolution of injunction.* Where a special injunction has been obtained on affidavits, and, on the answer coming in, the defendant moves to dissolve, such affidavits may be used against the answer. *Custance v. Cunningham*, xvii. 501.

4. An injunction obtained by a company was dissolved by the Vice-Chancellor, on the ground that it ought never to have been granted. The company, who had not raised the question before the Vice-Chancellor, appealed from the order dissolving the injunction, on the ground that it ought to have been made on such terms as that their rights to take certain proceedings might not be affected by lapse of time. Application refused. *The South Staffordshire Railway Co. v. Hall*, vii. 30.

5. *Copyright—Undertaking—Inquiry as to damages.* A plaintiff claiming copyright in a work by a foreigner, and assigned to him, obtained an injunction on giving an undertaking to abide by any order the court might make respecting damages the defendant might sustain by reason of the injunction. The House of Lords (after conflicting decisions in the courts of law) decided, that a party in the situation of the plaintiff in this suit, had no title to copyright; and the injunction was dissolved without opposition. The defendant moved for an inquiry as to damage. *Held*, that the defendant was entitled to an inquiry what, if any, damage he had sustained. *Novello v. James*, xxxi. 280.

6. *Cross-examination on motion for injunction.* On a motion for an injunction, the defendant is entitled to cross-examine the plaintiff's witnesses before filing his own affidavits. *Besemeres v. Besemeres*, xxiii. 349.

7. Where a motion for an injunction is ordered to stand over, with leave to the plaintiff to bring an action, the plaintiff is not bound to bring his action till the defendant applies to the court. *Bell v. Bell*, i. 121.

INNKEEPER.

1. *Liability of innkeeper—Negligence of plaintiff.* In an action against an innkeeper for the loss of goods, if the jury find that the plaintiff was guilty of gross negligence, the innkeeper is relieved from his liability. *Armistead v. White*, vi. 349.

2. *Retaining borrowed goods.* An innkeeper is not justified in detaining for his unpaid bill a piano borrowed of a manufacturer by a guest whilst residing at the inn, the innkeeper knowing that it had been so borrowed. *Broadwood v. Granara*, xxviii. 443.

3. *Liability of boarding-housekeeper for negligence of servant.* The plaintiff was a guest in the defendant's boarding-house, at a weekly payment, upon the terms of being provided with board and lodging, and attendance. The plaintiff being about to leave the house, sent one of the defendant's servants on an errand; the servant left the front door ajar, and whilst he was absent on the errand, a thief stole a box of the plaintiff's from the hall. The jury were directed that the defendant was not bound to take more care of the house and the things in it, than a prudent owner would take, and that she was not liable if there were no negligence on her part in hiring and keeping the servant, and that question was left to the jury. *Held*, by the court, that

at least it was the defendant's duty to take such care of her house and the things of her guests in it, as every prudent householder would take. By Wightman, J., and Erle, J., that the direction at the trial was right; by Lord Campbell, C. J., and Coleridge, J., that it was not correct. *Dansey v. Richardson*, xxv. 76.

4. As to the liability of innkeepers and warehousemen for loss of goods in their possession by accidental fire, see *Morewood v. Pollok*, xviii. 341, *note*.

See LICENSE.

INSANITY.

In an action to recover money paid by the plaintiff under a contract made when insane, evidence is admissible of his conduct, both before and after signing the contract to show that the defendant must have known his insanity. *Beavan v. McDonnell*, xxvi. 540.

See LUNACY.

INSOLVENCY.

I. POWER OF INSOLVENT COURT.

II. RIGHTS OF INSOLVENT.

III. RIGHTS AND LIABILITIES OF ASSIGNEES.

IV. DISCHARGE AND OPPOSITION THERETO; FINAL ORDER.

V. MISCELLANEOUS CASES.

I. *Power of Insolvent Court.*

1. *Transfer of jurisdiction from commissioners to county courts—Rehearing.* The 10 & 11 Vict. c. 102, s. 10, abolishes the circuits of the insolvent commissioners, and transfers their powers to the judges of the county courts, to whom it gives the same power and authority with respect to any petition transmitted to them, and to do all such matters and things respecting such prisoner as the court for insolvent debtors, or any commissioner might do in the matter of petitions heard before them. *Held*, (*dubitante* Crompton, J.) that the judge of a county court, by whom an insolvent had been discharged, had jurisdiction to order a rehearing, and to issue a warrant under the 1 & 2 Vict. c. 110, s. 96, to bring up the insolvent for the purpose of the rehearing. *Quære*, whether such a warrant can be executed out of the district of the county court? *Regina v. Dowling*, xviii. 397.

2. *Rehearing of case after discharge of insolvent.* The court for the relief of insolvent debtors has no jurisdiction to rehear the case of an insolvent who has been discharged by the judge of a county court under 10 & 11 Vict. c. 102, s. 2; but it seems the judge of the county court has power to rehear the case. *Ex parte Phillips*, xiv. 34.

3. *Satisfaction of judgment entered up against insolvent.* Where judgment has been entered up against an insolvent debtor, in pursuance of sect. 87 of stat. 1 & 2 Vict. c. 110, the court of queen's bench has no jurisdiction to order satisfaction to be entered on such judgment, upon the ground that all the debts in respect of which the adjudication was made, have been paid. The power to make such an order is reserved, under sect. 92, to the insolvent debtors' court. So *held*, where the commissioners of that court differed in opinion whether payment of debts without interest, entitled the party to have satisfaction entered. *Sturgis v. Joy*, xxii. 286.

II. *Rights of Insolvent.*

1. *Insolvent may sue for what debts.* An insolvent who has petitioned the insolvent court for his discharge under 1 & 2 Vict. c. 110, may sue for a debt which accrues due to him after the vesting order, and before his final discharge, unless the provisional assignee interferes. *Jackson v. Burnham*, xiv. 447.

2. *Insurable interest of insolvent in property acquired before and insured after insolvency.* A person was discharged as an insolvent debtor, and the order for his discharge afterwards annulled on the ground of fraud. It was *held*, that he had an insurable interest in property acquired by him before, and insured after his insolvency. *Marks v. Hamilton*, ix. 503.

3. *Equity of redemption of policy of insurance.* *Semble*, that the owner of an equity of redemption of a policy of insurance has no claim separate from his assignee after he has become insolvent. *Desborough v. Harris*, xxxi. 592.

III. Rights and Liabilities of Assignees.

1. *Right to diplomas, certificates, &c.* Diplomas conferring degrees and honors, and certificates from medical institutions and practitioners, do not pass to the provisional assignee by the vesting order of the insolvent debtors' court, under stat. 1 & 2 Vict. c. 110, s. 37. *Kernot v. Catlin*, xxii. 234.

2. *Right to pension granted to insolvent.* A pension granted as a compensation for the value of an office which has been abolished, is assignable, and passes to the assignee of the pensioner in insolvency unless specially exempted by statute, even although he is obliged to make oath periodically as to an existing state of facts, upon which his right to continue to receive the pension depends. *Spooner v. Payne*, x. 202.

3. *Rights as against sequestrator of insolvent's estate.* A defendant was committed for contempt for not obeying an order made on him for the payment of certain sums of money into court, and a writ of sequestration issued against his estate. He was afterwards discharged from prison under the insolvent debtors' act. A petition by the assignee that the sequestrator might deliver up possession of the estate of defendant, was dismissed. *Tatham v. Parker*, xix. 573.

4. *Right to fund belonging to wife of insolvent.* The provisional assignee of the insolvent debtors' court claimed a fund belonging to a wife, which, upon her consent, had been ordered to be paid to her husband who had been insolvent. *Held*, that her consent had not vested the fund in her husband so as to deprive this court of its jurisdiction to rescind the order and direct the fund to be settled for the benefit of herself and family. *Watson v. Marshall*, xix. 569.

5. *Mortgage of after-acquired property—Mistake—Rights of assignee of mortgagor against mortgagee.* A farmer made an assignment by way of mortgage of his stock, crops, &c. on a farm which he occupied, the assignment containing words sufficient to include after-acquired property. He afterwards acquired property in another farm, which with the consent of the farmer, and probably on his belief that it passed by the assignment, was sold by the assignees. He became insolvent, and his assignee in insolvency brought an action against the assignees who had sold the property to recover it. *Held*, that as there was no fraud, but only a mistake on the part of the insolvent, the property could not be recovered back. *Platt v. Bromage*, xxviii. 521.

6. *What causes of action pass to assignee—Pledge and insolvency of pledgor.* Declaration that in consideration of the defendant's withdrawing his execution the plaintiff delivered to him as security a printing machine, with a power to redeem the same within a specified time on payment of a sum agreed upon; and upon an offer of payment within the time specified, the defendant refused to deliver up the machine, whereby the plaintiff lost great profits and became insolvent. The defendant pleaded that, after the accruing of the causes of action declared upon, the plaintiff became insolvent, and his estate and effects were vested in the provisional assignee. *Held*, that this plea was good without averring that the assignee had interfered, and that the cause of action stated in the declaration was an entire cause of action which touched the personal estate of the insolvent, and therefore passed to the assignee, and also, that sect. 142 of the Common-law Procedure Act, applies only to actions

pending at the time when a bankruptcy or insolvency occurs. *Stanton v. Collier*, xxii. 373.

7. *Devesting estate out of assignee and revesting in insolvent.* *Held*, that under the 1 & 2 Vict. c. 110, the discharge out of custody of an insolvent with the consent of his detaining creditor, without any adjudication in that behalf, had the effect of putting a stop to the operation of the vesting order, and of divesting the insolvent's estate out of the assignee, and revesting it in the insolvent himself. *Grange v. Trickett*, vii. 431.

8. *Discharge of insolvent out of custody by consent—Vesting order.* "Where an insolvent, who had petitioned for his discharge under stat. 1 & 2 Vict. c. 110, was discharged out of custody by the consent of his detaining creditor, without any adjudication being made, the vesting order continues in force until an adjudication, under sect. 37, has rendered it void; and therefore, reversing the judgment of the queen's bench, (xiv. 77,) the property remains in the assignee. *Kernot v. Pittis*, xx. 67.

9. *Conditional bill of sale—Insolvency of vendor.* Under a bill of sale after condition unfulfilled, the property passes as if for full value received and the vendor's assignees cannot recover; otherwise, if any thing were necessary to complete the conveyance at the time of the filing of the petition for protection under the statute. *Simpson v. Wood*, xii. 558.

10. *Reversionary interest of insolvent in trust-fund not inserted in schedule—Subsequent assignment to purchaser for value—Rights of purchaser and assignee.* A person, being entitled to a reversionary interest in a trust-fund, became twice insolvent, but on neither occasion did he insert that property in his schedule, and the insolvent assignee did not give notice of the insolvency to the trustees of the fund other than by the general notice in the Gazette. Subsequently, the insolvent assigned the reversionary interest to a purchaser for value, without notice of the insolvency, who immediately gave notice of the assignment to the trustees of the fund. *Held*, affirming the decision of the court below, that the assignment to the insolvent assignee, under the 7 Geo. IV. c. 57, s. 11, had no greater effect than an assignment for value would have had; and that, as the insolvent assignee had not perfected his title by giving notice to the trustees, the title of the subsequent purchaser for value must prevail. *In re Atkinson's Trust*, xiii. 459.

11. *Liability for messenger's fees.* A creditor's assignee in insolvency under 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable for the messenger's fees, except upon an express contract. *Hamber v. Hall*, iv. 382.

IV. Discharge and Opposition thereto; Final Order.

1. *Correct schedule essential to discharge.* In order to entitle an insolvent to a discharge, he must name in his schedule all his creditors, or those who claim to be his creditors, and describe their debts as far as it is possible for him to do it. *Lambert v. Smith*, vi. 394.

2. *When discharge does not satisfy judgment.* The discharge by an insolvent court of a person against whom a judgment for debt has been obtained in a county court, does not satisfy the judgment, and the claim still remains good against the debtor. *Abley v. Dale*, vi. 422.

3. *Discharge of judgment debtor no bar to further proceedings on judgment of county court.* It is no bar to further proceedings on a judgment obtained in a county court, that the judgment debtor has been discharged by the insolvent court under a petition presented after the date of the judgment; and such judgment may still be enforced by a judgment summons under the 9 & 10 Vict. c. 95, s. 98. *Ex parte Christie*, xxx. 175.

4. *When discharge cannot be pleaded in answer to action.* A discharge under the insolvent act cannot be pleaded in answer to an action for not redelivering certain

mining shares lent to the defendant and to be returned on a certain day. *Owen v. Routh*, xxv. 306.

5. *Discharge as to some debts immediately, and as to others after certain time.* A prisoner was discharged by an order of the insolvent court, under 1 & 2 Vict. c. 110, s. 76, except as to four debts, after six months, and as to those four debts, under s. 78, after sixteen months. *Held*, whether the order was invalid or not as to the latter part, on the ground of the commissioner having exercised his power in the former part, that the prisoner was not entitled to his discharge at the end of the six months. *Ex parte Violati*, v. 386.

6. *New security given after adjudication to secure to creditor payment of original debt.* An insolvent, who was adjudged to be discharged forthwith as to all his debts, except his debt to A, and as to that debt after he should have remained in custody twenty months, in order to obtain A's consent to his release from custody during the period, gave A a warrant of attorney to secure to A the payment of his debt by instalments. *Held*, that the warrant of attorney, although given before the time that the insolvent was entitled to his discharge, was invalid and might be set aside before the twenty months had expired, as the statute 1 & 2 Vict. c. 110, s. 91, avoids any new security given after adjudication to secure to a creditor payment of his original debt. *Humphries v. Smith*, xvi. 228.

7. *Discharge as to particular creditor—Arrest by creditor and payment to obtain release.* Where an insolvent is adjudged to be discharged as to a particular creditor at a future period, and is arrested by that creditor, a payment of part or all of the debt to obtain his discharge from the arrest, is valid, although a fresh security given under the same circumstances would be invalid. *Quære*, whether money paid under such invalid security can be recovered back? *Viner v. Hawkins*, xxiv. 437.

8. *Agreement to pay money in consideration of not opposing discharge.* Although there is no legal obligation upon a creditor of an insolvent to oppose his discharge, yet where he has given notice of an opposition and led other creditors to believe that he will go on, and that the case will be properly adjudicated on, the subsequent withdrawing of his opposition is not a valid consideration to support an agreement to pay money to him, and such an agreement is illegal and against the policy of the insolvent act. *Hall v. Dyson*, x. 424.

9. *Note given in consideration of not opposing discharge.* To an action on a promissory note, it was pleaded, that one C. being insolvent and in jail, petitioned for his discharge; and while the petition was pending, defendant induced one H. not to oppose it by giving him the note in question, which was by H. indorsed to plaintiff with notice. *Held*, that this was an illegal agreement, and the plea good. But that the production of the copy of the causes of the insolvent's detention, filed with the petition and duly sealed, was no evidence of his having been in actual custody at the time of his petition. *Hills v. Mitson*, xx. 510.

10. *When final order does not protect from being taken in execution.* A final order, under the 5 & 6 Vict. c. 116, s. 4, and the 7 & 8 Vict. c. 96, s. 22, does not protect the petitioner from being taken in execution for damages, for which a verdict has been given in an action of tort, but for which, at the date of the petition, judgment has not been signed. *Bevan v. Walker*, x. 510.

V. Miscellaneous Cases.

1. *Debt omitted from schedule, when barred.* Where a party who petitions for his protection under the Insolvent Acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, omits a debt from his schedule with the knowledge and consent and through the contrivance and procurement of the party to whom it is owing, the debt is barred. *Wilkin v. Manning*, xxv. 514.

2. *Insufficient description of creditor in schedule.* An insolvent debtor in India had

a creditor in England by the name of Moses Symons. In his schedule of creditors he thus described the debt: "Creditor, A. M. Symons, for the following bills of exchange (describing them) drawn by us upon Messrs. R. I. & Co., in favor of Moses Symons." A person named A. M. Symons resided in Calcutta, but was not shown to be in any way connected with the bills in question. *Held*, that the description was insufficient. *Symons v. May*, vi. 541.

3. *Execution levied for half of debt—Order for protection—Subsequent execution—Amendment.* After execution levied for half of the amount of a debt secured by a warrant of attorney from defendant to plaintiff, defendant obtained an order for protection, stating the consideration for the warrant, and the balance due thereon, at less than their true amounts. Plaintiff sued out another execution for a much larger balance. On application to set aside this last writ, it was *held*, that the order for protection must be considered as valid until set aside by the insolvent debtors' court; and that the issuing of execution upon the judgment was a violation of sect. 21 of stat. 7 & 8 Vict. c. 96, unless the amount of the debt was inaccurately stated in the schedule, by "culpable negligence, fraud, or evil intention" on the part of the defendant. It seems that such an innocent inaccuracy being amended by the commissioner, under s. 30, plaintiff might prove for the true amount. *Brook v. Chaplin*, xxx. 276.

4. *Arrest, discharge, order for protection and second arrest.* The defendant filed a petition in the insolvent debtors' court, inserting the plaintiff in his schedule as a creditor for the amount of a judge's order previously given. Soon after he was arrested on a judgment by the creditor, from which arrest he was discharged by a second judge's order. Afterwards the defendant obtained an order protecting him from arrest under any process in respect of the debts due at the time of filing his petition to the persons named in the schedule. Being afterwards arrested on the second judge's order, he was discharged, the court holding that the debt was the same as that inserted in the schedule. *Hockpayton v. Bussell*, xxiv. 475.

5. *Liability of subsequently acquired assets.* A debtor took the benefit of the "Insolvent Debtors' Act" and executed a warrant of attorney, but no judgment was entered up. It was *held* that subsequently acquired assets were not liable to the suit of a scheduled creditor. *Thomas v. Pinnell*, xv. 119.

6. *Void conveyance—Intention to petition insolvent court.* A tenant being indebted to his landlord, and being in insolvent circumstances, executed to the defendant, in April, 1850, a bill of sale of his farming stock and furniture; and in June, 1851, petitioned the insolvent court for protection from process. The 7 & 8 Vict. c. 96, s. 19, provides, that no such conveyance shall be deemed void if made prior to three months before filing the petition, and not with the view or intention by the party so conveying of petitioning the court for protection from process. The judge directed the jury to consider whether the insolvent executed the bill of sale with the view or intention of petitioning the insolvent court for protection at any time when he might apprehend proceedings would be or were taken against him. *Held*, that this was a misdirection, the question being, not whether the insolvent had a general intention at some future time of petitioning the insolvent court, but whether he had the present intention of so doing. *Thoyts v. Hobbs*, xiv. 421.

7. *Double insolvency—Acceptor and drawer of bills of exchange—Property of one in the hands of the other.* The principle of Lord Eldon's decision, in *ex parte Waring*, 19 Ves. 345, namely, that where A and B are acceptor and drawer of bills of exchange, and property of the one comes to the hands of the other, to be held as security against the bills, and then both become bankrupt, the billholders have a right to have the property applied exclusively, in the first instance, in payment of the bills, is applicable as well to cases of double insolvency, as of double bankruptcy; and the principle is applicable, although the property held as an indemnity is not sufficient to pay the bills in full. *Powles v. Hargreaves*, xxiii. 57.

INSPECTION OF DOCUMENTS.

1. *In case of mandamus.* Under stat. 14 & 15 Vict. c. 99, s. 6, an order may be made compelling parties to allow an inspection of documents, in a proceeding by *mandamus*, if the *mandamus* be for the purpose of enforcing a civil right. *Regina v. The Ambergate, &c. Railway Co.* xi. 469.

2. *Insufficiency of affidavit as to necessity of inspection.* Where the affidavit of an attorney stated that it was material and necessary, in order to enable the defendant to defend the action, and to arrive at a just and proper conclusion as to the state of accounts between him and the plaintiff, that the deponent or the defendant should inspect and take copies of all bonds, books, &c., relating to the matter in dispute, which the deponent verily believed were in the possession, or under the control of the plaintiff, it was *held*, that the affidavit was too vague, and that no ground was shown for an order to inspect, under the 14 and 15 Vict. c. 99, s. 6. *Sneider v. Mangino*, ix. 488.

3. *Practice.* Under an order that one of the defendants should allow the plaintiffs, their solicitors or agents, to inspect certain documents, it was *held* that the defendant was justified in refusing to allow the inspection to take place in the presence of a co-defendant, although employed as an agent of the plaintiffs. *Bartley v. Bartley*, xvii. 329. See PRODUCTION OF DOCUMENTS.

INSURANCE.

I. LIFE ASSURANCE.

II. MARINE INSURANCE.

III. FIRE INSURANCE.

IV. MISCELLANEOUS CASES.

I. *Life Assurance.*

1. *Principle of life assurance.* The contract commonly called life assurance, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity during his life, and is not a contract of indemnity. Assurances against fire and marine risks are contracts of indemnity. *Dalby v. India & London Life Assurance Co.* xxviii. 312.

2. *Wager policies.* At common law, wager policies, which were not contrary to the policy of the law, were legal contracts, but they are now forbidden by stat. 14 Geo. III. c. 48. The effect, however, of that statute is, that a party insuring the life of another may recover to the extent of the interest which he had in such life at the time of effecting the assurance, although such interest may have diminished or ceased since the assurance. *Ib.*

3. *Insurable interest.* J. W., having an interest in the life of the Duke of C. to the extent of 3,000*l.*, effected four policies of assurance with the A. Assurance Company upon the duke's life for that amount; and that company effected a policy with the defendants, by way of counter-assurance, for 1,000*l.* of the amount. J. W. afterwards, in consideration of an annuity, surrendered the policies to the A. Company, and three of them were cancelled, but the A. Company paid premiums to the defendants on the other policy effected with them, until the death of the Duke of C. *Held*, that as the A. Company had an insurable interest to the amount of 1,000*l.* at the time of effecting the policy with the defendants, they were entitled to recover that amount. *Ib.*

4. *Waiver by insurer of breach of conditions.* If an agent of an insurance company receives the regular premiums from the insured, knowing that a condition of the policy has been broken by the insured, this knowledge of the agent is constructive

notice to the company of the breach, and the acceptance of the premiums is a waiver of the forfeiture by the company. *Wing v. Harvey*, xxvii. 140.

5. *Avoidance of insurance.* An insurance company having had the chance of a contract of life insurance turning out in their favor, cannot afterwards be permitted, on the ground of the inconsistency of the contract with their rules, to escape from it. *Collett v. Morrison*, xii. 171.

6. *Assurance in trust for another.* The stat. 14 Geo. III. c. 48, does not prohibit a policy of life insurance from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument; nor does the effecting of such an insurance in any way contravene the policy of the statute. *Ib.*

7. *Fraud in issuing policies.* If upon a proposal and agreement for insurance, a policy be drawn up by the insurance office in a form which differs from the terms of the agreement, and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy. Circumstances in which insurance companies preparing and issuing policies not in conformity with the agreement upon which the insurance was accepted, may be liable in equity on the ground of fraud. *Ib.*

8. *Declaration of health—Usage upon reinsurance.* Evidence was given that it was usual where insurance offices reassured lives, on which they had before granted policies, for the office proposing such reinsurance to submit to the office granting it the papers on which the original assurance was effected, and for the latter office to accept or decline such reinsurance on the statements contained in those papers. *Held*, by Lord Campbell, C. J., that the evidence of this usage was admissible to show that no declaration as to the present health of D. was signed by the plaintiffs—*dissentientibus Coleridge, J., and Erle, J.* *Foster v. The Mentor Life Assurance Co.* xxiv. 103.

9. The plaintiffs (the B. Insurance Company) reassured, with the defendants (another insurance company) the life of D. When the proposition to reassure was made the defendants sent a form of declaration to the plaintiffs, which was never signed by the plaintiffs or by D., except that at the foot of the words "for these particulars, see copies of B papers attached," the plaintiff's agent signed his name. The defendants signed the policy, reciting that the plaintiffs had delivered to the defendants a declaration signed by them, setting forth the past and present health of D., and that such declaration was to be the basis of the contract, and if any thing were untrue in it, the policy was to be void. *Held*, that whether the plaintiffs had signed the declaration was a question for the jury, and not for the judge; and that the plaintiffs were not under circumstances precluding them from denying that they had signed the said declaration. *Ib.*

10. *False statements—Questions for jury.* If, in a contract for a life insurance, certain questions be proposed by the company, and answered by the party wishing to be insured, and it be agreed that "if there shall have been any fraud or misstatement," or "any false statement made to the company in or about obtaining or effecting of the insurance," then shall the policy be void; the questions to be left to a jury are, first, were the statements false; secondly, were they made in obtaining the policy, and not whether the statements were material. *Anderson v. Fitzgerald*, xxiv. 1.

11. *Recovery in case of self-destruction.* A. upon his marriage gave a bond to secure 5,000*l.* to his intended wife. Several years after the marriage, A. being in difficulties and unable to perform his bond, it was arranged that his wife should, out of her private income, keep up certain policies to be effected on A.'s life, in which he was to have no further interest than to carry out his bond. In pursuance of this arrangement, A. insured his life by a policy, one of the conditions of which provided that policies effected by persons on their own lives who should die by their own hands should be void, so far as regards the executors or administrators of the person so dying, but should remain in force only to the extent of any *bonâ fide* interest acquired

by any other person under an actual assignment by deed for a valuable consideration in money, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest being given to the directors to their satisfaction. The policy, together with the bond for 5,000*l.*, was immediately, on its being effected, handed over to T. as a trustee for A.'s wife, in whose hands they always remained. A.'s wife paid the premiums upon the policy in pursuance of the arrangement. A. died by his own hands, and a claim was made upon the insurance office by his executors for the amount of the policy, which was resisted. *Held*, that T. had a *bonâ fide* interest in the policy by virtue of an equitable lien as a security for money, within the meaning of the condition, and that the executors of A. were, therefore, entitled to recover. That, under the condition, it was obligatory upon the office to pay the amount of the policy, upon proof of the interest being given as required; and that it was sufficient if evidence to that effect was given to the directors, with which they ought reasonably to be satisfied. That the condition was not illegal as offering an encouragement to suicide. *Moore v. Woolsey*, xxviii. 248.

12. *Agreement—Annuity—Policy of insurance, as security—Evidence to be delivered upon payment of loan.* Where the plaintiff borrowed money, and the creditor procured an insurance on the plaintiff's life for the amount so borrowed, and the plaintiff gave as security a warrant of attorney for the same amount, and also a bond with sureties conditioned for the payment of an annuity during the life of the plaintiff, and all additional premiums of insurance which might be occasioned by the plaintiff, which annuity amounted exactly to the interest on the sum borrowed, together with the premium on the policy of insurance, the letters which were written in negotiating the loan, and not inconsistent with the bond, may be read as evidence that the insurance constituted a part of the security of the loan; and being shown to be a part of the security, upon payment of the loan, the policy will be ordered to be delivered up to the plaintiff. *Gottlieb v. Cranch*, xxi. 67.

13. *Against railway accidents—Measure of damages.* In a suit on a policy of insurance, by which 1,000*l.* was to be paid to the plaintiff's representatives in case of his death by a railway accident, and a proportionate part of that sum to him in case of a personal injury by such accident, it was *held*, that the assured could only recover for the personal expense and pain occasioned to him by the injury, and was not entitled to damages for loss of time or loss of profit occasioned by it, and that it was not a true measure of damage to assume the sum insured as the value of life, and estimate a proportionate sum for the injury sustained. *Theobald v. The Railway Passengers Assurance Co.* xxvi. 433.

14. *Accident within the policy.* A railway insurance company insured the plaintiff 1,000*l.*, payable to his representatives in the event of his death from railway accident, a proportionate part of the sum to be paid him in case of injury by such accident. In getting out of the carriage after the train stopped, the steps of the carriage being accidentally slippery, the plaintiff fell without any negligence on his part, and was injured. *Held*, a railway accident within the meaning of the policy. *Ib.*

II. Marine Insurance.

1. *Implied warranty of seaworthiness.* Assumpsit on a time policy of insurance, commencing on the 25th September, 1843. Plea, that the ship was not, at the commencement of the risk in the policy mentioned, nor at the time of the making of the policy, nor on the 25th September, 1843, seaworthy, or in a fit and proper condition safely to go to sea. Plea, *held* good in the queen's bench, but on error in exchequer chamber, it was *held*, first, that the word "seaworthy" did not necessarily mean that the ship was in a state completely fit for sea navigation, but included in it a fitness for present navigation either on a sea or river, if about to sail or sailing on either, and a condition of repair and equipment fit for such a port, if she was then in

port. Secondly, that the plea was bad, because in a time policy there is no implied warranty or condition that the ship was seaworthy at the commencement of the risk or term, wherever she happened to be, or in whatever circumstances she was placed at the time. *Small v. Gibson*, iii. 290, 299. Affirmed in the House of Lords, xxiv. 16.

2. *Warranty*. A marine policy was made subject to the rule that ships were not to sail from any port on the east coast of Great Britain between the 5th of October and the 5th of April, to any port in the Belts between the 20th of December and the 15th of February. The plaintiff's vessel sailed on the 8th of February, for F., a port in the Belts, and was lost. *Held*, that the rule amounted to a warranty, and not to an exception; that the assured was not entitled to recover in respect of the loss; and that the word "to," as used in this rule, meant "towards." *Colledge v. Harty*, iii. 550.

3. *General average*. A declaration set out a policy of assurance on a ship and cargo, with a memorandum stating that the ship and freight were free from average, unless general, and that the assurance was on money advanced on freight, and alleged that E. was interested in the money insured against, being money advanced to him as owner of the ship on account of freight, and that the insurance was made on his account. Further, that during the continuance of the risks insured against, the ship, with the cargo, was greatly damaged by stress of weather, and obliged to put into port, unload, repair, and load, and that divers of the costs thereof were the subject of a general average loss. Breach, that the defendant had not contributed according to the rate of the sum assured by him, nor paid any part of the charges incurred in respect of the said ship and cargo. Plea, that the policy was made in London, and according to the usage and custom of merchants, &c., underwriters, and others affecting and underwriting marine insurances in London, and the known and accepted mercantile interpretation and meaning of a policy so worded, an insurer of money advanced on account of freight was not liable to a general average loss or contribution. *Held*, upon demurrer, first, that the declaration sufficiently showed a loss in respect of which a claim to general average contribution arose, and for which the underwriters to the policy were liable. Secondly, that there was nothing in the description of the interest insured by the policy to lead the underwriters to infer that the insurance was effected by the charterer or shipper, and not by the ship-owner. Thirdly, that the alleged usage was in derogation and contradiction of the written contract, and could not be set up in bar of the action. *Hall v. Janson*, xxix. 111.

4. *Total loss—Expense of protecting cargo*. Where corn is insured free from average, and, in consequence of injury to the ship, damaged in the voyage and taken out at an intermediate port during the repairs of the ship, there is not a total loss, unless the corn is in such a condition that the expense of bringing it to the port of destination for sale would exceed the value of it when brought; and it is not proper to leave it to the jury, whether the insured had acted as a prudent uninsured owner would have under the circumstances. *Reimer v. Ringrose*, iv. 388.

5. *Total loss—Expense of preserving cargo*. A cargo of wheat was insured from O. to L. and the vessel was damaged and repaired, and vessel and cargo were hypothecated for repairs, by a bottomry bond, and afterwards the vessel was wrecked and towed into the port of C. by salvors. The cargo was damaged, but part of it could have been dried and conveyed in a merchantable condition to L., the port of discharge. Proceedings were taken in the admiralty court, and a sum was awarded on the bottomry bond, and another sum for salvage. *Held*, that in determining whether it was "practicable" to send the whole or part of the cargo to its place of destination in a marketable state, the jury ought to have ascertained the costs of unshipping, drying, warehousing, and transshipping the cargo into a new bottom, the cost of the difference of transit to the port of discharge, if it could be only effected at a higher than the original rate of freight, and the amount of the salvage in propor-

tion to the value of the cargo saved; that the loss would have been total if the aggregate of those items had exceeded the value of the cargo at L., but if the aggregate would not have exceeded the value of the cargo or the part saved, then the loss would have been only partial. *Held*, also, that the sum paid to the parties entitled under the bottomry bond, and their costs in the admiralty court, could not be taken into account. *Rosetto v. Gurney*, vii. 461.

6. *Peril of the sea—Wetting cargo.* A ship loaded with hides and tobacco encountered bad weather and shipped much water, whereby the hides were wetted and rendered putrid. Neither the tobacco nor the packages containing it were immediately in contact with nor directly damaged by sea water; but the tobacco was damaged and deteriorated in flavor by the fetid odor proceeding from the putrid hides. *Held*, that this was a loss by peril of the sea. *Montoya v. The London Assurance Co.* iv. 500.

7. *Perils of the seas—Loss by.* In an action on a policy of insurance in the usual form, the insurance being on advances for the transport of Chinese emigrants from China to Peru, their outfit, provisions, &c., the insurance to continue till the emigrants were landed, it appeared that the emigrants had risen and murdered the master and a part of the crew, compelled the survivors to steer to the nearest land, and there escaped. *Held*, a loss by a peril insured against. *Palmer v. Naylor*, xxvi. 455, and *Naylor v. Palmer*, xxii. 573.

8. *Peril of the seas—Taking ground in harbor.* A vessel being, in the ordinary course of her voyage, moored in harbor, floated when the tide was in, and took the ground when the tide was low, she became hogged, or strained, all over in consequence. *Held*, that this did not constitute a loss for which an underwriter was liable, as a loss from perils of the seas, there having been no accident. *Magnus v. Buttemer*, ix. 461.

9. *Loss by barratry.* A fraudulent sale of ship and cargo, and an application of the proceeds to his own use by a master, who is part owner, is a loss by barratry. Per *Martin, J.* It is a loss within the general words of the policy. *Jones v. Nicholson*, xxvi. 542.

10. *Bilging.* A vessel was thrown on her beam ends in a hurricane and so strained that her seams opened and let in much water; but no fracture took place in her bottom. *Held*, no "bilging," within the policy. *Corcoran v. Gurney*, xvi. 215.

11. *Stranding.* A ship on her voyage from Nantes to Dublin, was obliged by stress of weather to run into the Bay of Calais, and there let go the bower-anchor and chains. The gale increasing, and the ship dragging the large anchor, the captain, to prevent the ship going on shore, slipped both chains overboard, got the ship under sail, and succeeded in entering the tidal harbor of Sanzon, where, by reason of its being at the time low water, the ship took the ground, and for a month only floated about eight days, and then only at the top of spring tides. When afterwards the ship proceeded to sea, it was found that she had become strained and was making water, in consequence of which her cargo was damaged. *Held*, that the ship was "stranded" in the harbor of Sanzon, within the meaning of the memorandum in a policy of insurance. *Ib.*

12. *Capture by pirates—Abandonment.* If a vessel insured on a time policy be captured by pirates and then recaptured by an English man-of-war, and retained in the possession of the prize crew, and the owners give notice of abandonment as soon as they have received the news of the capture by pirates, they are entitled to recover as for a total loss. *Dean v. Hornby*, xxiv. 85.

13. *Advanced freight.* By a charter-party a vessel was to proceed from M. to F., thence to S. and thence to E., one month's pay to be received at F. From S. the vessel returned to M., where a new charter-party was made, whereby the vessel was to proceed at once to H., at a certain price per month, beginning at a time previous to the reception of the month's pay at F., which had been duly received. *Held*, that the

second charter-party annulled the first, and that the parties were entitled to treat the money as paid under the second charter-party, and, consequently, covered by a policy effected, the vessel "lost or not lost between M. and H.," on a sum of freight advanced. *Ellis v. Lafone*, xviii. 559.

14. *Insurance of freight.* A ship arrived at her port of destination, delivered her cargo, and her owners received the freight. The ship was greatly damaged, however, and the owners abandoned to the insurers on ship; the loss was adjudged total and the abandonment a proper one. The abandonees were adjudged entitled to the freight received by the owners. The latter brought an action against the insurers on freight for the amount. *Held*, that they could not recover. The contract of the defendants was completed when the freight was received, and the freight was subsequently lost to the owners; it was by their own act, and not by perils of the sea insured against. *The Scottish Marine Insurance Co. v. Turner*, xx. 24.

15. If any passengers of a ship shall, without any neglect or default of their own, find themselves within any colonial or foreign port other than that at which they contracted to land, the master of the ship is bound, under the Passenger Act, to forward them to their destination; and the amount expended by him in forwarding them may be recovered from the underwriters of a policy of assurance on the passage-money against all costs, charges, and liabilities to which the owners may be subjected under the act. *Gibson v. Bradford*, xxx. 194.

16. *Fraudulent representations.* To an action on a policy of insurance, a plea, that the insurer was induced to enter into the policy by a false misrepresentation of a material fact, knowingly made by the assured and their agent, is supported by proof, either of concealment or of misrepresentation not fraudulent. Where a policy is avoided by concealment or by misrepresentation not fraudulent, the assured is entitled to a return of the premium, and the policy is conclusive evidence of the receipt of the premium by the insurer. *Anderson v. Thornton*, xx. 839.

III. Fire Insurance.

1. *Notice of loss and statement of particulars.* A fire policy contained several conditions, a non-compliance with which, it was stated, would make the policy void. There was another, that in case of a fire the insured should at once notify the secretary, and within three months deliver to him written particulars of the loss, &c. *Held*, that the delivery of such particulars was a condition precedent to the right to recover on the policy. *Mason v. Harvey*, xx. 541.

2. *Covenant not to use steam engine—Avoidance of policy.* A fire policy contained clauses providing, that if any steam engine, &c., was used on the premises, it should be specially mentioned; if the risk was in any way increased afterward, the circumstances were to be indorsed on the policy; any alteration in the buildings, or any introduction of steam engines, &c., or any new trade carried on, were to be so indorsed, and extra premium paid. Otherwise the policy was to be void. Plaintiff placed a small engine on the premises, and ran it several days, to see if it were worth his while to buy it for use there. A fire having happened, it was *held*, that the policy was avoided, and that whether the fire was occasioned in consequence of the steam engine having been worked or not, was immaterial. *Glen v. Lewis*, xx. 364.

3. *Alteration of buildings—Increase of risk.* Fire policy for one year upon a "brick building, &c., (described in a paper attached to this policy.)" Description annexed. During the year, the house was altered, by adding to it an additional story, but so that the alterations did not increase the hazard or probability of fire, except so far, if at all, as the increase of the area of a building by a third story may be considered to have necessarily increased such hazard; and afterwards, during the year, the house was totally burnt. *Held*, that the underwriter was not liable; for the description was by reference incorporated into the policy, and the description amounted to a warranty,

and not only to a warranty that the building was as described at the time the description was given and at the date of the policy, but that it would not be altered by the assured, so as to increase the risk during the year, and that it had been so altered. *Sillem v. Thornton*, xxvi. 238.

4. *Assignment to company of rights against third parties.* An insurance company, on payment of a loss occasioned by the negligence of a third party, may take an assignment of any rights of action which the assured may have, growing out of such negligence. *The Quebec Fire Insurance Co. v. St. Louis*, xxii. 73.

5. Plaintiff and defendant were members of an insurance association, of which one rule was, that sums to be paid for losses should be settled by the committee; if the assured was not satisfied with their award, arbitrators were to be appointed; until the decision of the latter, the assured was to have no right to sue at law or in equity, and then only for the amount they gave; and obtaining their decision was declared a condition precedent to such right. This rule was referred to in and made part of the policy. To an action on a policy, defendant pleaded the above rule, alleging that the committee determined the amount due, that plaintiff was dissatisfied, but would never consent to a reference to the arbitrators. The exchequer held this and a similar plea bad, the rule being void as an attempt to oust the superior courts of their jurisdiction. *Held*, in the exchequer chamber, that the contract was not of that description, since it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained, either by the committee or by arbitrators. *Scott v. Avery*, xx. 327.

IV. Miscellaneous Cases.

1. *Who entitled to insurance money.* By an order of court the receiver of certain real estates was directed to pay certain fire insurances on them. By a subsequent decree it was declared that H. was tenant in tail in possession of the real estates, and the receiver was directed to pay the balances to the account of H. A fire having taken place, it was *held*, that H. was entitled to the insurance money. *Seymour v. Vernon*, x. 40.

2. A testator bequeathed certain chattels to A, and afterwards had them insured against loss by sea, and embarked with them in a ship and was lost with them. *Held*, that A had no interest in the insurance money recovered by the executors. *Dureant v. Friend*, xi. 2.

3. *Warranty of truth of answers.* The plaintiffs were insured against loss by the unfaithfulness of their treasurer. To the question in the application "what checks will be used to secure accuracy in his accounts, and when and how often will they be balanced and closed," it was answered, "examined by finance committee once every fortnight." *Held*, that this was not a warranty that the accounts should be so examined. *Benham v. The United Guarantee, &c. Insurance Co.* xiv. 524.

4. The circumstance that the mortgage assignment of a policy does not contain a clause making the receipt of the mortgagee a good discharge for the sum assured, but does contain the ordinary power of attorney to sue in the name of the mortgagor, does not entitle the assurance office to call for the insolvent assignee of the mortgagor to join in the receipt. *Desborough v. Harris*, xxxi. 592.

5. An action of debt as well as an action of covenant may be maintained against an insurance company for the amount of the insurance. *The Sunderland Marine Insurance Co. v. Kearney*, vi. 312.

6. The directors of an insurance company cannot enforce the payment of the premiums on a policy after the company has ceased to do business, and is virtually dissolved. Consequently, a bond given to secure the payment of the premiums as well as the repayment of a sum of money borrowed, is not assignable by the directors at the time of the dissolution *quoad* the premiums, and the surety is so far not responsible to the assignees. *Atkinson v. Gylby*, xiii. 209.

7. A declaration in assumpsit for a total loss on a policy of insurance on a ship and cargo, stated that the defendants were shareholders of and partners in the G. M. Assurance Co.; that the plaintiff caused a policy (which was set out) to be effected on the ship and cargo, by which "it was declared and agreed by and between the company and the assured, that the capital stock and funds of the said company should alone be liable to answer and make good all claims and demands whatsoever, under and by virtue of the said policy; and that no proprietor of the said company, should be in anywise subject or liable to any claims or demands, nor be in anywise charged by reason of the said policy, beyond the amount of his or her share or shares in the capital stock of the said company, it being one of the original and fundamental principles of the said company that the responsibility of the individual proprietors should, in all cases and under all circumstances, be limited to their respective shares in the capital stock." The declaration then averred that, in consideration of the payment of the premium and of the promises of the plaintiff, the defendants then promised the plaintiff that they would become and be insurers to the plaintiff of the said sum, &c.; and after stating the loss of the ship, averred that the capital stock and funds of the company were sufficient to pay the plaintiff the said sum, yet that the defendants had not paid. To this declaration, there was a demurrer by one defendant, and by another a plea of non-assumpsit, and a traverse of the allegation of the sufficiency of the capital stock and funds to pay the plaintiff. *Held*, in error, on the demurrer, that the declaration disclosed a joint contract by all the defendants with the plaintiff, and was therefore good; and on the issue on non-assumpsit, that there was no evidence for the jury of any joint liability of the defendants. *Hallett v. Dowdall*, ix. 347.

8. The declaration alleged a policy of assurance, in respect of losses by sales to debtor traders, and that by rules indorsed thereon, it was provided, Rule 40: "That the assured should be entitled to set off admitted claims against premiums." Rule 41: "That if the premiums should not be paid within fifteen days after they fell due, the directors might either cancel and declare the policy void or enforce payment of the premiums." Rule 60: "That for the mutual benefit of the assured, the directors might cancel any policy and give notice to the assured, and the policy should thenceforth be null and void, but the assured should be entitled to every benefit secured by it up to the date of its being so cancelled." General averment, that the plaintiffs had done all things necessary that they should do, to entitle the plaintiffs to be paid by the defendants a loss incurred during the continuance of the agreement. Breach, that the defendants had not paid the plaintiffs in respect of the loss. Plea, that a premium payable by the plaintiffs was not paid within fifteen days after it fell due, wherefore the directors cancelled the policy, and declared it void. *Held*, first, that the general averment in the declaration was sufficient; secondly, that the effect of rule 41 was to empower the directors to make a policy as void as if actually cancelled, and that there was nothing in rules 40 and 60 inconsistent with it, and, therefore, that the plea was a good answer to the action. *Bamberger v. The Commercial Credit Mutual Assurance Co.* xxix. 307.

INTEREST.

1. *Surety compelled to pay debt of principal, entitled to interest.* A surety who is indemnified against all loss by his principal, and who is compelled to pay the debt of his principal, is entitled to interest upon the amount so paid, though interest was not expressly mentioned in the contract between them, and though there was not any demand of interest, and though the claim in respect thereof was not made until many years after payment. *Petre v. Duncombe*, i. 320.

2. *Question for jury.* And where the principal had, on one occasion, allowed the surety interest at the rate of 5l. per cent on a sum thus paid, it was held no misdirection to leave it to the jury to say whether they would not give the surety interest at

that rate in respect of all sums paid by him for the principal under the same contract. *Ib.*

3. *On money had and received.* Before action brought, upon agreement to repay deposits on subscription, to railway shares in case of failure to obtain act of incorporation, plaintiff, by letter to defendant, demanded repayment of the whole of the deposits on his shares, adding, that he should expect to be paid 5l. per cent. interest from a time specified, which was prior to the date of the letter. *Held*, (Parke, B., and Maule, J., doubting,) a sufficient demand of payment within section 28 of statute 3 & 4 Will. IV. c. 42, to entitle the jury to give interest from the date of the demand until the time of payment. *Londesborough v. Mowatt*, xxviii. 119, and xxv. 25.

4. *On purchase-money of an estate.* A purchase was to be completed on a given day, when the purchaser was to have possession, and it was provided, "that if, from any cause whatever," the purchase-money should not be then paid, the purchaser should pay interest. A delay of six months occurred from the default of the vendor in not furnishing proper abstracts. *Held*, that the purchaser must pay interest, unless he gave up the rent, during that period. *Cowpe v. Bakewell*, xvii. 508.

5. Upon the sale of a reversion, interest is payable upon the purchase-money from the date of the contract. *Bailey v. Collett*, xxiii. 263.

6. *On legacies.* A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of his child out of another fund, the legacy does not necessarily carry interest. *Rouse's Estate, in re*, xv. 183.

7. A, by deed settled property on himself, for life, with power of appointment to his children, &c. Ten years after, he married a second wife, and appointed a portion for the two children of this second marriage. He also appointed portions to the children by the first marriage, with interest from his death. *Held*, that the children by the second marriage were not entitled to interest from the death of A to the death of his widow. *Gardner v. Perry*, vi. 119.

8. *On arrears of annuity.* Interest is not payable upon the arrears of an annuity; and it forms no exception to that rule that the annuity is for maintenance, and is secured by a bond; but in an administration suit, upon further directions, the assets of a testator may, after payment of the other debts, be rendered liable, under the 46th order of August, 1841, for interest upon the arrears of an annuity from the date of the decree, and from the subsequent times of the annuity falling due. *Lanison v. Lanison*, xxiii. 15.

9. Interest not allowed on the arrears of an annuity, and the discretion of the court, on the question, is not affected by the stat. 3 & 4 Will. III. c. 42, s. 28. *Powell's Trust, in re*, xvii. 558.

10. *On rent paid into court.* Where a lessee company paid into court money due to the lessor company for rent, it was *held*, that the lessor company was entitled to interest on the same, such payment having been in abuse of the process of the court. *The Hull and Selby Railroad Co. v. The Northeastern Railroad Co.* xxxi. 234.

11. *Upon costs.* In an agreement relating to debts due to a solicitor for costs, &c., from a client, the words "with lawful interest on the same respectively upon the principle of annual rests" were held to relate to interest before and down to the date of the agreement, and therefore the instrument was not void for illegality. *Moss v. Bainbridge*, xxxi. 565.

12. *On an award.* The award of an arbitrator declared that a given sum was due from A to B which was ordered to be paid on given days, if not, then the securities were to be sold, &c. In the order no mention was made of interest. *Held*, that the produce of the securities was not, as against subsequent encumbrancers of A, chargeable with more than the principal sum of the award. *Collett v. Newnham*, xxi. 263.

13. F. had mortgaged his interest in the subject-matter of his suit to Messrs. S., to

secure, among other sums, a sum which they were to pay for him. This they had omitted to pay, but the court treated it as an ordinary sum of money in hand, and refused interest upon those sums, though the mortgage, which was to include them, was bearing interest. *Foley v. Smith*, vii. 117.

INTERPLEADER.

1. *Grounds for a bill of interpleader.* The foundation for a bill of interpleader is, that there is a conflict between two or more persons claiming the same debts, but this conflict must not be caused by any fault of the plaintiffs. *Desborough v. Harris*, xxi. 592.

2. *Party holding funds must be a mere stakeholder.* It is essential in interpleader that the plaintiff should be a mere stakeholder, and the fact that there is dispute as to the amount in the hands of the stakeholder will be fatal to the bill. *Diplock v. Hammond*, xxvii. 202.

3. *Assignees.* Where A, a judgment creditor, assigned, subject to a lien of B, all his interest in the debt to C, and notice of the lien and assignment were given to the debtor, and then A went into insolvency and his assignee claimed the debt, the debtor's executor was held entitled to protection by a bill of interpleader. *Jones v. Thomas*, xxiii. 474.

4. *After verdict at law.* It is no objection to a bill of interpleader that it is filed after verdict at law, where the effect of the action at law was to ascertain the quantum of damages due on the claim of the plaintiff at law (a defendant in equity). *Hamilton v. Marks*, xix. 321.

5. Where a company has registered what is alleged to be a forged transfer of shares, and an action is brought against it by the original shareholder, for dividends, and another is threatened by the alleged transferee, the court will not grant an interpleader. *Dalton v. The Midland Railway Co.* xxii. 452.

6. Upon an interpleader issue whether certain goods and chattels seized in execution were "at the time of the seizure the goods and chattels of the plaintiff," the plaintiff proved a bill of sale of the goods to himself. Held, that the defendant, the execution creditor, might set up, by way of answer, a prior bill of sale to a third party. *Gadsden v. Barrow*, xxiv. 543.

7. *Right of bailiff to costs.* As to the bailiff's right to deduct costs under the 148th interpleader rule of practice of the county court, and his right to sue for the costs after paying them over, see *Bloor v. Huston*, xxviii. 358.

8. See, also, *Deller v. Prickett*, ii. 232; *Hardy v. Walker*, xxiv. 448.

JAIL.

Liability of boroughs in respect of. An act was passed providing that where boroughs sent prisoners to the county jails, they should pay a share of the expenses, and of the repairs &c. of the jails, provided that this should interfere with no special contract then existing. Another act required the city of S. to build a new jail, obliging the county jail to receive the prisoners meanwhile, the county justices to fix the compensation therefor. This act was afterwards repealed so far as it required the building of the jail; and a piece of land, granted by R. by way of compensation to the county, was vested in the sheriff in trust for the same uses to which the jail was subject. On *mandamus* to the city of S. to contribute for keeping the prisoners in, and for repairs of, the county jail, it was held, that there was no special contract in the case; the provision in the second act above not being by way of contract, and the grant of land at most only a contract for the maintenance of the prison. Moreover, the city bounds had been enlarged since that time, and therefore the present city was no party to any contract with the county. The city was therefore liable in said contribution. *Regina v. The Mayor, &c. of New Sarum*, xx. 59.

JAILER.

Discharge of debtor—Habeas corpus. A jail-keeper is bound to discharge a debtor upon the order of an insolvent court, even though a writ of *habeas corpus ad satisfaciendum* for the debtor has been served upon him, the return day of which writ has not yet arrived. *Harvey v. Hudson*, i. 428.

JOINT-STOCK COMPANY.

I. DEED OF SETTLEMENT.

II. RIGHTS AND LIABILITIES OF DIRECTORS.

III. SHAREHOLDERS, RIGHTS AND LIABILITIES OF; EXECUTIONS AGAINST.

IV. SHARES, WHETHER REAL OR PERSONAL ESTATE.

V. TRANSFER OF SHARES.

VI. ACTIONS BY AND AGAINST THE COMPANY.

VII. REGISTRATION; POWER OF MAJORITY; MISCELLANEOUS CASES.

I. Deed of Settlement.

1. *Departure from, substantial and as to formalities only.* Distinction in equity between the effect of transactions between directors of joint-stock companies and other persons, where there is a substantial departure from the powers and objects of the deed of settlement, and where there is a departure as to formalities only. *Ex parte Straffon's Executors*, x. 275.

2. *Agreements in, when of no effect.* Whatever enactments are contained in an act of parliament establishing a joint-stock company are legally binding, whatever their effect. But agreements in the deed, if they are intended to alter the incidents of law with regard to property, will have no effect. *Myers v. Perigal*, xvii. 109.

3. *Shares forfeited for non-execution of—Notice.* The deed of settlement of a joint-stock company contained a clause providing that the shares of every subscriber who should not execute the deed within three months from its date should be forfeited, if the board of directors thought fit, and that the amount paid upon such shares should become the property of the company. *Held*, that the company were not bound to give notice of their intention to declare shares forfeited for non-execution of the deed, and that upon such declaration the property of the defaulting subscriber in the share ceased. *Stewart v. The Anglo-Californian Gold Mining Co.* xiv. 51.

4. *Construction of deed of copartnery—Fraudulent abstracts of directors—Balancing books—Estoppel—"Losses of the company."* By the deed of copartnery of a joint-stock bank, the directors were to submit yearly abstracts of the company's affairs, showing a balance, which abstracts should be binding on the partners, who were to have no right to examine the company's books; but it was to be competent to a majority of partners at a general meeting to appoint two of themselves to examine and report on the company's affairs in general. It was also provided that, if at any time it should be found on balancing the books that the losses amounted to a certain sum, the company was to be, *ipso facto*, dissolved. A, a partner, filed his bill, alleging that the yearly abstracts were false and fraudulent; that the losses already equalled the specified amount; that the directors had misapplied the funds, and, by undue influence, procured a majority of partners to back them; and that the company was insolvent. *Held*, that the plaintiff's allegations were sufficient to warrant a reference to an accountant to inspect the company's books, and report whether the abstracts were false, and whether the losses equalled the specified amount. *Held*, further, that A was not estopped by the deed from seeking redress in a court of equity; for the deed contemplated a case where the abstracts were *bonâ fide*, and not fraudulent. *Held*, further, that the expression, "if on balancing the books a certain loss be found," being general, the court is justified in taking its own way of ascertaining the fact of the loss,

though the deed may contain provisions as to a particular mode of ascertaining it. *Held*, further, that "the losses of the company" include such losses as may arise through the fraud of the directors, and for which the directors may be personally liable. *The North British Bank v. Collins*, xxviii. 7.

II. Rights and Liabilities of Directors.

1. *Entitled to indemnity against expenses.* Though the directors of a company undoubtedly stand in the position of agents, and cannot bind their company beyond the limits of their authority, they also stand in some degree in the position of trustees, and as such are entitled to be indemnified against expenses *bonâ fide* incurred by them in the due execution of their trust. *In re The German Mining Co.* xxvii. 158.

2. *Acts in violation of deed—Neglect.* Where the directors of a company do acts in violation of their deed, in a matter in which they have no authority, such acts are altogether null and void. But when acts to be done are within the power and duty of the directors, and are neglected, and thereby third parties are damaged, neither a court of law nor of equity will allow the company to take advantage of that neglect: (per Lord St. Leonards.) *Bargate v. Shortridge*, xxxi. 44.

3. *Objection of want of form.* If a company neglect a form or an obligation which they could and ought to perform, they cannot afterwards raise an objection of that want of form as against a person with whom they have been dealing. And on the other hand, a shareholder coming into a company cannot raise an objection to want of form, if he has really become *de facto* a shareholder, so as to prove a nullity as against the company, and to relieve himself from his obligation: (per Lord St. Leonards.) *Ib.*

4. *Power to draw checks—Liability for money improperly applied.* A resolution of the directors of a company enabling any three of them to draw checks is within the power given by a resolution authorizing the directors "to adopt all such measures as they should in their judgment consider necessary or expedient for the promotion of the undertaking;" and if under that power three of the directors draw checks and apply the money improperly, those directors who are not privy to such drawing or application are not liable. *The Direct East and West, &c. Railway Co.* xxxi. 430.

5. *Power to lease or sell company's works—Option to lessees to buy—Confirmation by shareholders.* By the terms of the deed of settlement of a joint-stock salt company, power was given to the directors to sell, exchange, and lease all or any of the partnership property, and to enter into any contract. It was also provided, that no new rule or regulation altering the fundamental constitution of the partnership should be binding, unless confirmed by two thirds of the votes of the partners present at two successive general meetings. The company purchased works and carried on the manufacture of salt. In consequence of the rivalry of the Joint-stock Alkali Company, the business was carried on at a loss. After negotiation, the managing director on behalf of the salt company, and a director on behalf of the alkali company, entered into and signed an agreement, dated in May, 1846, whereby the former agreed to lease for the term of twenty-one years all their works to the latter at a specified rent. It was a term of the agreement that the lease should contain an option to the alkali company to purchase the works at any time within twenty-one years at a price named; the agreement was to be subject to the consent of the proprietors of the salt company. At a meeting of proprietors properly convened, held in June, 1846, it was unanimously resolved that the agreement should be confirmed. The alkali company entered into possession of the works; disputes arose as to the state of the repairs, and the managing director for and on behalf of the salt company, by bill alleged that the parties to the agreement were respectively duly authorized by their respective companies to enter into the agreement, and also the confirmation thereof by the general meeting of the salt company, and sought to enforce the specific performance of the

agreement. The answer admitted the due authority of the director of the plaintiffs' company to enter into the negotiation, and that the general meeting authorized its being carried out, and no objection was taken to the agreement as being *ultra vires*. *Held*, that the directors had a power to lease or sell, or to do both; but that the giving an option to the alkali company, extending over twenty-one years, to purchase or not, at a price now fixed, was beyond the powers of the managing body; and that a confirmation by a meeting of the shareholders could not effectually sanction the contract; also, that the consent of every member of the company was necessary to give validity to the contract; and that this objection was available to the defendant at the hearing, notwithstanding the admissions in the answer, and that it had not been taken on the pleadings. The court was willing to give the plaintiffs an opportunity to obtain the consent of each proprietor individually; but it being admitted that some of them were under disability, it dismissed the bill without costs. The defendant's case was, that a verbal agreement was added to the written agreement, as a part of it, as to repairs, and that the plaintiffs had not done the repairs agreed on, which disentitled them to enforce specific performance; and he filed a cross-bill to obtain discovery and evidence in support of this defence. This ground not being in accordance with the view which the court took of that defence, the cross-bill was dismissed with costs. *Clay v. Rufford*, xix. 350.

6. *Guaranty of dividend—Want of consideration—False representation.* The first count of the declaration stated that the society was formed on the plan of a *société anonyme*; that — shares were offered to the public at — per share, free of further calls; that the defendant as a promoter and managing director had guaranteed and promised to the bearers of the — shares a dividend of —; that the plaintiff confiding in such promise purchased — shares, &c. Breach, non-payment of the dividend guaranteed. *Held*, that the count was bad, as it showed no privity between the plaintiff and the defendant, nor any consideration for the promise moving from the defendant to the plaintiff. The second count, beginning like the first, alleged that defendant, intending to deceive the public had represented the concern as safe, &c.; and intending to deceive the public who might become purchasers of the — shares, and in order to induce them so to purchase had stated, &c., that the directors guaranteed, &c., by said false, fraudulent, and deceitful representations inducing plaintiff to purchase, &c., defendant knowing the same to be false, &c. *Held*, that the count contained a sufficient allegation of a false representation by the defendant, and that the plaintiff was entitled to judgment upon it, as there was no necessity for any privity between the parties to support an action of tort for a false representation. *Gerhard v. Bates*, xx. 129.

7. *Number of directors requisite to transact business.* The deed of a joint-stock banking company contained provisions that the directors should be not fewer than five nor more than seven; that three or more should constitute a board, and be competent to transact all ordinary business; and that the directors should have power to compromise debts, &c. The number of directors became less than five; four directors, being the whole number then existing, executed a deed compromising a large debt due to the bank, taking from the debtor a mining concern, and covenanting with him on behalf of the company, to indemnify him against certain bills of exchange. In an action of covenant by the debtor for not indemnifying him, it was *held*, that such covenant did not bind the company; for that this was not ordinary business, and no smaller number than five directors were competent under the deed to transact it. *Quare*, whether a board of three directors could transact even ordinary business, unless it was a board of three out of five directors. *Kirk v. Bell*, xii. 385.

8. *Suit by public officers against directors of insolvent company—Unauthorized speculations—Parties—Multifariousness.* A joint-stock banking company, subsisting under the 7 Geo. IV. c. 46, having become insolvent, and ceased to carry on business, the public officer instituted a suit, charging certain of the directors, as defendants, with

losses during the time when the business was carried on, by reason of unauthorized speculations in shipping and collieries, and of a fraudulent transaction by a deed of arrangement with a debtor to the company, who was also made a defendant; and praying relief in respect of all these matters, and particularly to have the deed set aside. On the demurrer of one of the directors, it was *held*, that the suit was properly instituted by the public officer, although the company had ceased to carry on business; that it was not necessary to make the directors and trustees, who were not charged with the improper transactions and fraud, parties; but, it appearing that the manager was mixed up in the transactions, that it was necessary to make him a party. *Held*, also, that, although there were several distinct transactions, as to which the liabilities might be several, yet that it would lead to a mischievous multiplicity of suits if the demands were divided; and a demurrer for multifariousness was disallowed. *Harrison v. Brown*, xix. 335.

9. *Secretary presumed to be under control of directors.* The secretary of a joint-stock company is the servant of the directors of the company, who are presumed to have control over him as such; and this presumption is not rebutted by the circumstance that the company has ceased working. *Elmes v. Ogle*, li. 379.

III. Shareholders, Rights and Liabilities of; Executions against.

1. *Limited liability, as among themselves.* The shareholders in a joint-stock company, may by express agreement, restrict their liability on the contracts of the company, as among themselves, but an individual contracting with the company will not be affected by such agreement unless he have notice thereof and contract with reference thereto. *Hallett v. Dowdall*, ix. 347.

2. *Limited liability for calls under deed.* The deed of partnership by which a joint-stock company was established, for the erection of a corn exchange, provided that the amount of each share should be 5*l*. The deed gave powers to the directors for raising more money, such power to be exercised in a prescribed mode; and it was declared that it should be lawful for the directors from time to time, to make such calls for money upon the shareholders, to defray the expenses of the said undertaking, as they should think fit, but not beyond the amount for the time being remaining unpaid of their respective shares. The directors incurred expenses considerably beyond the capital of the company, but did not raise the excess in the modes pointed out in the deed. The company was ordered to be wound up, and a call was made by the Master upon all the shareholders to recoup the parties who had advanced money. *Held*, discharging the call, that the shareholders *inter se* were not liable for more than the 5*l*. per share already paid up. *The Worcester Corn Exchange Co.* xix. 627.

3. *Partners.* *Semble*, this was not a trading partnership, from which a power would be implied for one partner to bind the others. *Ib*.

4. *Limited liability.* Where parties have stipulated for a limited liability, and the managing parties incur an expense beyond that limit *inter se*, the latter have no right to call for indemnity. *Ib*.

5. *Semble*, if third parties, knowing the stipulation for limited liability, enter into contracts with the directors, they cannot set up unlimited liability against the body of shareholders. *Ib*.

6. *Commencement of liability of transferee.* By the deed of settlement of a joint-stock banking company it was provided, amongst other things, "that whenever, by any means whatever, any shares in the capital of the company shall become actually forfeited, or shall be duly and effectually transferred to a new proprietor, then, and in such a case, and not before, the responsibilities of the previous owner, as a proprietor in the company in respect of such shares, shall cease and determine, and such previous owner shall be exonerated and discharged from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance

and performance of the covenants," &c. *Held*, that under the terms of the deed, the transferee of shares was subject to the liabilities of the company, as well those incurred before as after the date of the transfer. *Cape's case*, xix. 1.

7. *Calls on bankrupt shareholder.* The deed of settlement of a joint-stock company provided, that the shareholders would pay calls; that the assignees of a bankrupt shareholder should not become shareholders themselves, but might sell the shares; and then followed a general power to the directors to make calls on all holders, except deceased bankrupts, their assigns, &c. *Held*, that the bankruptcy of a shareholder was an answer to an action for calls made and due after his certificate, although the assignees had not availed themselves of the power of sale, and the bankrupt still remained the nominal holder of the shares. *The Wylam Steam Fuel Co. v. Street*, xxx. 569.

8. *Certificate of proprietorship.* The holder of shares in a joint-stock company, who has not executed the deed of settlement, is not entitled to a certificate of proprietorship. *Wilkinson v. The Anglo-Californian, &c. Co.* xii. 444.

9. *Invalid sale of shares to company does not exonerate shareholder.* Where a joint-stock company are authorized by deed to purchase the shares of any proprietor upon specific conditions, and they make such purchase without observing the conditions, the sale is invalid and the seller is not exonerated from contribution as a shareholder, the company being insolvent. *Ex parte Lawes*, x. 162.

10. *Proof of debt against estate of deceased member—Practice.* A petition from a creditor of a joint-stock (banking) company to prove his debt against the estate of a deceased member must state that the company has ceased to do business, or that an attempt has been made to enforce judgment against those who are primarily liable, or it will be dismissed. *Heward v. Whealley*, xiii. 214.

11. *Liability as makers of note given by directors.* Three directors of an unregistered joint-stock company signed a note as follows: "We, directors of the — Bank, for ourselves and the other shareholders, &c., jointly and severally promise to pay G. W. or bearer," &c., to which were annexed coupons for each half-year's interest up to maturity. *Held*, that the shareholders were liable, both as makers of the note and borrowers of the money; that the words, "and severally," might be struck out; that the coupons did not affect the validity of the note. Besides the banking business, the deed of settlement specified "the borrowing or taking up money at interest on receipt," &c., and the management of the funds was intrusted to the directors. *Held*, that this note came within the above clause. The plaintiff "purchased" the note of the agent of the bank for the amount of its face and the coupons. *Held*, to be a loan on the security of the note. The deed authorized the directors to issue such notes, &c., as were lawful under the banking laws. *Held*, to apply to dealing as a bank of issue, and not to borrowing for purposes of trade on such notes as this. By the deed, all contracts were to run in the name of the trustees, who, with the directors, might authorize any person to sign notes for the company, on terms approved by the directors; and no note otherwise signed should be binding on the company. *Held*, that this did not interfere with the directors' power to make promissory notes. And, further, that by allowing the directors to manage things in their own way for seven years, the shareholders had ratified the transaction, supposing it to have been irregular. *MacLae v. Sutherland*, xxv. 92.

12. *Sale or mortgage of shares before execution of deed of settlement.* Subscribers to a company fully registered within the provisions of the 7 & 8 Vict. c. 110, to whom shares have been allotted after the complete registration of the company according to the provisions of the act, cannot lawfully deal with those shares, by way of sale or mortgage, before they have executed the deed of settlement of the company, and have been duly registered as shareholders in the register established by the act. *Ex parte Neilson*, xxiii. 479.

13. *Exaggerated statements in prospectus, how liability affected by.* A person who

takes shares in a mining company will not be relieved from his contract on the ground that the description of the undertaking and his prospects are exaggerated in the prospectus and advertisements published by the directors, when he is present at the first meetings of the company, and visits the mine, and has as full an opportunity as the directors of ascertaining the real state of the mine and its prospects. *Jennings v. Broughton*, xix. 420.

14. *Sale of shares and removal of vendor's name from books.* R. S., a shareholder in a joint-stock banking company, sold his shares, and his name was erased from the books and that of the purchaser inserted. The bank subsequently suspended payment, and upon a call being made, the purchaser of the shares neglected to pay it, in consequence of inability. The bank then made an entry in the share register list, stating that the transfer was invalid for want of the consent of a board of directors duly constituted, and they made a fresh return to the stamp office, in which they inserted the name of R. S. as a shareholder. *Held*, upon a bill filed by R. S., that he was not bound to inquire whether the provisions of the deed had been observed, and that he had ceased to be a shareholder; that after the name of R. S. had been removed from the books, the directors had no power, under the clauses of the deed, to again introduce his name. *Shortridge v. Bosanquet*, xvii. 331.

15. *Liability for calls of shareholder who has not executed deed.* Where the defendant was a shareholder and registered as such, but had never executed the deed of settlement, and, the company being unsuccessful, an act of parliament was passed authorizing calls to be made on the shareholders, according to the deed of settlement, &c., it was *held*, that the defendant was not liable for calls. *The Galvanized Iron Co. v. Westoby*, xiv. 386.

16. If some of the provisions of the original act have not been complied with, as, for instance, a provision that the full capital shall be subscribed, and the act authorizing the calls extends to persons who have only agreed to take shares, in such case one who has never executed the deed of settlement cannot be made liable, if the full amount of capital has not been subscribed. *Ib.*

17. *Liability of executors of shareholder.* Where, by the deed of settlement of a joint-stock company, each partner is to remain liable till his shares are completely transferred, and his executors are not to become proprietors till they have observed certain formalities, then, after the death of a partner, his executors not observing the formalities prescribed, his estate continues liable for partnership debts, and, *semble*, also entitled to a share of the profits. *In re The Northern Coal-Mining Co.* x. 171.

18. *Husband's liability in respect of interest in wife's shares.* Defendant's wife, before marriage, was possessed of some shares in a joint-stock company. The company's deed of settlement provided that the husband of such person should not be a member of the company in respect of such shares, without complying with certain provisions. *Held*, that as he had not complied with these provisions, he was not liable, under 7 Geo. IV. c. 46, s. 13, to a *sci. fa.* as a member of the company in respect of his interest in his wife's shares. *Dodgson v. Bell*, iii. 542.

19. *Execution against shareholder, application for—Practice.* Where an application under the 7 & 8 Vict. c. 110, ss. 66, 68, for execution against a shareholder in a joint-stock company on a judgment against the company is refused, no fresh application can be made without a fresh notice; though the first application were made to a judge who had no jurisdiction. *Quære*, whether, notwithstanding the 1 & 2 Vict. c. 45, s. 1, such applications can be made to a judge who is not a judge of the court in which the judgment has been obtained. *Edwards v. The Cameron's Railway Co.* iv. 529.

20. *Execution against shareholder—Sci. fa.* Under sect. 36 of 8 & 9 Vict. c. 16, the court of common pleas will not order execution to issue against a shareholder of a company without a *sci. fa.*, but will only, upon sufficient ground being shown, allow a *sci. fa.* to issue in order that execution may be obtained against such shareholder to the extent pointed out by that section. A suggestion is not the proper course. It is not

sufficient, in order to obtain leave for issuing such *fi. fa.*, to show that *fi. fas.* have been issued against the effects of the company into two counties, and *nulla bona* returned to them. *Hutchings v. The Kilkenny, &c. Railway Co.* i. 357.

IV. *Shares, whether Real or Personal Estate.*

1. *Shares in mining company—Statute of frauds.* Where a mining company was managed on the cash book principle, and the title to the minerals or the right to search for and get them was vested in one person, the property being divided into shares which were taken by different members of the joint-stock company, each contracting to supply the necessary capital in proportion to his shares, and having the right to sell his share and insist upon his vendee being accepted as a member of the company in his stead, upon certificate given of the sale of shares to him; the court, considering the question as one of fact for a jury, *held*, that a contract for the sale of these shares was not a contract for the sale of land or an interest in land, under the 4th section of the Statute of Frauds, 3 Car. II. c. 19; *dissentiente*, Parke, B. Nor a contract for the sale of goods, wares, and merchandise, within the 17th section of that statute. *Watson v. Spratley*, xxviii. 507.

2. And it seems that the interest of a shareholder in any joint-stock company where the persons seised of the realty hold in the same way as a corporation, that is, in trust only to use the land and to make profits to be divided among the shareholders whose only interest is in those profits, is personal estate. *Ib.*

3. *Bequest of shares not void for mortmain.* By the deed of a joint-stock company, it was declared "that all the property thereof should always be considered personal estate." A shareholder, by his will, gave his shares to trustees to invest the proceeds in securities for the benefit of certain charities. At this time the property of the bank consisted of freehold and copyhold hereditaments, &c. *Held*, that the bequest was good, and not void for mortmain. *Myers v. Perigal*, xvii. 109.

V. *Transfer of Shares.*

1. *Cannot be made till calls are paid.* Upon application for a *mandamus* to the secretary of a joint-stock company to enter and register a memorial of a deed of transfer, it was *held*, that by sect. 16 of stat. 8 & 9 Vict. c. 16, the right to transfer shares was taken away until all calls made in respect thereof had been paid; and the deed of transfer was, therefore, void. *Re Hall v. The Norfolk Estuary Co.* viii. 351.

2. *Deposit of shares as security for money advanced—Judgment and judge's order charging shares—Equity.* The defendant, being the registered owner of 200 shares of a joint-stock company, deposited the certificates thereof with E., as a security for money advanced. He afterwards borrowed a further sum from an insurance office, of which C. was a director, and E. and C. being sureties for the repayment of that sum, he executed according to the Joint-stock Act a transfer to C. of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. Judgment for the recovery of the sum advanced having been obtained by the insurance office, and a judge's order *nisi* to charge the shares having been made, C. subsequently requested the joint-stock company to transfer the shares into his name, which they refused, and the shares remained standing in the name of the defendant. The court made the judge's order absolute, holding that the shares were to be considered as standing "in the defendant's name in his own right," within the meaning of the 1 & 2 Vict. c. 110, s. 14, and that the relief of the creditors was in equity. *Fuller v. Earle*, xiv. 390.

3. *Transferor of shares, liable for what losses—False balance sheets.* By the deed of partnership of a joint-stock banking company, the directors were ordered, at every half-yearly meeting of the company, to exhibit to the shareholders a balance sheet

containing a full, true, and explicit statement of the affairs of the company; and every such balance sheet should be binding and conclusive on all the shareholders, their executors, &c., unless some error should be discovered therein before the next half-yearly general meeting. By the clauses regulating the mode of transfer, it was declared that the transferrer should, from the date of the transfer, be released from all subsequent claims and obligations in respect of the shares, but that such release should not extend to release him "from his proportion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder." The directors for several years exhibited, at the half-yearly meetings, very erroneous balance sheets, purporting to show that very large profits had been made; and they declared dividends, when, in fact, from the first, large losses had been sustained. A shareholder sold and transferred his shares, with the consent of the directors, more than three years before the order for winding up the company. *Held*, that the losses to which a transferrer of shares would be liable under the deed must be taken to mean such as appeared upon the balance sheet; and that, as no losses appeared upon them, it was not competent, by other means, to show the existence of such losses; and that the balance sheet was binding upon all the shareholders. *Semble*, that losses cannot be said to have been sustained at the time of the loan or advance, but only at the time when the loan or advance turns out to be unrecoverable. *Quære*, whether there could be losses within the meaning of the deed, to which a transferrer would be liable, so long as any of the capital remained uncalled up. *In re The North of England Joint-stock Banking Co.* xiii. 341. See, also, iii. 131.

VI. Actions by and against the Company.

1. *Action for calls—Certificate of complete registration—Pleading.* A joint-stock company, registered under 7 & 8 Vict. c. 110, cannot maintain an action for calls until they have obtained a certificate of complete registration, and a plea that they had not obtained such a certificate is an answer to the action. But this defence will not arise under a plea of never indebted, or a plea traversing that the plaintiffs were a completely registered company. *The Agriculturist Insurance Co. v. Fitzgerald*, iv. 211.

2. *For price of prospectuses.* A quantity of prospectuses of a registered public company were ordered by its secretary of a printer who had been before employed by the company; they were delivered at its office, and never returned. No proof that they were used was offered. The company was held liable for their price. *Levy v. The Metropolitan Cab Co.* xxv. 263.

3. *For price of goods furnished company—Agents acting without authority.* Where goods bought for a registered joint-stock company, by the officers or agents of the company, were delivered at its place of business and used by the company, the company is liable for the price of the goods, although the persons making the purchases acted without authority. *Smith v. The Hull Glass Co.* ix. 442.

4. An action for work and labor does not lie against a company completely registered for work done for the company provisionally registered. *Hutchinson v. The Surrey Gas Light Association*, vii. 474.

5. A company completely registered is not liable on any contract made by the promoters before provisional registration. *Ib.*

6. *Quære*, whether a company is liable, after complete registration, to be sued in its collective name upon contracts previously made by the provisionally registered company, when such contracts are within sect. 23 of the 7 & 8 Vict. c. 110. *Ib.* See, also, *Taylor v. The Crowland Gas and Coke Co.* xxvi. 460; *Payne v. The New South Wales, &c. Co.* xxviii. 579; *Abbott v. Rogers*, xxx. 446.

7. *Action on covenant to pay annuity to company—Validity of contract.* By a deed made between B. and his wife of the first part; the defendant of the second; the plaintiffs, a joint-stock company, of the third; and the trustees of the company of the

fourth, in consideration of 200*l.* advanced to L. by the company on the execution, L. and the defendant covenanted to pay an annuity to the plaintiffs, and that L. should keep on foot a policy on his own life, and one upon his wife's. L. and his wife further granted to the trustees their interest in certain freehold property, upon trust to pay thereout, by sale or otherwise, the arrears of the annuity, and pay over the surplus moneys received to the parties entitled thereto. In an action of covenant by the company against the defendant for the non-payment of the annuity, and for not keeping on foot the policies, the defendant pleaded that it was a contract made on behalf of a completely registered joint-stock company, under the 7 & 8 Vict. c. 110, s. 44, and that it was void because it was not executed with the formalities thereby required. *Held*, that the plea was bad, the contract not being one made on behalf of the company, and being a unilateral one, on which the covenantee might sue without executing it. *British Empire Mutual Life Assurance Co. v. Browne*, xiv. 285.

8. *Dissolution no bar to action by creditor.* The dissolution of a company by an order absolute under the Joint-stock Companies Winding-up Act, 1848, (11 & 12 Vict. c. 45,) is no bar to an action against the company, by a creditor. Neither can the omission by such creditor to prove his debt before the Master in Chancery be pleaded in bar to such an action; the appropriate remedy being under sect. 73, by an application to a judge to stay proceedings in the action until after proof made. *M'Kenzie v. The Sligo and Shannon Railway Co.* xiv. 37.

VII. Registration; Power of Majority; Miscellaneous Cases.

1. All joint-stock companies must be provisionally registered. *Abbott v. Rogers*, xxx. 446.

2. *Contracts before provisional registration.* A railway company requiring an act of parliament, must be provisionally registered under the 7 & 8 Vict. c. 110, s. 4; and, consequently, contracts entered into on behalf of such a company before provisional registration, are illegal, being prohibited by the 24th section of the act; and an action for work done in pursuance of them will not lie. *Ib.*

3. *Prospectus issued before complete registration.* It is also illegal under the 7th section of the 10 & 11 Vict. c. 78, for the promoters of such a company to issue, before obtaining a certificate of complete registration, a prospectus containing any of the particulars required by that act or the 7 & 8 Vict. c. 110, to be returned to the registrar of joint-stock companies. *Ib.*

4. *Illegal contract between promoters of two companies, for services and work.* Plaintiffs and defendants were promoters of two several joint-stock companies. Declaration in *assumpsit* for materials furnished and work done by plaintiffs for defendants. Plea, that the materials, &c., were not necessarily required for the establishment of the defendants' company; that plaintiffs acted as promoters; that neither company was registered according to 7 & 8 Vict. c. 110, all of which plaintiffs knew at the time, &c. *Held*, that as the contract for services and work was forbidden by the act, and was therefore illegal, the plea was not bad on special demurrer as amounting to *non-assumpsit*; and that it was good on general demurrer, as it was a good answer to the action. *Bull v. Chapman*, xx. 488.

5. *Power of majority to bind minority.* The rule, that the majority cannot bind the minority in a joint-stock company, as to acts not contemplated by the common contract, has not been applied to corporate companies for a public undertaking involving public interests and duties under the sanction of parliament. *Ffooks v. The London, &c. Railway Co.* xix. 7.

6. Where a deed enables the majority of a body to bind the minority by a resolution passed in a certain manner, the provisions of the deed in that respect must be strictly complied with, otherwise the minority are not bound. *The Direct East and West, &c. Railway Co. In re*, xxxi. 430.

7. *What is a public company.* A banking copartnership which made returns to the stamp office pursuant to 7 Geo. IV. c. 46, held to be a public company not incorporated within the meaning of 1 & 2 Vict. c. 110, s. 14. *Macintyre v. Connell*, iii. 249.

8. *Contract between director and company—Submission to shareholders.* The statute requisition, that any contract or dealing between a company and any director, shall be submitted "to the next general or special meeting of the shareholders to be summoned for that purpose" is satisfied by a submission to the next general meeting of the company, though particular reference to this purpose was not made in the advertisement calling the meeting. *In re The Universal Salvage Co.* xxvii. 582.

JUDGES.

1. *Interested judge sitting on the hearing, without intending to take a part in the decision.* When a judge, interested in the result of the pending trial, sits on the bench with his associates, even though he declares his purpose to take no part in the hearing or decision, the order will be invalid, and a notice of intention to move for a *certiorari* given to such justice as one "by and before whom the order was made," and stating that the motion is "on behalf of the inhabitants" of the respondent parish, and signed "J. M., attorney for the inhabitants of the respondent parish," is sufficient under stat. 13 Geo. II. c. 18, s. 5. *Regina v. The Justices of Suffolk*, xiv. 90.

2. *Decree by an interested judge—Mode of avoidance.* A decree or order pronounced by a judge, (the Lord Chancellor,) in a cause in which he is individually interested, is not absolutely void, but only voidable. The proper mode by which to avoid a decree of the Lord Chancellor, voidable by reason of his having an interest in the suit, is by appeal to the House of Lords. *Dimes v. The Grand Junction Canal Co.* xvi. 63.

3. *Vice-Chancellor—Interest of the Lord Chancellor.* The Vice-Chancellor appointed under the 53 Geo. III. c. 24, is not the mere deputy of the Lord Chancellor, but has independent jurisdiction, subject to reversal or approval by the Lord Chancellor; and the personal interest of the Lord Chancellor in a decree made by the Vice-Chancellor will not vitiate the decree of the Vice-Chancellor. *Ib.*

4. *Appeal—Enrolling decree.* As a decree of a Vice-Chancellor cannot be appealed against to the House of Lords until it be enrolled, and it cannot be enrolled without the signature of the Lord Chancellor, the personal interest of the Lord Chancellor is no objection to the validity of the signature. *Ib.*

5. *Judge of consistory court appointed by bishop—Bishop's interest in suit.* Under an appointment by the bishop, A., D. C. L., was constituted Chancellor and Vicar-General in Spirituals, and Official Principal of the Episcopal and consistory court of C. for life, with power of surrogating and substituting fit person or persons in his stead, and of recalling or removing them, with the consent of the bishop; and power is conferred upon him, in the absence of the bishop from the consistory court, to proceed by himself or his substitute in all causes, business, suits, and complaints, spiritual and ecclesiastical, &c., and decide and finally determine the same, (with certain exceptions not now material,) nevertheless, first consulting and having the consent of the bishop, if either party prayed the judgment of the bishop. The appointment also reserved to the bishop to examine and determine every cause in his proper person in the consistory court. Held, that although the official principal exercised powers delegated to him by the bishop, he was constituted an ordinary judge of the consistory court, and acted judicially quite independently of the bishop. And, therefore, that the bishop's being interested in a suit heard and decided by the official principal, was no ground for a prohibition. *Rawlinson v. Medwin*, xvi. 285.

6. *Information against judge for mistake.* The mistake of a judge as to the course of proceeding under a statute, is no ground for filing a criminal information against him. There must be a corrupt motive. *In re —*, xiv. 151.

JUDGMENT.

I. FOREIGN JUDGMENTS.

II. PRIORITY OF JUDGMENTS; JUDGE'S ORDER.

III. REGISTRATION AND NOTICE OF JUDGMENTS.

IV. VALIDITY AND LIEN OF JUDGMENTS.

V. EFFECT, ARREST, AND SATISFACTION OF JUDGMENTS.

I. *Foreign Judgments.*

1. *Examinable as to jurisdiction and service of process—Pleading.* A foreign judgment is examinable, so far as to show that the foreign court had not jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained; but is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it is founded were never made or were obtained by fraud of the plaintiff; and any pleas which might have been pleaded to the original action cannot be pleaded to the action upon the judgment. *Bank of Australia v. Nias*, iv. 252.

2. *Action on foreign judgment.* It does not appear that it has ever been solemnly decided, whether in an action on a foreign judgment the merits of the case upon which the foreign court has regularly adjudicated between the parties may again be put in issue and retried. Per Lord Campbell, C. J. *Ib.*

3. *Plea of.* The defendant, being sued in England as a member of a colonial company upon a contract entered into by the company, pleaded the judgment recovered against the chairman in the colony. *Held*, that the plea was bad, as the judgment only extinguished the debt against those members who were resident in the colony. *Ib.*

4. *Pleading foreign ordinance.* To an action on a judgment at the Cape of Good Hope, the defendant pleaded an ordinance of that country, enacting that the court might, on petition of an insolvent, sequester his estate, and that further execution of any judgment and all actions pending against him, should be stayed during such sequestration. The facts were in accordance with the provisions of the enactment. *Held*, on demurrer, that the plea was bad, as it merely showed a temporary suspension of the execution during the pendency of the sequestration, but not a discharge of the person or estate of the insolvent. *Friih v. Wollaston*, viii. 559.

5. The court of chancery in England will not enforce a foreign judgment, unless it is final. *Paul v. Roy*, xi. 12.

II. *Priority of Judgments; Judge's Order.*

1. *Beneficed clergyman—Giving security for judgment debt.* In January, 1851, A obtained and registered a judgment against B, a beneficed clergyman. By a deed, dated in November, 1851, after reciting that A had agreed to allow B to receive the rent-charge in lieu of tithes of the benefice, for his own use, B assigned to A certain property, by way of mortgage, as a security for the judgment debt. In December, 1851, C obtained and registered a judgment against B, and obtained a writ of sequestration. *Held*, (on the ground of contract between A and B, in the deed of November, 1851,) that C had priority over A. *Bates v. Brothers*, xxiii. 172.

2. Whether a judgment creditor of a beneficed clergyman has priority over a subsequent judgment creditor, who had obtained a writ of sequestration, *quære*. *Ib.*

3. *Judge's charging order on a judgment—Mortgagee of stock.* The order of a judge made according to 1 & 2 Vict. c. 110, s. 14, charging stock in the name of a trustee in trust for a judgment debtor, gives such debtor, who has given the trustee notice of the order, priority over a prior mortgagee of the same stock who has not given the trustee

notice of his mortgage, the judgment creditor not having notice of the mortgage. *Watts v. Porter*, xxvi. 116.

4. *Charging order against stock.* When a judgment creditor has obtained a judge's order charging stock to the dividends of which the debtor is entitled for life, with payment of the debt, the proviso in the statute which declares "that no proceedings shall be taken to have the benefit of such charge until after the expiration of the six calendar months from the date of such order" does not prevent the creditor from taking steps to protect his security, but only prevents him from enforcing immediate payment of the debt by realizing the security. *Watts v. Jefferyes*, vi. 6.

III. Registration and Notice of Judgments.

1. *Registration in Middlesex.* The 7 Ann. c. 20, s. 18, which provides that no judgment shall affect or bind any lands in Middlesex, except from the time when a memorial of such judgment shall be entered at the register office for Middlesex, is not repealed by the 1 & 2 Vict. c. 110, s. 13, and, therefore, a judgment registered in the common pleas, has the effect of a charge upon lands in Middlesex, only from the time when the judgment has been also registered in Middlesex. *Westbrook v. Blythe*, xxvi. 153.

2. *First registry—Charge upon land.* A judgment has the effect of a charge on lands in Middlesex only from the time when it has been registered in the registry of Middlesex; and as between several judgments registered in the common pleas the judgment first registered in the registry of Middlesex is entitled to priority. *Hughes v. Lumley*, xxviii. 270.

3. *Effect of registration against purchasers or mortgagees without notice.* By the 2 & 3 Vict. c. 11, s. 5, as against purchasers or mortgagees without notice, a judgment registered in the common pleas, under the 1 & 2 Vict. c. 110, s. 19, is not to "bind or affect any lands, &c., further or otherwise, or more extensively in any respect" than a docketed judgment would have done before the 1 & 2 Vict. c. 110. Therefore, leaseholds, which were formerly not bound by a docketed judgment until an *elegit* issued, are not now affected, as against purchasers or mortgagees without notice, until an *elegit* has issued. *Westbrook v. Blythe*, xxvi. 153.

4. After twelve months, a judgment creditor may enforce his equitable charge against the real estate, although twelve months have not elapsed since its registration. *The Derbyshire and Staffordshire Railway Co. v. Bainbridge*, xv. 118.

5. When a judgment has been registered, and a search has been made for such a judgment, the person searching must be considered to have notice of the judgment. *Proctor v. Cooper*, xxiii. 506.

IV. Validity and Lien of Judgments.

1. *Usury.* A judgment given to secure the payment of a sum of money, and interest higher than the legal rate, may be valid, but cannot be used as a charge upon lands. *Lane v. Horlock*, xxi. 163.

2. *Against beneficed clergyman.* A judgment entered up against a beneficed clergyman, does not create a charge, under the 13th section of the stat. 1 & 2 Vict. c. 110, upon his living. *Hawkins v. Gathercole*, xxxi. 305.

V. Effect, Arrest, and Satisfaction of Judgments.

1. *Unsatisfied judgment for conversion against one a bar to an action for money had and received against another.* The recovery of a judgment, though it remains unsatisfied against one, in an action for a conversion of goods by a wrongful sale, is a bar to an action for money had and received, against another, for the proceeds of the sale,

whether he be a party to the conversion or a stranger. *Buckland v. Johnson*, xxvi. 328.

2. *Arrest of judgment.* It is no ground in arrest of judgment after conviction for a felony that the indictment also contains a count for a misdemeanor. *Regina v. Ferguson*, xxix. 536.

3. *Good and bad counts in an indictment—General verdict—Appellate court will render proper judgment and arrest judgment on bad count.* Where an indictment contains some good and some bad counts, and a general verdict is rendered for the crown, the court below, under sect. 5 of stat. 11 & 12 Vict. c. 78, ought to arrest the judgment on the bad counts and pass sentence on the good counts; but if the court below pass sentence generally, the court of error may, under the statute, order the judgment to be arrested on all the bad counts, and pronounce the proper judgment on all the good counts. *Regina v. Holloway*, v. 310.

4. *Entering satisfaction on judgment roll.* The defendant in a case was taken on execution and discharged by plaintiff's attorney on making arrangements to pay part of the debt. The plaintiff denying that the discharge was made by his authority refused to sign the satisfaction piece and brought an action on the judgment, and the court refused to order that satisfaction should be entered on the judgment roll. *Ward v. Broomhead*, xiv. 502.

5. Certain articles of agreement executed in part, held to be no satisfaction of a judgment. *Hughes v. Lumley*, xxviii. 270.

JUDICIAL ACT.

1. The allowance of justices to an indenture for binding a parish apprentice is a judicial act. *Slaverton v. Ashburton*, xxix. 131.

2. A license for the sale of beer, granted by the solicitor of excise, without the production of a certificate from the overseer, required by 3 & 4 Vict. c. 61, s. 2, is not a judicial act removable into this court by *certiorari*. *Regina v. The Overseers of Salford*, xiv. 145.

JURISDICTION.

I. OF COURTS OF CHANCERY.

II. OF COURTS OTHER THAN THE CHANCERY AND COUNTY COURTS.

I. Of Courts of Chancery.

1. *Directing action at law.* The court of chancery has jurisdiction, on appeal from the decision of the Master disallowing a claim under a winding-up order, to direct an action at law to try the validity of the debt. *Norwich Yarn Co. &c., in re*, ii. 118.

2. *Sir S. Romilly's Act.* The court of chancery has jurisdiction to decide the questions raised on petition under Sir S. Romilly's Act. *In re Hall's Charity*, vi. 150.

3. *Discharge of party in custody for non-payment.* The Lord Chancellor has no jurisdiction under the 17th rule of the 15th sect. of the act 1 Will. IV. c. 36, to discharge a party in custody for the non-payment of a sum of money ordered to be paid in a suit. *Dew v. Clark*, vii. 32.

4. *Lunacy—Land in Ireland.* The Trustee Act, 1850, does not give the chancellor jurisdiction in lunacy over lands in Ireland. *Davies, in re*, vii. 8.

5. *Complete redress at law.* Where a party has complete redress at law a court of equity will not interfere. *Webb v. The Direct London, &c. Railway Co.* ix. 249.

6. *Specific performance—Discretion of court.* The court of chancery cannot speculate on the damages which a jury might have given for the breach of an agreement, nor on the damage caused to property by failure of a sale; therefore the specific

performance of an agreement, where the consideration money is 50*l.*, is not too small matter for the jurisdiction of the court. *Bennett v. Smith*, x. 272.

7. The exercise of the jurisdiction is discretionary in the court; but the discretion is not arbitrary, but must be exercised according to the circumstances of the case. *Ib.*

8. *Enforcing foreign judgment.* The court of chancery in England will not enforce a foreign judgment, unless it is final. *Paul v. Roy*, xi. 12.

9. *Complication of accounts.* Complication of accounts, where the receipts have been all on one side, if it ever alone constitutes sufficient ground for the intervention of a court of equity, must show a very strong case of entanglement. *Padwick v. Stanley*, xii. 281; *Phillips v. Phillips*, xii. 259.

10. *Mutual account—Practice.* A bill for an account cannot be maintained in equity, unless it is for mutual account. In this case the bill should have been for a discovery, and the court of law has jurisdiction. *Phillips v. Phillips*, xii. 259.

11. *Authorizing married woman to sue in formâ pauperis—Costs.* If the court of chancery has authority to give a married lady permission to sue in *formâ pauperis* without a next friend, it can also do all the acts consequential upon it, and order costs to be paid to the lady. *Wellesley v. Wellesley*, xiii. 148.

12. *Removal of bankrupt trustee.* Under the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 130, every vice-chancellor has jurisdiction to remove a bankrupt trustee, and appoint a new one in his stead. *In re Heath*, xv. 387.

13. *Confusion of boundaries.* If a bill proves usage of payment of rent, but that by reason of accident or lapse of time the boundaries have become confused, and there is difficulty in obtaining a legal remedy, the court of chancery will give relief. *Mayor, Aldermen, &c. of Basingstoke v. Lord Bolton*, xv. 539.

14. *Quasi guardian and ward.* The court of chancery has jurisdiction over transactions between persons in the relation of quasi guardian and ward. *Espey v. Lake*, xv. 579.

15. *Marriage of ward of court—Settlement—Lapse of time.* In 1839, A B married a ward of court without leave; articles were executed both before and after the marriage. In 1840, a reference was made to approve of a settlement, but nothing was done thereon. In 1850, the parties executed a settlement of the wife's real estate without the sanction of the court of chancery. In a suit instituted by the wife to annul the articles and confirm the settlement, it was held, in 1852, that the power of the court was not affected by the lapse of time, that the parties coming to the court had given it authority to do what was right, and that a reference must be made to the Master to report as to the propriety of the settlement of 1850, and whether it ought to be varied, and to approve of a settlement of the wife's personal estate. *Cave v. Cave*, xix. 280.

16. *Ward of court—Husband and wife—Payment out of court of fund belonging to wife.* By marrying a ward of court, without the sanction of the court, the husband commits a contempt of court, by which the court acquires a jurisdiction over the husband and wife, by virtue of which it may decline, during their joint lives, to part with the capital of a fund belonging to the wife, which is within its own power and custody, even upon the application of the husband and wife, supported by the consent in court of the wife, whether of age or not of age, until such settlement shall be made upon the wife as the court thinks advisable and proper under the circumstances of the case. *Martin v. Foster*, xxxi. 379.

17. *Changing location of college.* The court of chancery has jurisdiction within the 52 Geo. III. c. 101, to determine, upon petition, whether resolutions by some of the trustees of a college, &c., for changing its locality, would be beneficial to the institution. *In re The Manchester College*, xix. 404.

18. *Declaring rights of persons.* The court of chancery will not entertain a suit merely for the purpose of declaring, that a person has not a certain right, or that he shall not have one which may arise hereafter where he has yet attempted to exercise none. *Jackson v. Turnley*, xxi. 13.

19. *Decision of legal question.* The court of chancery is not exceeding its functions in deciding a purely legal question arising in a suit before it, either with or without legal assistance, but ought to decide such a question where the controversy and material facts are plain. *The Shrewsbury and Birmingham Railway Co. v. The Stour Valley Railway Co.* xxi. 628.

20. *Regulations for joint use of station by two railway companies.* The court of chancery may interfere between two railway companies entitled to the joint use of a station by prescribing regulations for its management; but such interference ought not to take place without grave occasion. The court may also direct a partition of the station, and appoint a receiver if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitration, the court will withhold its interposition until the remedy thus provided has been resorted to. *Ib.*

21. *Injunction to restrain from pursuing claims in foreign court.* A party cannot be stopped by the English court of chancery from pursuing his claims in a foreign court, merely on the allegation that the contract on which such claims are founded is illegal. But where it appears that evidence of all the transactions cannot be given in, in the foreign court, so that complete justice cannot be done, then an injunction may be granted. *Ainslie v. Sims*, xxiii. 232.

22. *Establishing will.* The jurisdiction of the court of chancery in establishing a will against the heir at law is not limited to cases of a devise upon trust but extends likewise to cases of a simple legal devise. *Boyse v. Rossborough*, xxvii. 101.

23. *Validity of testamentary gifts.* Where probate is granted, establishing the validity of a testamentary instrument, courts of equity have jurisdiction to inquire into the validity of gifts challenged on the ground of fraud and undue influence. *Hindson v. Weatherell*, xxiii. 132.

24. *Order respecting custody of children.* The court of chancery has jurisdiction to make an order that children shall be given up to the father notwithstanding that the mother and children were born and are resident abroad. Power to enforce the order is another matter. *Hope v. Hope*, xxvii. 249.

25. *Stay of execution of judgment of queen's bench annulling letters-patent.* After a judgment in *scire facias* in the court of queen's bench, annulling letters-patent and directing that they should be restored to the court of chancery to be cancelled, the Lord Chancellor has no jurisdiction to stay the execution of the judgment, his duty in cancelling the enrolment being only ministerial. *Regina v. The Eastern Archipelago Co.* xxvii. 549.

26. *Tenant for life—Permissive waste.* A court of equity will not interfere to make a tenant for life liable for permissive waste. *Powys v. Blagrave*, xxvii. 568.

27. *Of court of appeal.* There is jurisdiction in the court of appeal (under the stat. 14 & 15 Vict. c. 83) to correct an error in an order of the Lord Chancellor. *Attorney-General v. The Corporation of Exeter*, xvii. 421.

II. Of Courts other than the Chancery and County Courts.

1. *Of recorder of borough—License.* The recorder of a borough has no jurisdiction to hear an appeal under the 9 Geo. IV. c. 61, s. 27, against a refusal by the borough justices to grant a license to keep an inn, alehouse, or victualling-house, such jurisdiction being expressly taken away by the proviso to sect. 105 of the 5 & 6 Will. IV. c. 76. *Regina v. Recorder of Bristol*, xxviii. 291.

2. *Of courts of Scotland.* The courts of Scotland must determine how a legacy given to erect a bridge there, shall be laid out. *Forbes v. Forbes*, xxiii. 335.

3. *Of superior courts.* The concluding words of the proviso of sect. 113 of stat. 34 Geo. III. c. 78, do not by necessary implication take away the jurisdiction of the superior courts. *King v. Rockdale Canal Co.* vi. 241.

4. *Of court of admiralty.* Where property has come, in the course of law into the

hands of a receiver of admiralty droits, and he has dealt illegally with it, the court of admiralty has not jurisdiction to interfere. *Derelict Iron*, ii. 568.

5. *Of the heads of colleges of the University of Cambridge—Tradesmen.* The Vice-Chancellor and heads of the colleges in the University of Cambridge have authority to make a decree that every tradesman with whom any person *in statu pupillari* should contract a debt exceeding 5*l.* should be required to send notice thereof at the end of every quarter to the college tutor of the person so indebted, on pain of being punished by discommuning, or otherwise, as to the Vice-Chancellor and heads of colleges should seem fit. Where a tradesman, resident in Cambridge, who has violated this decree, is summoned to appear before the Vice-Chancellor and heads of houses to answer the complaint, he is not entitled to appear by counsel or attorney, as upon a judicial proceeding. Upon proof that the tradesman had violated the above decree, it was ordered by the Vice-Chancellor and heads of colleges, that no person *in statu pupillari* should contract, &c., or have any tradings or dealings with the said tradesman, and that if any person *in statu pupillari* should disobey this decree he should be punished by suspension, rustication, or expulsion, as the case should appear to the Vice-Chancellor and heads of colleges to require. *Held*, that there was no ground for a prohibition of the proceedings. *Ex parte Death*, xii. 456.

6. *Of courts at Westminster, exclusive—Dispute arising out of mortgage.* One of the rules of a benefit building society provided for referring to arbitration any dispute between the society and a member. On the refusal of the society so to refer a dispute, a member obtained an order of two justices in his favor. *Held*, that the dispute being one between mortgagor and mortgagee, arising out of a mortgage, was within the jurisdiction of the courts at Westminster only, and a *certiorari* was granted. *Regina v. Trafford*, xxix. 163.

7. *Equitable jurisdiction of courts of common law.* When the ground for equitable relief is not a complete bar to proceeding on the judgment, and a court of common law cannot pronounce an absolute judgment which will do final and complete justice between the parties, it is not matter for a defence to an action on equitable grounds within sect. 83 of the Common-law Procedure Act, 1854. No power is conferred by the above act on courts of common law to pronounce a conditional judgment or an equitable decree. *Wodehouse v. Farebrother*, xxx. 412.

8. *Fraudulent decree of House of Lords, how may be treated in inferior court.* Where a decree of the House of Lords has been obtained by the fraudulent collusion of both parties, in order, by means of that decree, to defeat the objects of public justice, or the rights of one of the nominal parties, being an infant—*semble*, such decree may be called in question even in an inferior court, and an original suit for relief may be there instituted, notwithstanding such fraudulent decree. Per Lord Cranworth, L. C. *Semble*, such fraudulent decree may even be treated as a nullity in the inferior court, and the question there arising will simply be, was it a real judgment or not? Per Lord Brougham. *Semble*, though such fraudulent decree might, perhaps, be treated by the inferior court indirectly as a nullity, if the case shows manifest gross direct fraud, yet the relief should be sought for in the house in the first instance. Per Lord St. Leonards. *Shedden v. Patrick*, xxviii. 56.

9. *Matters relating to fisheries.* Jurisdiction of all matters relating to the fisheries in the seas between England and France belongs exclusively to the tribunals designated in the treaty, or the statutes referring to such treaty. *Marshall v. Nicholls*, xii. 466.

10. *Action against foreign sovereign.* No English court has jurisdiction to entertain an action against a foreign sovereign for any thing done, or omitted to be done, by him in his public capacity as representative of the nation of which he is the head. *De Haber v. The Queen of Portugal*, vii. 340.

11. *County rate, charges on—Illegal order of visiting justices—Disallowance by sessions—Subsequent allowance.* The expenses of the house of correction at P. were

paid out of a district rate levied on only a part of the county. A bill for refreshments furnished to justices and other persons concerned in the trial of the judge of the county court for misconduct, which trial was held in the sessions court house at P., was ordered by two visiting justices to be paid by the county treasurer out of the county rates, and was so paid by him. The general sessions disallowed this as an item in his account, but at a subsequent annual session an order was made allowing it. The orders of the sessions having been brought up on *certiorari*, it was *held*, that the order of the visiting justices was not a judicial order, which the treasurer was bound to obey; that the general sessions had acted properly in disallowing the sum of 53*l.* 7*s.* 6*d.*; and that the subsequent sessions had no power afterwards to allow that sum, and that their order to that effect was, therefore, void. *Regina v. Saunders*, xxviii. 294.

12. As to jurisdiction, as depending on title, see *Adey v. The Deputy Master of the Trinity House*, xvi. 124.

13. As to jurisdiction of county courts, see COUNTY COURT.

14. As to jurisdiction of justices, see JUSTICES.

JURY.

I. QUALIFICATION OF JURORS ; RIGHT TO CHALLENGE.

II. QUESTIONS FOR THE JURY.

III. MISCELLANEOUS CASES.

I. Qualification of Jurors ; Right to challenge.

1. *Challenge of town councillor—Special jury list.* A town councillor is, by the 3 & 4 Vict. c. 108, disqualified from being a special jurymen. The name of a town councillor stood on a special jury list after it had been reduced. *Held*, that under the Irish Jury Act, 3 & 4 Will. IV. c. 91, he was liable to challenge for this disqualification when about to be sworn. *Barrett v. Long*, xvi. 1.

2. *Common-law right to challenge.* The right of challenge against a jurymen is a common-law right, which cannot be taken away except by the express terms of a statute; and *quære*, whether it is taken away by the 3 & 4 Will. IV. c. 91, except in cases where corporate bodies are parties, and kindred of affinity with a member of the corporate body, is the ground of challenge. It is not taken away by the effect of the 3 & 4 Will. IV. c. 91, in respect of a disqualification created since that statute. *Ib.*

3. *Challenge after reducing a special jury—Disqualification.* Where a challenge in respect of such disqualification was made after reducing a special jury, it was *held* not to be necessary to allege that the disqualification had arisen since the jury was reduced. *Ib.*

4. *Supplemental jurors—Verdict.* The Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 55, provides that in case of a full special jury not appearing, the sheriff shall, upon the application of either party, add to the list of such jury the names of any other disinterested persons qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the court, or can speedily be procured, so as to complete such jury, all parties having their lawful challenges against such persons. *Held*, that the want of qualification in such supplemental jurors is ground of challenge only, and in default of such challenge their verdict cannot be set aside for want of jurisdiction or irregularity. *In re Chelsea Waterworks Co.* xxviii. 542.

5. *Peremptory challenge—Special jury.* The 105th and 108th sections of the Common Law Procedure Act do not allow a right of peremptory challenge, in the case of a special jury appointed under its provisions. *Creed v. Fisher*, xxvi. 384.

II. Questions for the Jury.

1. *Whether the name of a partner was to be kept secret under a contract.* In a suit for an account, A alleged that he had been in partnership under a verbal contract for four years with B, as a pawnbroker; but that B subsequently fraudulently made over the whole stock to a new firm, into which B entered with C and D, under articles of partnership. An issue was directed to try whether these articles were fraudulent on the part of B, C, and D, and for the purpose of depriving A of his interest in the stock. At the trial, evidence on both sides was given of a partnership between A and B; but it was also proved that, during such partnership, A's name was neither over the door nor on the pawn-ticket, nor in the pawnbroker's license. The judge asked the jury to say whether they were satisfied, on the whole facts, that it was one of the stipulations of the contract between A and B that A's name was to be kept secret. To this ruling defendant's counsel took exception, inasmuch as the judge ought to have directed the jury that on such facts there was no lawful partnership. The judge overruled the exception. *Held*, the judge was right; and that it was for the jury, and not for the judge, to say whether it was one of the stipulations of the original contract between A and B that A's name should be concealed, in contravention of the statute 39 & 40 Geo. III. c. 99, s. 23. *Fraser v. Hill*, xxviii. 25.

2. *Question of acceptance of bill.* Where a declaration on a bill by an indorsee against an indorser contains an averment of presentment and a plea traversing it, but no averment of acceptance and no plea putting it directly in issue, the question of acceptance is open as a question of fact for the jury. *Weston v. Hodd*, xxvi. 278.

3. *Handwriting—Admission.* An admission of his handwriting by the defendant, and a promise to pay, though it may be evidence of notice of dishonor is not an admission of liability so as to preclude his objecting to the presentment, but this is also a question for the jury. *Ib.*

4. *Indorsement of bill.* The jury are also to decide whether the indorsement was made before the supposed acceptance. *Ib.*

5. *Libellous letter—Privileged communication.* A letter of a libellous nature addressed by the rector of a parish to his people is not necessarily a privileged communication, but it is for the jury to decide whether it is upon its face malicious or whether the circumstances show malice. *Gilpin v. Fowler*, xxvi. 386.

6. *Beginning of tenancy under written agreement.* A tenancy from year to year under a written agreement will be held by the court in the absence of evidence to the contrary to begin on the day of the date of the agreement, and it will not be left to the jury to decide when the tenancy commenced. *Bishop v. Wraith*, xxvi. 568.

7. *Idem sonans.* An indictment described the prosecutor as Darius C., and the prosecutor in evidence stated that his name was Trius C. *Held*, that it was a question of fact for the jury, and not of law for the court, whether the two words were *idem sonantia*. *Regina v. Davis*, iv. 564.

8. *Notice to quit.* Whether a notice to quit has been waived is a question for the jury. *Blyth v. Dennett*, xvi. 424.

9. *Entire case in written documents.* When, relative to a contract of sale, the entire case is contained in written documents, the parties never having had any personal communication with each other, it is for the court, and not for the jury, to decide what the contract between the parties is. *Key v. Cotesworth*, xiv. 435.

10. *Bona fides of magistrate.* In an action against a magistrate, for acts done by him in the execution of his office, the question of *bona fides* is to be decided, according to stat. 11 & 12 Vict. c. 44, by the court and not by the jury. *Kirby v. Simpson*, xxvi. 469.

11. *False imprisonment—Probable cause.* In an action for false imprisonment or malicious prosecution, the question of probable cause is a question for the court. *Per Cranworth, L. C. Fraser v. Hill*, xxviii. 25.

12. *Construction of written documents is for the court.* The rule that the construction of written documents constituting *per se* a complete contract, is for the court, is not affected by the fact that they extend, (as in the case of correspondence,) over a considerable period of time, during which various circumstances may intervene; as such circumstances, however they may be material in regard to the performance, or breach of the contract, cannot affect its construction. But the rule does not apply where the documents do not contain the entire contract, so as to require a stamp, (supposing it otherwise within the Stamp Act.) *Begg v. Forbes*, xxx. 508.

13. See, also, *Doe d. Armistead v. The North Staffordshire Railway Co.* iv. 216; *Foster v. The Mentor Life Assurance Co.* xxiv. 103.

III. Miscellaneous Cases.

1. *Party's right to have his case go to jury.* Where there is evidence that may by possibility justly lead the jury to come to a conclusion in favor of the plaintiff, he has the right to have his case go to them. Per Lord Cranworth. *Paterson v. Wallace*, xxviii. 48.

2. *Certificate that cause is fit for special jury.* A cause came on for trial, before Wilde, C. J., on the 13th of December, 1848, when a verdict was taken for the plaintiff, subject to a special case. Upon the argument of the special case, on the 11th of June, 1850, (which was after Wilde had ceased to be a judge of this court,) the court directed a nonsuit. On the 12th of September, the following indorsements were made upon the *nisi prius* record:—

“I certify that this was a fit and proper cause to be tried by a special jury.

“THOMAS WILDE.”

“It was assented to at *nisi prius*, that, in the event of judgment being for the defendants, I should certify for special jury; which I have accordingly done *nunc pro tunc*.
TRURO.”

The court refused to set aside the certificate, as being informal or too late. *Serrell v. The Derbyshire, &c. Junction Railway Co.* xii. 518.

3. *Special jury.* Where the defendant has duly obtained a rule for a special jury, and the jury has been struck and reduced, it is not competent to the court to direct that the cause be tried by a common jury, on the defendant's failure to summon a special jury. *Newman v. Graham*, xiv. 326.

4. *Thirteen jurors in box.* During trial, it was discovered that there were thirteen jurors in the box. Defendant's counsel refused to consent that one be dismissed, and it being impossible to ascertain which one was sworn last, the judge discharged the jury, directed the special jurymen to be called over again, and tried the cause by the first twelve that answered. *Held regular.* *Quære*, whether if it could have been ascertained which of the thirteen men in the box was the superfluous juror, the proper course would not have been to turn him out of the box and let the trial proceed. *Muirhead v. Evans*, iii. 587.

5. Under a precept to summon a jury *de corpore comitatus*, the sheriff may summon the whole jury from a particular hundred. *Taylor v. Loft*, xviii. 567.

6. *Opinion of jury on immaterial issue.* If a judge rightly directs a verdict on the undisputed questions of fact, it is no misdirection because he takes the opinion of the jury on an immaterial issue which is disputed by the parties. *Clarke v. Arden*, xxx. 455.

JUSTICE OF THE PEACE.

I. JURISDICTION AND QUALIFICATIONS OF.

II. ORDERS OF.

III. ACTIONS AGAINST.

I. *Jurisdiction and Qualifications of.*

1. *Over disputes between friendly society and members thereof.* Under the Friendly Societies Act, 4 & 5 Will. IV. c. 40, s. 7, if the rules of a society provide for the settlement of disputes between the society and any of its members by arbitration, justices have no jurisdiction to decide such disputes, unless the arbitrators neglect or refuse to make an award: and an erroneous award by arbitrators duly appointed cannot be treated as a nullity, so as to give the magistrates jurisdiction to hear. *Ex parte Long*, xxix. 194.

2. *To award compensation for land taken by railway company.* Justices have no jurisdiction to award damages against a railway company, for land taken or injured, where the complaint is made more than six months after the cause of complaint arose. *In re Edmunson*, xxiv. 169.

3. *To entertain second application for bastardy order—Perjury.* Perjury was committed before magistrates; upon the second application for a bastardy order, a former application having been dismissed on the merits, it was *held*, that the magistrates had jurisdiction, and that the prisoners were properly convicted. *Regina v. Cook*, ix. 551.

4. *To commit to liberty house of correction and jail.* In the liberty of A., which is situated within the county of H., there is a jail and house of correction, used only for offenders within the liberty. It is entirely supported by a rate in the nature of a county rate levied on the inhabitants of the liberty, who do not contribute to the general county rate. The keeper of the liberty house of correction is appointed by the justices of the liberty, who act under a separate commission, which does not give them exclusive jurisdiction. There is a court of quarter sessions held for the liberty. The commission under which the justices of the county of H. act, gives them jurisdiction as well within liberties as without. *Held*, that the county justices sitting out of the liberty, were authorized to commit to the house of correction of the liberty, a person guilty of an assault within the liberty, and were not bound to send him to the county house of correction. *Quære*, whether they could commit to the liberty jail, for offences committed out of the liberty. *Arnold v. Dimsdale*, xxii. 168.

5. *To convict of using false certificate to obtain license to retail beer.* The jurisdiction to convict of the offence, under the 3 & 4 Vict. c. 61, of using a false certificate for the purpose of obtaining a license to retail beer, is in the justices acting in and for the place where the offence is committed. *Regina v. Waghorn*, xviii. 251.

6. Where such a conviction was made by two justices of the county of Kent, having jurisdiction within the division in which the house sought to be licensed was situate, but not within the borough of Maidstone, in which the offence was committed, it was *held*, (Coleridge, J., *dissentiente*,) under the 3 & 4 Vict. c. 61, s. 19, the 11 Geo. IV. and 1 Will. IV. c. 64, and the 4 & 5 Will. IV. c. 85, that the jurisdiction given to such justices by the two latter statutes, did not extend to the offence of using a false certificate for the purpose of obtaining a license to retail beer, subsequently created by the 3 & 4 Vict. c. 61, s. 6, and that the conviction was therefore bad. *Id.*

7. *To convict of assault.* A party assaulted has his election of remedies, and under the stat. 9 Geo. IV. c. 31, justices have no jurisdiction to convict of an assault unless the party aggrieved complain of the assault before them with a view to their

adjudication upon it. *Regina v. Deny*, iv. 296. See, also, *Regina v. The Justices of Totness*, ii. 272.

8. *To order imprisonment in default of payment of penalty*—1 & 2 Will. IV. c. 32, s. 3—*Certiorari*. The justices have no jurisdiction under the 1 & 2 Will. IV. c. 32, s. 3, to order a defendant to be imprisoned in default of the payment of a penalty if they have not directed in what manner the penalty should be paid. In case of such conviction and order for imprisonment the conviction may be removed by *certiorari*. *Ex parte Hyde*, v. 368.

9. *To require sureties for good behavior in cases of libels against private individuals*. A warrant of commitment in substance stated, that whereas the plaintiff had been brought before the defendant, (who was a justice,) charged, on the oath of T. P., with having written on the pavement in a certain lane the offensive words, reflecting on the character of R. J. W. "Donkey Watt, the railway jackass;" and it having been stated to the defendant, on the oath of T. P., that the continued writing for some time past of the offensive words was calculated to produce a breach of the peace, and T. P. praying that the plaintiff might be required to find sureties to keep the peace, he, the defendant, ordered and adjudged that the plaintiff should enter into his own recognizance in 20*l.*, with two sufficient sureties in 15*l.* each, to keep the peace for three calendar months. *Held*, first, that the warrant put in by the plaintiff was evidence of the information recited in it. Secondly, that it must be taken that the defendant intended to require sureties for good behavior, notwithstanding the words "sureties of the peace" in the warrant. Thirdly, that a justice of the peace has jurisdiction to require sureties for good behavior in some cases of libels against private individuals. That, therefore, the defendant had jurisdiction in the matter out of which the cause of action arose, and within the meaning of the 11 & 12 Vict. c. 44, s. 1, and consequently was not liable to an action of trespass. *Haylock v. Sparke*, xviii. 269.

10. *With respect to repair of turnpike roads*. A public highway in the parish of R., and which was also a part of the turnpike road, was out of repair. An information being laid before a justice of the peace, he summoned the clerk of the turnpike road to appear at the special sessions of highways. He accordingly appeared, and the two justices who presided convicted him for having neglected to repair such part of the turnpike road. *Held*, on motion for a *certiorari* to remove the conviction, that a single justice had no authority, under the 94th section of the 5 & 6 Will. IV. c. 50, to summon a clerk or other officer of turnpike roads; and that the justices are not justified in making an order for payment of the sum of money necessary for the repair of such turnpike road, without having first examined into the sufficiency of the funds. *Held*, also, that the *certiorari* was not taken away, as the justices had acted without jurisdiction in convicting. *Regina v. The Justices of St. Albans*, xviii. 244.

11. *Qualifications*. In an action for penalties under stat. 18 Geo. II. c. 20, for acting as a justice of the peace, without being qualified, it appeared that an estate of more than 300*l.* a year was held in trust for defendant's wife for life, remainder in trust for defendant for life, remainder in trust for the children of the marriage. *Held*, that this did not qualify him. *Woodward v. Watts*, xxii. 209.

II. Orders of.

1. *Good part of, may be enforced*. An order of justices, bad in part, may be enforced as to the good part, provided that, on the face of the order, the two parts are clearly separable. *Coley, ex parte*, ii. 282.

2. *For binding parish apprentice, must show jurisdiction*. An order of justices for the binding of a parish apprentice, made under the 56 Geo. III. c. 139, must show on the face of the order itself that the justices acted at the time within their jurisdiction. Where, therefore, in the order, two justices of the county of Mid-

dlesex, by whom it was made, were described as justices of the peace "of the said county," and in the margin were the words "Middlesex, to wit," and the order purported to be signed "at the board-room of the Holborn Union Workhouse," it was *held*, that the court could not take judicial notice that the board room was in the county of Middlesex, and that the order did not show on the face of it that the justices were acting within their jurisdiction; and, being therefore bad, that no settlement by service under the apprenticeship was gained. *Regina v. Inhabitants of Bloomsbury*, xxviii. 300.

3. *Verbal order and service of minute thereof—Refusal to pay—Warrant—Trespass.* On a complaint before justices, a verbal order was made for payment of a church rate and costs, and a minute thereof next day served on the plaintiff who refused to pay. A formal order was afterwards drawn up and a warrant issued bearing the same date, which was not executed until some months afterwards, when a cart of the plaintiff's was seized under it. It did not appear whether the warrant was drawn up before or after the formal order, nor did it recite that order. Upon trespass brought for the seizure, it was *held*, that the verbal order and service of the minute justified the issue of the warrant, and that its non-recital of the order, and their both bearing the same date, and the warrants not showing that it issued after disobedience of the order were all matters of form, and the action should have been case under 11 & 12 Vict. c. 44. *Ratt v. Parkinson*, iv. 332.

4. *Payment in part does not estop party to deny legality of order.* The payment of a part of a justice's order by a person under conviction will not estop him from subsequently denying the legality of the order, he not being presumed fully to have understood the law at the time of making the payment. And if such order is removed to the queen's bench to be enforced, the defendant has a right to object to the illegality of the order, though he could not have removed the order by *certiorari*. *Regina v. Hellier*, vi. 253.

5. *Payment may be ordered immediately or time may be given—Committal ordered before demand.* Where the party charged, though duly summoned, did not appear, and the justices, after hearing the case, adjudged the party to pay a fine and costs immediately, and before demand or notice, ordered him to be committed for non-payment, under the 9 Geo. IV. c. 31, ss. 27, 33, it was *held*, that the justices might order the payment to be made either "immediately," which means in this statute "on the spot," or might give time, in their discretion; and that, as they had ordered immediate payment, they were authorized (the money not being then paid) at once to order the party's committal before any demand, and without serving him with any summons to show cause why he should not be committed. *Arnold v. Dimsdale*, xxii. 168.

6. *Justice an interested party—Waiver.* A justice, being a shareholder in a railway company, took part in the decision of an appeal on the part of the company against a poor-rate, when the rate was quashed. *Held*, that the order of sessions was thereby invalidated, and that the objection was not waived by the knowledge of the respondents' attorney, and his not objecting. *Regina v. Justices of Cambridgeshire*, xxx. 405.

III. Actions against.

1. *For any thing done under a warrant upon information for alleged indictable offence.* The 11 and 12 Vict. c. 44, s. 2, which enacts that no action shall be brought against a justice of the peace for any thing done under a warrant, upon an information for an alleged indictable offence, if "a summons were issued previously to such warrant, and such summons was served upon such person, either personally or by leaving the same for him with some person at his last, or most usual place of abode, and he did not appear according to the exigency of such summons," does not apply to a summons and warrant issued after conviction, with a view to the levying of penalties and costs. *Bessell v. Wilson*, xviii. 294.

2. *For act done under conviction or warrant issued without jurisdiction—Notice.* The 11 & 12 Vict. c. 44, s. 2, provides that no action shall be brought against a justice for any act done under any conviction or warrant issued in a matter of which he has not jurisdiction, until after such conviction or warrant has been quashed; and by section 9, no action shall be commenced against a justice of the peace, until one calendar month after notice in writing of such intended action. *Held*, that a notice of action served before the quashing of a warrant of commitment in respect of which an action was brought against the justice granting it, was sufficient. *Haylock v. Sparkle*, xviii. 269.

3. *When must be an action on the case—Declaration—Excess of jurisdiction.* By the 11 & 12 Vict. c. 44, s. 1, it is enacted that every action against a justice, for any act done in the execution of his duty as such justice, with respect to any matter within his jurisdiction, shall be an action on the case, and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause. Sect. 2 provides that for any act done by a justice in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction, &c., issued by such justice in any such matter, may maintain an action against such justice, in the same form and in the same case, as he might have done before the passing of the act. *Held*, that the two sections must be read together, and that sect. 2 applies only to those cases where the act, in respect of which the action is brought against the justice, is itself an excess of jurisdiction. *Barton v. Bricknell*, i. 298.

LACHES.

1. *Contract not allowed to be enforced in equity.* A, a merchant in Cuba, sold part of a cargo shipped by him to B, and C, who was A's correspondent in England, being informed thereof by B, made no claim until four months afterwards, when he insisted on a paramount right over B, to the cargo. *Held*, that, even assuming he had originally such right, his conduct had been such that a court of equity would not allow him to enforce it against B. *Zulueta v. Tyrie*, xxi. 582.

2. *Ignorance of rights.* A party relying on his ignorance of facts must show, not only that he had not the information, but that he could not, with due diligence, obtain it. *Wason v. Wareing*, xv. 121.

LAND.

When to be deemed money and e converso, see EQUITABLE CONVERSION OF PROPERTY. Also, *Harcourt v. Seymour*, v. 203; *In re Wharton*, xxiii. 485.

LANDLORD AND TENANT.

- I. WHAT CONSTITUTES A LEASE.
- II. TENANCY FROM YEAR TO YEAR.
- III. TENANCY AT WILL.
- IV. MUTUAL RIGHTS OF LANDLORD AND TENANT.
- V. CONSTRUCTION OF LEASES, COVENANTS, &C.
- VI. BREACH OF COVENANT; DAMAGES FOR NON-REPAIR.
- VII. RENEWAL OF LEASE; ALTERATION BY PAROL.
- VIII. LANDLORD'S TITLE; NOTICE TO QUIT.
- IX. AVOIDANCE OF LEASE BY FRAUD, &C.; ENCROACHMENTS OF TENANT.
- X. DISTRESS.
- XI. MISCELLANEOUS CASES.

I. *What constitutes a Lease.*

1. *When lease must be by deed—Intention of parties to govern construction.* The 8 & 9 Vict. c. 106, s. 3, which enacts that a lease required by law to be in writing shall be void at law unless made by deed, has made no difference in the interpretation of written instruments. The intention of the parties, as declared by the words of the instrument, must govern the construction; and where there is an instrument by which it appears that one party is to give possession of premises, and the other to take it, that is a lease, unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made. *Stratton v. Pettit*, xxx. 479.

2. *Memorandum of lease of parish house in parish book, signed by one overseer.* In 1824, J. B., a pauper of the parish of P., was put into a parish house, under the following memorandum in the parish book, signed by one of the overseers: "We, the churchwardens and overseers of the poor of the parish of P., do hereby agree to let to J. B. of the parish of P., the cottage, situate, &c., and the said J. B. doth hereby agree to quit and give up the said cottage to the parish officers at any time on one month's notice." J. B. continued in possession, without payment of rent, until 1844, when the parish officers gave him a notice to quit, signed by three only of them, which he refused to do. In 1850, J. B. conveyed the cottage to defendant. In ejectment by the parish officers, it was held, first, that there having been a disclaimer by J. B., no notice to quit was necessary. Secondly, that the memorandum, not being signed by all the parish officers or by their order, was not a lease, in pursuance of sect. 17 of stat. 59 Geo. IV. c. 12; and, therefore, thirdly, that the action, not being within sect. 5 of stat. 3 & 4 Will. IV. c. 27, was barred by section 8. *Doe d. Lansdell v. Gower*, viii. 317.

3. *Lease not executed by lessor.* A lessee took premises under a lease executed by himself but not by his lessor, and received the profits of the estate. Held, that an action of debt would not lie on his covenant for the rent, as the lessor having failed to execute the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise and under its terms. *Swatman v. Ambler*, xvi. 539.

4. *Sale of house with rent reserved till payment of purchase-money.* By an agreement, in writing, R. sold a house to S. for 150*l.*; the house was to be conveyed upon the payment of that sum; but in the mean time, and until the payment, a weekly rent was reserved. S. afterwards married the defendant. The purchase-money was satisfied, and R. died. The executors then proceeded in the county court against the defendant, to recover possession of the house. Held, on an application for a prohibition, that the relation of landlord and tenant did not exist, and, therefore, that the defendant was in as purchaser, though he had no legal title. *Banks v. Rebbeck*, v. 298.

5. For an agreement which was held to create the relation of master and servant, and not that of landlord and tenant, see *Mayhew v. Suttle*, xxvi. 139, and xxviii. 266.

II. *Tenancy from Year to Year.*

1. *When it begins—Question for court.* A tenancy from year to year under a written agreement, must, in the absence of evidence to the contrary, be taken to begin on the day when the agreement purports to have been executed; and it is for the court to decide this, not the jury. *Bishop v. Wraith*, xxvi. 568.

2. *When presumed.* *Primâ facie* a yearly rent makes a yearly tenancy, but the presumption is rebutted by the express stipulation that the demise shall continue only till the lessor shall have given the lessee six months' notice to quit. *Doe d. King v. Grafton*, xi. 488.

3. *Repairs.* As between the landlord and tenant of premises let from year to year,

there is no obligation upon the former to do substantial repairs, in the absence of an express stipulation to that effect. *Gott v. Gandy*, xxii. 173.

4. *Agreement to let—Expiration of tenancy—Notice to quit.* Under an agreement to let for three years, though it is void as a lease for three years by the stat. 8 & 9 Vict. c. 106, s. 3, the tenant holds from year to year, subject to the terms of the agreement, and is bound to quit at the expiration of the three years, without a previous notice to quit. *Tress v. Savage*, xxvi. 110.

5. *Whether tenancy from year to year, or conveyance of fee subject to rent-charge.* M. H. and W. R., granted and leased certain premises unto and to the use of J., his heirs, executors, administrators, and assigns forever, yielding and paying therefor a yearly rent. Proviso for reëntury on non-payment of rent. Covenant by J. for payment of the rent, for repairs, and for insurance. *Held*, that, in the absence of proof that the premises were, at the date of the instrument, in the occupation of tenants, and the expressed intention of the parties precluding the presumption of livery of seisin, the instrument could not operate as a conveyance of the fee subject to a rent-charge, but only to create a tenancy from year to year. *Semble*, that if it had been necessary to presume livery of seisin in order to account for the possession under the instrument, the court would have made that presumption. *Doe d. Robertson v. Gardener*, xiv. 236.

6. *Tenant for more than three years under void lease.* Where a party became tenant, for a period exceeding three years, under a lease, void at law as not being made by deed under the 8 & 9 Vict. c. 106, s. 3, and the receipts given to him for rent, which he had paid for two years, stated the rent to be payable in advance, it was *held*, that he became a yearly tenant, on the terms of paying the rent in advance. *Lee v. Smith*, xxv. 497.

III. Tenancy at Will.

1. *When created by mortgage—Notice to quit.* A mortgage contained a power of sale and then a proviso and covenant, by the mortgagee, that no sale should take place, nor any means of obtaining possession of the premises be taken, until the expiration of twelve calendar months after notice in writing of such intention had been given to the mortgagor. It also contained a covenant by the mortgagee for quiet enjoyment by the mortgagor as tenant at will to the mortgagee, on payment of a yearly rent in lieu of and as interest upon the mortgage money. The mortgagor remained in possession of the premises, but no livery of seisin was made to the mortgagor. Prior to the commencement of the action, there was a demand of possession, but no notice to quit was ever given to the mortgagor. *Held*, that the effect of the deed was to create a tenancy at will only; and that a demand of possession, without any notice to quit, was sufficient to entitle the mortgagee or his assignee to maintain ejectment. *Doe d. Dixie v. Davies*, viii. 510.

2. *How determined.* A tenant at will cannot put an end to his tenancy, even by assignment, without giving notice to his landlord. *Pinhorn v. Sonster*, xx. 501.

3. *Insolvency—Alienation.* Where a party, having created a tenancy at will, afterwards becomes insolvent, the vesting order and notice thereof to the tenant at will operate as a determination of the tenancy. But it seems that mere alienation by the lessor at will, will not determine the tenancy, as to the tenant, until he has knowledge of the alienation. *Doe d. Davies v. Thomas*, vi. 487.

4. *Alteration of, to tenancy from year to year.* After the tenant at will entered into possession there was an agreement for a lease of the premises, but no lease was ever prepared; on the back of the draft there was an indorsement made and signed between the parties; rent had been paid, and a receipt given for a quarter's rent, and a distress also had been put in by the landlord upon the tenant. *Held*, not sufficient to alter the original tenancy at will into a tenancy from year to year. *Doe d. Benton v. Frost*, xiv. 506.

IV. *Mutual Rights of Landlord and Tenant.*

1. *Death of lessee during term—Security against future breaches.* Where a lessee dies in the middle of his term, no covenants of the lease having been broken by him, the lessor is not entitled to have any portion of the assets of the deceased brought in as security against any future breaches of covenant. *King v. Mallcott*, x. 88.

2. *House under lease burnt and pulled down—Expenses.* A house occupied under a lease for years, was, during the term, burnt, and was pulled down under the provisions of the Metropolitan Buildings Act. By the lease, the tenant was exempted from paying rent for the time that the house was untenable by reason of an accidental fire. *Held*, that the expenses incurred could not be recovered from the landlord under sect. 42 of the act, which throws the burden upon "the owner of every such building, being the person entitled to the immediate possession thereof" *Ex parte Saffron Hill*, xxix. 136.

3. *Copyhold tenant—Surrender.* A copyhold tenant cannot compel his lord to accept and enrol a surrender "to such uses and in such manner as A shall appoint," which surrender is executed and to take effect in the lifetime of the copyhold tenant. *Flack v. The Master, Fellows, &c. of Downing College*, xxiv. 251.

4. *Tenant may deduct from rent property tax paid in respect of landlord.* A tenant may deduct from his rent the property tax paid by him in respect of his landlord, although the landlord is not, in fact, liable to be assessed, and has before the payment, claimed exemption, and that exemption has been subsequently allowed. *Swatman v. Ambler*, xxix. 439.

5. *Certain rates to be paid landlord—Increase of ratable value by tenant.* A demised land to B upon a building lease, at a yearly rent, clear of all rates, assessments, &c., the sewers rate, land tax, and landlord's income tax only excepted, &c. B, having by building on the land increased its ratable value, it was *held*, that he was only entitled to deduct the sewers rate and land tax upon the original rent. *Smith v. Humble*, xxix. 300.

6. *Expense of drainage.* It is not an unreasonable custom that a tenant who is bound to use and cultivate his farm according to the rules of good husbandry and the custom of the country, should be entitled on quitting the farm to charge his landlord with a certain portion of the expense of the necessary drainage of the farm done without his landlord's consent or knowledge. *Mousley v. Ludlam*, ix. 319.

7. *Ejectment—Mesne profits.* In ejectment by landlord against tenant, under 15 & 16 Vict. c. 76, s. 214, mesne profits may be recovered, although not specially claimed in the writ or issue. *Smith v. Telt*, xxiv. 483.

8. *Trade and tenant's fixtures.* A lessee, for a long term of years, of an unfinished house, covenanted with the lessor to surrender the premises at the end of the term, "together with all locks, keys, bars, bolts, marble, and other chimney-pieces, foot-pieces, slabs, and other fixtures and articles in the nature of fixtures which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging." At the time of the lease, the house was intended to be used as a tavern, and was subsequently completed and fitted up by the lessee with things necessary for carrying on the business of a tavern-keeper and licensed victualler, including various articles of the description known as "trade fixtures," and others known as "tenant's fixtures," fixed to the house in the ordinary way, and which, in the absence of any covenant to the contrary, would ordinarily be removable by a tenant. On a case stated, on an agreement to purchase of the lessee the lease and fixtures, with covenants corresponding with those in the original lease, as to whether the plaintiff could sell the fixtures, and the defendant buy and get good title, with right to remove them at the end of the term, it was *held*, on error in the exchequer chamber, that the lessee was not restrained by the covenant above set forth from selling either the trade or tenant's fixtures. *Held*, also, that a tenant during the term has a right to remove a

chimney-piece of an ornamental character put up by himself, but that he has no such right with respect to a plain chimney-piece merely because it is of marble. *Bishop v. Elliott*, xxx. 595.

9. *Defendants in ejectment not to remove fixtures.* Defendants in ejectment, having accepted an offer to leave them in possession for awhile, on condition of their not appearing to the action, must not remove fixtures in the interval. *Heap v. Barton*, x. 499.

V. Construction of Leases, Covenants, &c.

1. *Covenant for perpetual renewal.* An agreement contained in a memorial, to demise certain lands for three lives, "with a clause of renewal, provided lessee, his heirs, &c., should, within six calendar months from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half-year after the fall of such life as the sum of 11*l.* 7*s.* 6*d.* for renewing or adding such life or lives forever," is sufficiently distinct to import a covenant for perpetual renewal. *Sadlier v. Biggs*, xvii. 74.

2. *Right of entry for breach of covenant—Assignment.* E., the tenant of leasehold premises, underlet (for a less term) a portion to B., who covenanted to build thereon before a given day. B. did not build, and subsequently E. sold his interest in the premises to I., still acknowledging the underlease, using no words which showed his intention to convey his right of entry for the breach of covenant, nor did it appear whether he knew of the breach. *Held*, that the general words of the indenture did not transfer to I. the right to enter for condition broken. *Hunt v. Remnant*, xxiv. 545.

3. *Agreement by under lessee to pay rent, confined to term of his own tenancy.* The first count of the declaration averred that the plaintiffs C. and S., being tenants to H. of certain chambers, at a certain rent, payable quarterly, underlet them to the defendant, who undertook to pay the said rent to H., and agreed that if he did not do so, he would indemnify the plaintiffs in respect thereof, and that the defendant did not pay the rent to H., nor indemnify the plaintiffs. *Held*, that whether the contract meant that the defendant was to pay to H. the rent due from the plaintiffs to H., or the rent due from him to the plaintiffs under the demise, the promise of the defendant to pay did not extend beyond the term of his own tenancy. *Smith v. Lovell*, i. 374.

4. *"Occupation under a lease," meaning of.* "Occupation under a lease" means occupation of all that passed under the lease, whether in actual enjoyment and use or not, and whether known to exist at the time of the lease or not; and therefore a cellar under certain demised premises was held to be in the "occupation of the lessee under the lease," although the tenant of the neighboring tenement was in the actual use of such cellar. *Whittington v. Corder*, xiii. 503.

5. *Right of tenant for life to lease—Waste.* Tenant for life, punishable for waste, had power to lease for twenty-one years certain ancient pasture land, which she afterwards, and before any lease, had converted into garden allotments in a manner amounting to waste. The leasing power provided against "any fine, premium, or foregift being taken for the making thereof," and that "none of the lessees should be, by any clause or words therein contained, authorized to commit waste, or exempted from punishment for waste." Under this power the tenant for life has a right to lease the premises for twenty-one years, reserving rent, and to make this exception to the general covenant by the lessee not to break up the pasture land; namely, "except for the purposes of carrying out the allotment system." *Doe d. Hopkinson v. Ferrand*, vi. 404.

6. *Hedges, trees, &c., reserved to landlord.* The following stipulation in a lease not under seal: "All the hedges, trees, thorn bushes, fences, with the lop and top, are reserved to the landlord," is evidence for the landlord under a plea of leave and

license in an action against him by his tenant for entering the close and drawing the trees, when cut down, over the close. *Hewitt v. Isham*, vii. 595.

7. *Outgoing and incoming tenant—Hay and straw—“Fair valuation” and “consuming price”—Evidence.* In an action by an outgoing tenant against his landlord for the value of hay and straw left on the premises, it appeared that the plaintiff held, subject to the terms of a draft lease, by which it was agreed, first, that the tenant was to consume the hay and straw on the premises, and not to sell it except as afterwards mentioned; secondly, that the tenant might sell his hay and wheat straw, (except the last year's,) provided for each load he brought back two loads of dung or equivalent manure on the lands; and, thirdly, that all the hay and straw not used for fodder arising from the last year's crop should be left on the determination of the tenancy, the tenant being paid at a fair valuation. It appeared in evidence, that the words “fair valuation” had been substituted in the draft for the words “consuming price.” An umpire who had valued the hay and straw, neither at a market price nor at a consuming price, but a fair valuation between outgoing and incoming tenant, was the only witness as to the value. The amount at a “consuming price” had been paid into court, and a verdict was given for the amount of the “fair valuation.” It was contended, for the defendant, that, according to the terms of the agreement, a “fair valuation” must mean a “consuming price.” The court held, without considering the effect of the alteration in the draft, that the plaintiff was entitled to keep his verdict, it being a matter of evidence what is a “fair valuation,” and the only evidence on the subject being that of the umpire. *Cumberland v. Lady Glamis*, xxviii. 377.

8. *Rights of outgoing tenant—Custom of country.* A testator, being the owner of B. and the lessee of certain crown lands, and being desirous of selling B., entered into a negotiation with the plaintiff for the sale thereof, and let to the plaintiff for one year B., by an agreement, in which the testator agreed that if he should be able to obtain a further lease from the crown he would grant the plaintiff the same. By a subsequent agreement, the plaintiff, after stating that he was desirous of securing the occupation of the lands, held by the testator of the crown, agreed to take the said lands belonging to the crown, as under-tenant to the testator, “subject to the same rents, covenants, and obligations in all respects as provided for in the leases by which Mr. C. (the testator) holds or shall hold the same.” By the terms of the crown lease the custom of the country, which was, that the landlord should pay to the outgoing tenant for fallows, half fallows, &c., was excluded. The plaintiff, on entering upon the crown lands, paid the testator for fallows, half fallows, &c. The crown lease, at the request of the plaintiff, not having been renewed by the testator, but having expired by effluxion of time, it was held, that the plaintiff, as outgoing tenant, was entitled to be paid by the executors for fallows, half fallows, &c., the custom of the country to that effect not having been excluded by the agreements between the parties. *Faviell v. Gaskoin*, viii. 526.

9. *Merger—Assignment operating as new lease.* A, the plaintiff, demised certain premises to B for a term of years, subject to the payment of yearly rent, and covenants for repair. B subsequently assigned to A, by way of mortgage, the residue of the term, subject to the rents and covenants, with a power of sale. A, by deed, “bargained, &c.,” to the defendant, the said premises, for the residue of the term, subject to the rents and covenants as aforesaid. The defendant covenanted as aforesaid, and entered the premises. Held, that although the term of years was merged by the mortgage to the lessor, the effect of the conveyance to the defendant was to create a new term of the same duration as the unexpired part of the old term, and that the defendant was liable upon the covenants to pay the rents, and to perform the repairs. *Cottee v. Richardson*, viii. 498.

10. *Merger of part of reversion—Surrender—Suspension of right of action—Apportionment of covenant.* Declaration, that A, lessee for a term of years, underlet the premises during said term to B and C, they covenanting to deliver up the premises in

good repair at a time previous to the expiration of the original lease. That the said B and C entered upon the premises; that afterward A sold the reversion of the term to B and the plaintiffs; that C then assigned his interest to B. B died before the termination of the lease from A to B and C. Breach, non-repair by C after B's death. *Held*, that the declaration was good, as the whole of the reversion which remained was vested in the plaintiffs alone, in respect of which they were entitled to sue on the covenant to repair. That under the conveyance by A to B and the plaintiffs, one third of the reversion was at once destroyed by coalescing with half the interest under the lease which was in B; and that, consequently, B never took as reversioner; and there never was any suspension of the right of action by reason of B being a party to sue and be sued. That even if B took and remained interested in one sixth of the reversion until that one sixth was destroyed by the assignment to him by C, still, the right of action for not leaving in repair, which arose only at the termination of the lease, never accrued to S., and therefore was never suspended; the doctrine of a right of action being gone by, suspension applying only to the case where there has once been a subsisting right of action, and not to a case where the objection is, that if it had accrued earlier, it could not have been enforced from the fact of the same person then being the party both to sue and be sued. That the plaintiffs might recover on the privity of contract, transferred by the 32 Hen. VIII. c. 34, although there were an apportionment of the covenant to repair; but that, in the present case, there was no such apportionment, as the plaintiffs had the whole existing reversion, and were injured if the whole of the premises were not kept in repair. That the plaintiffs might recover on the privity of contract, transferred by the statute of Hen. VIII., where the entire interest in the covenant had not passed to them. *Baddely v. Vigurs*, xxvi. 144.

11. *Covenant by lessee to finish houses demised to satisfaction of lessor's surveyor—Condition precedent—Right of reëntree—Assignment.* H. demised land and unfinished dwelling-houses to defendant, who covenanted to finish said houses by a certain date, "under the direction and to the satisfaction of H.'s surveyor." Proviso for reëntree and repossession by H., on default. Subsequently, H. assigned the premises to plaintiff, with all his estate, right, &c., therein, subject to the defendant's lease. The houses were not finished, and ejectment was brought. No surveyor had been appointed. *Held*, first, that the appointment of a surveyor was a condition precedent to the liability of the defendant to finish the houses. *Semble*, that there existed a right of reëntree, and that the forfeiture was waived by the assignment. *Hunt v. Bishop*, xx. 542.

12. *Covenants running with the land—Condition precedent—Pleading.* Covenant by the administratrix of the lessor, R. L. M., and the assignee of the lessee, (W. E.) The declaration was upon an indenture containing a covenant by W. E., that he would, at his own costs, repair and put into good repair, all the messuages, &c., the said W. E. having been allowed by the said R. L. M. 400*l.* 17*s.* 8*d.*, being the valuation of the then dilapidations, exclusive of naked rough timber, (but not on the stem,) which was to be all owed by the said R. L. M., on some part of the demised premises, and that the said W. E. would, at his like costs, from time to time and at all times during the remainder of the term, repair and keep in good repair, the said messuages, &c., being allowed timber as aforesaid, and would deliver up the premises so repaired, at the expiration of the said term, and also would, during the said term, in every instance not in the indenture specified, use and cultivate the premises in a good husbandlike manner, and according to the custom of the country. There were also specific covenants as to the mode of cultivation. Covenant by R. L. M. to find and provide timber as aforesaid, to enable the said W. E., his executors, administrators, and assigns to repair and put in repair the said premises, and after they had been put into good repair by and at the expense of the said W. E., his executors or administrators, the said R. L. M. would, during the remainder of the term, from time to time, within

one month after request made, such request being made at a seasonable time of the year, find and provide sufficient rough timber as aforesaid, and also bricks, &c., for repairing the premises. *Held*, first, that the covenants to repair and yield up the premises in repair ran with the land, and were continuing covenants to the end of the term. Secondly, that readiness and willingness to find rough timber was a sufficient performance of the condition precedent relating thereto. Thirdly, that the allegation of the breach for non-cultivation, according to the custom of the country, was sufficiently certain, as it followed the words of the covenant. And, fourthly, that the third plea, alleging that materials were not found by the lessor was bad, as the breach to which it was pleaded was in respect of not putting the premises in repair, and the condition for providing the materials mentioned in the plea applied only to the future repairs, after the premises had been put in repair. *Martyn v. Clue*, xvi. 262.

13. *Performance of all covenants by lessees a condition precedent to their right to determine lease.* Where a lease containing numerous covenants on the part of the lessees, some of little importance and almost impossible to be fulfilled, provided that if the lessees should desire to quit the premises at any one of certain fixed periods during the term, and should give, &c., notice in writing of such desire, "then and in such case, (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed,) this lease, and every clause and thing herein contained, shall, &c., cease, determine, and be utterly void, to all intents and purposes, in like manner as if the whole of the said term had then run out and expired, but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained:" it was *held*, that the performance of all the covenants by the lessees was a condition precedent to their right to determine the lease. *Friar v. Grey*, v. 480; *Grey v. Friar*, xxvi. 27.

14. *Leases by tenant in tail in remainder—Ejectment.* Tenant in tail in remainder, during the lifetime of the tenant for life, demised for several terms of ninety-nine years, at different dates, to commence immediately. In ejectment by one of the posterior lessees, it was *held*, that by virtue of stat. 4 Ann. c. 16, s. 9, the leases, without entry of the lessees, operated not by way of *interesse termini*, but as grants of estates or interests out of a remainder to which the tenants of the preceding estates had attained. *Doe d. Agar v. Brown*, xx. 88.

15. *What passes by.* Under a lease of "all that messuage or tenement, called, &c., now or late in the occupation of C.," the boundaries given not accurately defining the premises, it was *held*, that a "gateway" under a portion of the messuage, and leading to a yard behind, in which were some small houses, not included in the demise, the tenants of which had always used the gateway, did not pass, in the absence of evidence to show that it had been in the exclusive occupation of C. *Dyne v. Nutley*, xxvi. 356.

16. *Lease granted under power—Lessee not estopped to dispute lessor's title—"Assigns," meaning of.* A lease, granted under a power contained in a settlement, recited the title of the lessor, and showed that he had only an equitable interest. A right of reëntry for a breach of the covenants in the lease was reserved to the lessor and his assigns. *Held*, first, that the lessee was not estopped from disputing the title of the lessor so disclosed in the lease; and, secondly, that "assigns" meant assigns of the settlor; and that although the right of reëntry could not be well reserved to the lessor, yet that the owners of the reversion under the settlement for the time being were entitled to take advantage of it as "assigns." *Greenaway v. Hart*, xxv. 311.

17. *Place of payment of rent.* Where a lessee covenants to pay rent at the time and in the manner reserved in the lease, no place of payment being named, it is no defence to an action upon the covenant that the lessee was upon the land demised on

the day the rent became due, with the money ready to pay the lessor, but that the lessor was not there ready to receive it. *Haldane v. Johnson*, xx. 498.

18. *Rent payable in advance when demanded—Right of distress.* The defendant let premises to a tenant, from the 15th of June, 1851, for five years, at a yearly rent of 100*l.*, to become due and payable in advance, (if demanded,) by equal quarterly payments, on the 15th of September, December, March, and June respectively in every year: "Provided always, that if the yearly rent hereinbefore reserved, or any part thereof, shall be in arrear and unpaid for twenty-one days next after any of the days hereinbefore appointed for payment thereof in advance, being first lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded," then the lessor should have power to reënter, &c. No rent was demanded until August, 1852, when, upon its not being paid, the defendant distrained. *Semble*, that the construction of this demise was, that the rent was payable in advance, but was not to be actually paid until demanded, and, therefore, that the defendant was entitled to distrain. *Williams v. Holmes*, xx. 370.

19. *Covenant in imperfect instrument to execute proper lease.* If A, being seised in fee, executes an imperfect instrument purporting to be a lease covenanting to execute a proper lease on request, the lease so executed is valid, though A in the mean time had become a tenant for life only. *Sadlier v. Biggs*, xxvii. 74.

20. *Implied agreement to pay for use and occupation.* A agreed to lease certain premises to B, at a fixed rent; the rent not to commence till A had made certain repairs. B entered and occupied the premises half a year, and then left because A did not make the repairs. *Held*, that there was evidence of an implied agreement on the part of B, to pay for his occupation what it was worth. *Smith v. Eldridge*, xxvi. 285.

21. *License, coupled with an interest in land.* The agent of B., the lessor, wrote to the lessee, in relation to fixtures put up by him: "Mr. B. has no objection to your leaving the fixtures on the premises and making the best terms with the incoming tenant." *Held*, that this document, if it gave a license at all, gave one coupled with an interest in land; and that, therefore, not being under seal, it could not be enforced against the incoming tenant. *Ruffey v. Henderson*, viii. 305.

22. *Premises tithe free.* Replevin. Avowry, that the plaintiff was tenant to the defendant, at a rent of 400*l.* a year. The defendant being the owner of a farm and lessee of the tithe commutation rent-charge, under the Dean and Chapter of W., at a rent of 60*l.* a year, let the land verbally to the plaintiff, at a rent of 400*l.* a year, tithe free. *Held*, that as by the 80th section of the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, in the event of the defendant distraining for the tithe rent, she would be compelled to allow the same to the plaintiff in account; the plaintiff was tenant to the defendant, at a rent of 400*l.*, and therefore that the avowry was proved. *Meggison v. Bowes*, xiv. 364.

VI. Breach of Covenant; Damages for Non-repair.

1. *Covenants to pay rent and cultivate in husbandlike manner—Injunction.* A lease for years was executed for certain building purposes, but it contained, besides a covenant to pay rent, a covenant by the lessee to cultivate the part not required for the buildings in a good and husbandlike manner. There having been a breach of the covenants to cultivate and to pay rent, an action of ejectment was brought and judgment was recovered against the lessee, and the court refused an injunction to restrain execution. *Hills v. Rowland*, xxi. 434.

2. *Covenant to pay rates and taxes—Proviso for reëntry.* If a lease contain a covenant in the usual form by the lessee to pay all rates and taxes, and a proviso for reëntry on breach, the non-payment, within a reasonable time, of a poor-rate, is a breach justifying the reëntry of the landlord; and it is not necessary to show that the

rate has been demanded of the tenant, or that any express notice has been given him. *Davis v. Burrell*, v. 417.

3. *Covenant to deliver up premises with all things affixed at end of term.* The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises, and to deliver up the same at the end of the term, together with all things affixed thereto. *Doe d. Burrell v. Davis*, i. 403.

4. *Agreement for lease—Breach of proposed covenants.* An agreement was made for a lease and the covenants specified. The lessee entered, but the lease was not made. The conduct of the lessee amounted to a breach of the proposed covenants, if they had been made. *Held*, that the court would not decree a specific performance of the agreement for a lease at the suit of the lessee, as, if it had been made, the lessor would have had a right to terminate it for breach of covenant. *Gregory v. Wilson*, x. 133.

5. *Covenant for quiet enjoyment—Eviction by prior appointee of lessor.* A. B. covenanted with his lessee for quiet enjoyment as against any person claiming by, from, or under him. *Held*, that an eviction by a prior appointee of A. B. was a breach of the covenant, and that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might, or could." *Calvert v. Sebright*, xv. 125.

6. *Covenant that lessee will insure in joint names of lessor and himself and their assigns—Action by assignee of the lease for breach.* A lease, containing a covenant "that lessee will insure at his own expense, in the joint names of the lessor, his heirs and assigns, and the lessee, his executors, administrators, and assigns, in such fire office as the lessor, his heirs or assigns, shall direct," was assigned. Before the assignment there was no breach of the covenant of which the assignee could take advantage. At the time of action of ejectment brought by assignee for an alleged breach of this covenant the premises were uninsured; but there was no evidence that defendant had notice of the assignment at the time when it was claimed the right of entry accrued. *Held*, that there was no breach of covenant working a forfeiture after the assignment, as the insurance was to have been effected in the joint names of the lessee and lessor, and their assigns, and the lessee did not know who the assignee was so as to be able to effect insurance in his name. *Crane v. Batten*, xxviii. 137.

7. Lessee covenanted to insure the demised premises in the joint names of the lessor and lessee. The premises afterwards became vested in an under lessee, who insured in the name of the original lessor alone, or of his representatives. It was not known whether the original lessee was alive or dead, or who was his representative. *Held*, that this was a sufficient compliance with the covenant, so as to prevent the lessor from taking advantage of a proviso in the lease, for reëntury on non-performance of the covenants. *Havens v. Middleton*, xvii. 263.

8. *Damages for non-repair—How estimated.* In estimating the damages for non-repair of a building which the tenant was bound to repair and which was burned, he is to be allowed the difference between its value before the fire, and when rebuilt. *Yates v. Dunster*, xxx. 590.

9. *Action against assignee of lease.* Covenant by a lessee against an assignee for damages for non-repairs, whilst he was such assignee. It appeared in evidence that after holding a time the defendant assigned to another person, who afterwards assigned to another, and that the premises were out of repair at the time of the assignment by the defendant. No evidence was offered to show the condition of the premises at the time of the assignment of them by the plaintiff to the defendant. The plaintiff had been obliged to pay the owners a substantial sum for dilapidations. *Held*, that the plaintiff was entitled to substantial damages. *Smith v. Peat*, xxiv. 471.

10. *Declaration—Evidence—Misdirection.* In an action for non-repair of premises mentioned in the declaration only as "the premises particularly described in the

lease," it was proved that there had been a notice to repair the premises, particularly describing them, and that before action plaintiff's surveyor had made an estimate of the dilapidations, and stated the amount to the defendant, (who promised to pay it,) and that particulars of breaches had been delivered in the action in the same terms as the notice to repair. *Held*, that there was sufficient evidence of the amount of damage; and that a direction for nominal damages, on the ground that the premises were not identified, was wrong. *Mapleton v. Rawlings*, xxx. 502. •

VII. *Renewal of Lease ; Alteration by Parol.*

1. *Renewal by adding cestui que vie—Payment for renewal.* If a lease, which the testator had directed to be renewed, be renewed by adding a *cestui que vie*, the costs and premiums of a policy of life insurance to secure the payment for the renewal ought to be paid out of the rents and profits of the estate to which the tenant for life is entitled; and the tenant for life is bound not only to bear the interest of the sum, but also to contribute towards the payment of such sum. *Hudlestone v. Whelpdale*, xv. 220.

2. *Expenses of renewal—Refusal to renew—Laches.* An under lessee, with a right to renew, must pay the proportion of fines and expenses of a renewal demanded of him by the mesne landlord, or apply himself without delay to a court of equity to assess the amount. If he delays both the payment and the application after due notice from the mesne landlord, the fact that an unreasonable sum was demanded will not excuse his laches. The time from which the lessee will be deemed to have refused to renew is to be computed from the time at which the mesne landlord applies to the under lessee to contribute to the expense of the renewal. *Chesterman v. Man*, xii. 192.

3. *What constitutes new demise.* A, by a contract in writing, demised to B, at a yearly rent of 145*l.*, from the 14th of May, 1851, certain premises, including a cottage occupied by C, at the rental of 5*l.* a year. B took possession of all the premises included in the demise, except the cottage, as C refused either to go out, or to attorn to B. Before the day fixed for the first half yearly payment of rent, A and B verbally agreed that A should receive from C some arrears of rent, and that A should pay B 70*l.* on the 14th of November, 1851, and 70*l.* on the 14th of May, 1852. *Held*, that this was a new demise, and that A was entitled to distrain for the 70*l.* due on the 14th of November. *Watson v. Ward*, xx. 391.

4. *What does not constitute new demise.* The defendant entered into a written agreement with the plaintiff to take certain premises at a rent of 20*s.* a week. During the continuance of this tenancy, a verbal agreement was made between the parties, that the rent should be 16*s.* a week, and the defendant for several weeks paid this reduced amount, and on one occasion submitted to a distress. *Held*, that there was no fresh demise, and that the original rent continued to be the rent payable for the premises, and the county court, therefore, had no jurisdiction in the premises. *Crowley v. Vitty*, ix. 501.

VIII. *Landlord's Title ; Notice to quit.*

1. *Waiver of right to call for.* Circumstances under which a party who had agreed to take an underlease, was held to have waived his right to call for the lessor's title. *Simpson v. Sadd*, xxxi. 385.

2. *Tenant, sued for use and occupation may show that landlord's title expired during tenancy—Jurisdiction of county court.* A tenant, sued for use and occupation of premises by the landlord of whom he took them on lease, is at liberty to show that the latter's title expired during the tenancy, even though the tenant continued to enjoy or occupy the premises for the whole term, without being subjected to any eviction

from the real owner; and if the tenant sets up such a defence when so sued in a county court, that court has no longer any jurisdiction to decide the cause, as title to land has come in question. *Mountney v. Collier*, xvi. 232.

3. *Waiver of notice—Question for jury.* Though payment and acceptance of rent accruing after the expiration of a notice to quit amounts to a waiver of the notice, a demand of such rent does not necessarily operate as a waiver, and it is a question for the jury, and not for the court, whether under the circumstances of the case, the notice has been waived. *Blyth v. Dennett*, xvi. 424, and see note.

4. The defendant entered as tenant, under a written agreement, on the 7th of May, 1850, but paid no rent. Held, that a six months' notice to quit, expiring on the 7th of May, 1851, was a good notice. *Doe d. Cornwall v. Matthews*, xx. 295.

See TENANCY FROM YEAR TO YEAR, 4; WHAT CONSTITUTES A LEASE, 2; TENANCY AT WILL, 1.

IX. Avoidance of Lease by Fraud, &c. ; Encroachments of Tenant.

1. *Collateral fraudulent representation.* A, the owner of premises, leased them to B, who represented himself as a respectable man carrying on a respectable business. B was not a respectable man, and at the time intended to use the premises for an immoral and illegal purpose. He afterwards entered and did so use them, and A forcibly evicted him. In ejectment by B to recover possession of the premises, it was held that A could not avoid the lease on the ground of B's fraudulent misrepresentation as to the intended use of the premises,—a matter collateral to the lease. And that B was to recover, as he was not enforcing an illegal contract, but merely seeking to regain possession of a term legally vested in him by the lease and entry. *Feret v. Hill*, xxvi. 261.

2. *Lessor not bound to disclose condition of house.* Where the intended lessor of a particular house knows that the house is in a ruinous state and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief in the soundness of the house in agreeing to take it, or unless the conduct of the lessor amounts to a deceit practised upon the lessee. *Keates v. Cadogan*, ii. 318.

3. *Encroachment on waste, presumed to be for benefit of lord.* Where a tenant, who holds under the lord of a manor, encroaches upon a waste, he is presumed to do it for the benefit of the lord. But evidence may be introduced to prove a different intention at the time of making the encroachment. *Doe d. Croft v. Tidbury*, xxiv. 340.

4. *Inclosure by tenant of land not belonging to landlord, and occupation for twenty years—Presumption of fact.* Where a tenant incloses a portion of land which does not belong to his landlord, and occupies it for upwards of twenty years with and as parcel of the demised premises, the presumption at the expiration of the lease is, that as against the tenant it is included in the tenancy, and not that the encroachment was made for the benefit of the landlord. This presumption is one of fact, not of law. *Andrews v. Hailes*, xxii. 139.

X. Distress.

1. Goods are privileged from distress during the time they are on the premises of an auctioneer, for the purposes of sale by auction. *Williams v. Holmes*, xx. 370.

2. *Bill of exchange taken from tenant for rent by landlord's agent without authority, and afterwards dishonored.* A tenant being indebted to his landlord for rent, the agent of the landlord, without his authority or knowledge, took a bill of exchange from the

tenant for the amount of the rent, and paid over the amount of the rent to the landlord in his settlement of account. The bill was afterwards dishonored whilst in the hands of a third party, and the rent was not paid by the tenant, whereupon the landlord distrained. *Held*, to be a question for the jury, whether the bill was discounted for, or the money lent to the tenant by the agent, or whether it was an advance by the agent to the landlord; and that if the bill was discounted for, or the money so lent to the tenant, the landlord was not entitled to distrain; otherwise he was entitled. *Parrott v. Anderson*, xiv. 371.

3. So in another case where, on the rent becoming due, the agent for both tenant and landlord paid the amount of rent to the landlord without any authority from either party, and the tenant afterwards failed to pay the rent, and the landlord distrained. *Griffiths v. Chichester*, xiv. 372.

4. *Hay distrained and sold on condition of being consumed on premises—Action for not selling for best price.* A landlord distraining his tenant's hay made on the premises, and selling it subject to a condition that it shall be consumed by the purchaser on the premises, by reason whereof it produces less than the usual price, is liable to the tenant in an action for not selling for the best price, notwithstanding that the latter was under covenant by his lease to consume such hay on the premises. *Ridgway v. Stafford*, iv. 453.

5. *Distress of goods fraudulently removed.* By statute, if any tenant shall fraudulently carry off the premises his goods, to prevent the landlord from distraining the same for arrears of rent so reserved, due, or made payable, the landlord may within thirty days take such goods, wherever the same shall be found, as a distress for the said arrears of rent. Plaintiff was tenant of a house from Michaelmas day, 1852, at a rent payable quarterly. On the morning of Christmas day he fraudulently removed all his goods from the demised premises. On the following day defendant followed the goods, and distrained them. In trespass against defendant, it was *held*, that the rent being due and payable on the quarter day, defendant was justified under the statute. Crompton, J., dissenting. *Dibble v. Bowater*, xx. 76.

6. *Withdrawal—Notice of proceeding in bankruptcy—Second distress on same goods for same arrears of rent.* Half a year's rent being due from a tenant, who had committed an act of bankruptcy, his landlord put in a distress and was about to sell, but in consequence of a notice from the petitioning creditor, stating that he was proceeding against the tenant in bankruptcy, and requiring the auctioneer not to sell, and threatening to hold him accountable if he did, the landlord withdrew the distress without obtaining payment. At that time no adjudication of bankruptcy had been made, nor had any assignee been appointed. *Held*, that the landlord was not justified in afterwards distraining a second time on the same goods to satisfy his claim for the same arrears of rent. *Bagge v. Mauby*, xx. 460.

7. *Second distress.* A landlord, having distrained for rent, was induced to withdraw the distress, by the tenant's assurance (which was false) that a particular debt had been satisfied. The creditor having proceeded to judgment and execution, the tenant's goods were seized by the sheriff. *Held*, that the landlord was entitled to a year's rent, under the stat. 8 Anne, c. 14. *Wollaston v. Stafford*, xxix. 263.

8. *Lease of copyhold—Mortgage of lease—Tenancy at will—Title.* J., tenant of a copyhold, leased it, and died during the term; his devisees, being admitted tenants, leased to M. who had purchased the residue of the first lessee's term. He leased to Q., who mortgaged the lease to defendant, with proviso that Q. should hold as tenant at will of defendant, who might distrain for rent. Q. assigned to E., without notice to defendant, who subsequently distrained for rent due. The warrant was against Q.'s goods; plaintiff's goods, on the premises, were taken. *Held*, in an action of trespass, that the above deed created a tenancy at will; and that the distress was regular. *Held*, also, that a sufficient *prima facie* title was made out without proof of the death of J. *Pinhorn v. Sonster*, xx. 501.

9. *Lease by joint tenants—Assignment of reversion by one.* Where rent has become due under a lease made by several joint tenants, an assignment of the reversion by one does not alter the nature of the bygone rent, and therefore the right of distraining for it is gone. *Staveley v. Alcock*, v. 326.

XI. Miscellaneous Cases.

1. *Change of tenancy by acceptance of rent.* A house being let to A, A died, leaving B and C her executors. B continued to pay the rent, and it appeared to be the intention both of B and the landlord that B should be substituted in the tenancy; but C, the other executor, knew nothing of the intended change. *Held*, that such change was inchoate only, and not perfected; and therefore A's estate still continued liable on the lease. *M'Donnell v. Pope*, xiii. 11.

2. *Rent, when a specialty debt.* Rent due ranks as a specialty debt where the relation of landlord and tenant exists in respect of lands within the jurisdiction; and that, whether the demise be by writing or upon a constructive tenancy from year to year. But the doctrine being founded in privity of estate, will not apply where the lands, the subject of the demise, are out of the jurisdiction. *Vincent v. Godson*, xxvii. 558.

3. *Assignment of right of entry for condition broken.* The 8 & 9 Vict. c. 106, s. 6, does not authorize the assignment of a right of entry for condition broken; but it relates only to an original right where there has been a disseisin, or where the party has a right of entry, and nothing but that remained. *Hunt v. Bishop*, xx. 542.

4. In carrying an informal contract for a lease into effect, the Master will be directed to regard previous leases containing special covenants. *Bell v. Barchard*, xi. 67.

5. *Forfeiture and reentry—Distress on under lessees—Bill for amount of rents.* The plaintiff demised a number of small leasehold houses to the defendant, who, having committed a forfeiture, the plaintiff reentered and determined the lease. The defendant thereupon distrained on the tenants, and prevented the plaintiff taking possession and repairing, and the plaintiff apprehended a forfeiture. The defendant had also, being insolvent, received the rents; and, in consequence of his conduct, the property had become greatly depreciated, and some of the houses had been abandoned by the tenants. The bill prayed an account of the rents, an injunction to restrain the defendant from receiving the rents and distraining, and that the right might be determined under the court. A general demurrer was allowed. *Aldis v. Fraser*, xix. 273.

6. *Sale of crops on farm—Purchaser bound by terms of lease.* The 11th section of the 56 Geo. III. c. 50, is not confined to sales of farming stock and crops on land let to farm, by the sheriff under an execution, but applies to an ordinary sale by the tenant himself, and a purchaser from the tenant is bound by the terms of the lease under which the tenant holds. *Willmot v. Rose*, xxv. 217.

7. Under a parol demise, the law will imply an agreement for quiet enjoyment, but not for good title. *Bandy v. Cartwright*, xx. 374.

8. *Demise by two tenants in common, and death of one.* In case of a demise purporting to be a joint demise by two tenants in common, with a general *reddendum* not specifying to whom the rent is payable, the rent follows the reversion, and, on the death of one of the lessors, the reversion is split, and the survivor becomes entitled to his share of the rent. *Beer v. Beer*, ix. 468.

9. *Non-completion of a purchase of a lease—Agreement to keep insured—I. O. U.* A brought an action against B for not completing the purchase of a lease held by A, who had agreed to furnish a good title; the lease contained a covenant to keep insured, with a proviso of forfeiture and reentry by the lessor for breach of covenant. A had not paid the last premium previous to the agreement until a month after it was due. B had given his I. O. U. for part of the purchase-money. *Held*, that A had incurred a forfeiture, which the lessor could still enforce, and B had a good defence. Also, that A could not recover on the I. O. U., it being only evidence of an account

stated, on which B was not indebted, and that the general issue covered this defence. *Wilson v. Wilson*, xxv. 392.

10. *Lease from two trustees—Death of one—Action for use and occupation by survivor in his own right.* The defendant being in possession of certain premises under a lease from two trustees for a term which had expired, a new lease was granted for a further term, but was executed by one of the trustees only. The defendant paid rent to both trustees until one of them died; and for the rent due after his death, the other trustee brought an action for use and occupation. *Held*, that he might maintain the action in his own right, and was not bound to sue as surviving trustee. *Wheatley v. Boyd*, xii. 552.

LARCENY.

I. WHAT IS LARCENY; SUBJECT OF LARCENY.

II. RECEIVING STOLEN GOODS.

III. PLEADING; EVIDENCE; VENUE.

I. *What is Larceny; Subject of Larceny.*

1. *Selling a lamb inadvertently driven away for prisoner's use—Denial of knowledge of the fact.* Where a man drove away a flock of lambs from a field, and in doing so, inadvertently drove away along with them a lamb, the property of another person, and, as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it, it was *held*, that as the act of driving the lamb from the field, in the first instance, was a trespass, as soon as he appropriated the lamb to his own use, the trespass became a felony. *Regina v. Riley*, xiv. 544.

2. *By artifice inducing a party to draw a check—Misappropriation of notes and coin.* Two men, J. and W., acting in concert, and intending to defraud S., entered the shop of S. and by means of an artifice induced him to draw a check on his bank for 42*l.*, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to S. of forty-two sovereigns, and that the prisoner W. was to remain at the shop till J. and S. went and returned from the bank. At the bank, by the desire of S., the banker handed four ten pound notes and two sovereigns to the prisoner J., in the presence of S. The prosecutor S. and the prisoner J. left the bank together, and while on their way back to S.'s shop, J. went into an inn-yard, and promising to return immediately, absconded with the four ten pound notes, and the two sovereigns, which he and the prisoner W. (who in the meantime had gone off from the shop with the forty-two sovereigns) appropriated to their own use. *Held*, that the misappropriation of the notes and two sovereigns was larceny, S. never having parted with the property and possession in them, and the prisoner J. having had no more than the bare custody of the money which he carried off. *Regina v. Johnson*, xiv. 570.

3. *Alteration by prisoner of his own gas pipes so as to defraud gas company.* It was *held* to be larceny to defraud a gas company by connecting the pipe leading to the meter with that leading from it so as to use gas without its passing through the meter; and this, although both these pipes were the property of the prisoner. Certain penalties imposed by the local act of the company were held additional punishment, and not to reduce the crime below felony. *Regina v. White*, xx. 585.

4. *Servant stating false account of moneys paid out—Embezzlement.* If a servant whose duty it is to pay and receive moneys, make a false statement of accounts to his master, charging him with more than he had really paid out, he cannot be convicted of larceny, the offence, at most, being that of obtaining money by false pretences. *Regina v. Green*, xxiv. 555.

5. *Severing watch and chain from the person for an instant.* A prisoner was found guilty of larceny in stealing a watch and chain, having severed them from the person of the owner for an instant, though the chain caught on a button in the act, and the watch remained suspended. *Regina v. Simpson*, xxix. 530.

6. *Agreement upon the purchase of one dress to throw in another—Subsequent refusal—Taking money from prosecutrix's hand.* The prisoners offered to the prosecutrix a dress for sale at 25s., saying that if she would give that price for it, she should have another dress, which was produced, worth 12s. into the bargain. The prosecutrix agreed to this, and took twenty-one shillings from her pocket. One prisoner opened her hand and took the money out, though not forcibly. He then declined to take the other 4s., but laid down the dress first produced, and refused to let the prosecutrix have the other. The dress proved to be of little value. *Held*, that the prisoners were properly convicted of larceny. *Regina v. Morgan*, xxix. 543.

7. *Buying goods and promising ready money, but hastily taking them away without payment.* A bargained with B for the purchase of goods, promising to pay ready money for the same, and, after agreeing upon the price, he took them to his carriage, B supposing that he was immediately to return to pay for the goods, instead of which he jumped into his carriage, rode away, and absconded for two years. *Held*, larceny in A. *Regina v. Cohen*, v. 545.

8. *By a bailee—Fraudulent appropriation of goods.* The prisoner was employed by the prosecutor to sell clothes on commission. The prosecutor fixed the price of each article, and the prisoner was intrusted with the articles to sell at that price, and was to bring back the money or the goods if they remained unsold. The prisoner took away a parcel of clothes on these terms, but instead of selling them fraudulently pawned part and fraudulently applied the residue to his own use. *Held*, that there was but one bailment of all the separate articles forming the parcel; that the original bailment was determined by the pawning part; and that the subsequent fraudulent appropriation of the residue amounted to a larceny. *Regina v. Poyser*, iv. 565.

9. *Removal of master's bags by servant—Accessory before the fact.* The prisoner M. had the charge of the prosecutor's warehouse, in which bags were kept; the prisoner S., for some years had been in the habit of supplying the prosecutor with bags, which were usually placed outside the warehouse, and shortly after so leaving them, either S. or his wife called and received payment for them. The prisoner M. went into his master's warehouse, and clandestinely removed twenty-four bags which had been marked by his master, and placed them outside the warehouse, in the place where S. used to deposit the bags before payment for them. Soon afterwards the wife of S. came and claimed payment for the said twenty-four bags. The prosecutor then sent for the prisoner S., who, upon being asked respecting the twenty-four bags, said they had been placed there an hour previously by him, and demanded payment for them. The jury found that the bags had been so removed in pursuance of a previous arrangement between the prisoners. *Held*, that M. was rightly convicted of larceny, and that S. was an accessory before the fact to the larceny. *Regina v. Manning*, xiv. 548.

10. *Servant disposing of coals—Embezzlement.* The prisoner was sent with his master's cart for some coals. The coals were delivered to the prisoner and deposited in the cart, their price being entered to the master's account. On the road home the prisoner disposed of a portion of the coals. *Held*, that this was larceny of the coals, and not embezzlement, the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, and the possession from that time being in the master. *Regina v. Reed*, xxiv. 562.

11. *Money given to a clerk to make purchases appropriated to his own use—Embezzlement.* A dealer in skins gave his clerk money to purchase skins. The clerk obtained them on credit, applying the money to his own use, but debited his master in his day-book with the sum as having been paid for skins. Being indicted for

embezzlement, he was found not guilty of embezzlement, but guilty of larceny. *Held*, that the conviction was wrong. *Regina v. Goodenough*, xxv. 572.

12. *Appropriating property of an unknown person.* A purchaser left his purse on the prisoner's stall, without himself or the prisoner knowing it. The prisoner not knowing whose it was, appropriated it, and denied all knowledge of it when inquiry was made by the owner. *Held*, that the prisoner was guilty of larceny, as the purse was not, strictly speaking, lost property, and, therefore, it was not necessary to inquire whether the prisoner had used reasonable means to find the owner. *Regina v. West*, xxix. 525.

13. *Getting possession of property by false representations and disposing of it.* Some wheat, not the property of the prosecutors, but consigned to them, was placed in the care of a servant, E., who was to deliver the wheat only to the orders of the prosecutors or their managing clerk, C. The prisoner, who was in the employ of the prosecutors, was allowed by E. to remove a quantity of the wheat, upon his representation to E. that he had been sent by C., and was to take the wheat to a railway station. This representation was false, and he subsequently disposed of the wheat. *Held*, to be larceny of the wheat. *Regina v. Robins*, xxix. 544.

14. *Prisoner going away with prosecutor's wife and assisting her in taking wearing apparel.* Where the prisoner went away with the prosecutor's wife, and assisted her in placing wearing apparel and other articles in a box; also in removing the box from her husband's house; afterwards, while the prosecutor's wife remained in adultery with him, pledging some of the articles and applying the money to his own purposes, it was *held*, that if the prisoner, going away with the prosecutor's wife for the purpose of adulterous intercourse, was engaged jointly with her in taking the goods; or, if the prisoner, though not a party to the original taking of the goods, or their removal, had afterwards appropriated any part of the goods to his own use, he was guilty of felony, and rightly convicted of larceny. *Regina v. Thompson*, i. 542.

15. *Husband's goods delivered by wife to her adulterer.* If the wife commit adultery and take her husband's goods and deliver them to her adulterer, it is felony in the adulterer. *Regina v. Featherstone*, xxvi. 570.

16. *Taking a cancelled check by clerk of company—Special property—Possession—Embezzlement.* Where a cancelled check, the property of an insurance company, had passed from the hands of the messenger, who received it at the bank, to the prisoner, a clerk in the employment of the company, whose duty it was to keep it for the directors, it was *held*, that as the check, when it came into his custody, had arrived at its ultimate destination, it was really in the possession of the directors, who had a special property in the check; and, therefore, that the prisoner, who had unlawfully abstracted it, was guilty of larceny, not of embezzlement. Also, that where the directors of a company have a special property in checks or other articles, the interest of a shareholder in the company gives him no property in it, and that he may be indicted for stealing property from the directors. *Regina v. Watts*, i. 558.

17. *Removal of goods assigned to creditors—Possession.* A, having assigned his goods for the benefit of his creditors, removed them before his assignees took possession, intending to deprive his creditors of them. The jury found that he was not in possession of the goods as the assignees' agent, and it was *held* he was not guilty of larceny. *Regina v. Pratt*, xxvi. 574.

18. *Taking a receipt written on stamped paper—Possession.* A owed the sum of 4*l.* 11*s.* 14*d.* to the prosecutor; and the latter having demanded payment, the prisoner said he would settle with him on behalf of A. He took out of his pocket a piece of paper, stamped with a sixpenny stamp, and put it upon the table, and then took out some silver in his hand. The prosecutor wrote a receipt for the sum mentioned on the stamped paper, and the prisoner took it up and went out of the room. On being asked for the money, he said, "It is all right," but never paid it. *Held*, that this was

not a case of larceny, the prosecutor never having had such a possession of the stamped paper as would enable him to maintain trespass. *Regina v. Smith*, ix. 532.

19. *Taking uncanceled mortgage deed—Goods and chattels.* Uncanceled mortgage deeds are choses in action, and the taking them is not a larceny of "goods and chattels." *Regina v. William Powell*, xiv. 575.

20. *Chose in action.* An agreement, although unstamped, is a chose in action, and therefore not the subject of larceny. Parke, B., *dissentiente*. *Regina v. Watts*, xxiv. 573.

21. *Stealing a letter by a gratuitous assistant of postmaster.* If a person, while engaged in gratuitously assisting a postmaster at his request, in sorting the letters, steal one of them, he is liable to the severer penalties imposed by the statute 7 Will. IV. and 1 Vict. c. 36, s. 26, as a person employed under the post-office. *Regina v. Reason*, xxii. 602.

II. Receiving stolen Goods.

1. *Allegation of possession.* To sustain an indictment for receiving stolen goods, the alleged receiver must have had actual or constructive possession, but where he went with the thieves to a room, over which he had control, for the purpose of purchasing the goods, and was arrested before the purchase was complete, the thieves all the time keeping actual possession of the property, it was *held*, by a majority of the judges (eight to four) that the prisoner had not received the goods, and that his conviction was wrong. *Regina v. Wiley*, i. 567.

2. *Possession restored to the owner before purchase by receiver.* A, who had stolen some goods, and had them in his pocket, was caught by the owner, who sent for a policeman. The policeman took the goods, but in concert with the owner, gave them back to A, who was told by the owner to go and sell them where he had sold others. A sold them to B, and B bought them, believing them to have been stolen. *Held*, that B could not be convicted, under the statute, as a felonious receiver of stolen goods, possession having been restored to the owner before the purchase by B. *The Queen v. Lyons* overruled. *Regina v. Dolan*, xxix. 533.

3. A principal in the second degree cannot at the same time be treated as a receiver of the stolen property. *Regina v. Perkins*, xii. 587.

4. A wife cannot be convicted of feloniously receiving from her husband goods stolen by him. *Regina v. Brooks*, xiv. 580.

III. Pleadings; Evidence; Venue.

1. *Description of property.* The London Dock Company by mistake delivered two hogsheads of sugar to a carrier, who produced two delivery notes authorizing them to deliver two other hogsheads of sugar, the property of one B. The carrier broke bulk, and was indicted for larceny. *Held*, that the property was well described as the property of the London Dock Company, they having still a special property in the chattels, notwithstanding that they parted with the possession by mistake. *Regina v. Vincent*, ix. 548.

2. *Evidence.* The prisoners were charged with stealing four sacks of barley and three sack bags from their master. It was proved in evidence that the prisoners and one B. were employed by the prosecutor to winnow barley which he had mixed with canary seed. One of the prisoners fetched several sacks from the prosecutor's house, which he and B. filled with barley. The two prisoners then sent B. home before the usual time. At twelve o'clock on the night of the same day, the carter went into the stable with a lantern, and shortly afterwards the two prisoners entered the stable. In a few minutes after this the prosecutor saw the carter in the loft above with a lantern, and found the two prisoners concealed under straw in the loft, and then, in a dust-bin

in a stable beneath, he found three sacks full of barley mixed with canary seed, which he swore was of the same kind which he had mixed. It was no part of the duty of the prisoners to place the barley in sacks, or to put the sacks of barley into the dust-bin. The jury found both the prisoners guilty. *Held*, that the evidence was sufficient to support the conviction. *Regina v. Samways*, xxvi. 576.

3. Where one was convicted of larceny on the sole evidence that he was employed on the premises and had been seen to go to the place where the goods stolen were kept, on appeal it was *held*, that there was not a *scintilla* of evidence for a jury. *Regina v. Walker*, xxv. 568.

4. *Corpus delicti*—Evidence. The prisoner was found coming out of a warehouse, where pepper was kept, with pepper of a similar quality in his possession. He had no right to be in the warehouse, and on being discovered said: "I hope you will not be hard with me," and took some pepper out of his pocket and threw it upon the ground. There was no evidence of any pepper having been missed from the bulk. *Held*, that there was sufficient evidence to go to the jury of the *corpus delicti*. *Regina v. Burton*, xxiv. 551.

5. *Venue*. Railway carmen were sent with a wagon from a place in Middlesex into Kent. On their arrival they took some oats, which had been carried in the wagon for the horses' food, and sold them there for their own profit. *Held*, that the carmen might be tried in Middlesex for the larceny of the oats in the county of Kent, under the provisions of the stat. 7 Geo. IV. c. 64, s. 13. *Regina v. Sharp*, xxix. 532.

LEGACY.

See WILLS.

LEGACY DUTY.

1. Personal property follows the domicile of the owner thereof. Hence the personal property of an officer in the queen's army in India, though such property be all in India, is liable to the payment of legacy duty as if in England. *The Attorney-General v. Napier*, ii. 397.

2. A testator devised real estate to trustees on trust, with power to exchange or sell it, and invest the proceeds in other real estate for similar trusts, and until such investment, to invest the proceeds in the funds or real mortgages. It was invested in the funds. A rule was ordered by the court of chancery on the prayer of trustees under a similar will. The proceeds were laid out in consols, and the interest paid to the tenant for life. On his death the court ordered the transfer of the stock to the party entitled under the will. *Held*, in both cases, that no legacy duty was payable. *Heale v. Knight*, xx. 574.

3. A testator devised his real estate on which there was a mortgage to B., naming him executor. The personal estate was insufficient to pay the simple contract debts. B. entered, and kept down the interest of the mortgage; and by will gave all his real and personal estate to his two sons, who paid off the mortgage out of the personal. *Held*, that legacy duty was payable on the amount so applied. *In re Taylor*, xx. 437.

4. Real estate having been sold by order of the court of chancery to secure payment of an annuity charged thereon by a testator, the principal fund was paid over to the devisee of the real estate after the death of the annuitant. Upon a case stated as to whether legacy duty were payable, it was *held*, in the court of exchequer, that if the sale was ordered by the court, under the general power of ordering sales of real estate, to secure the payment of an annuity charged thereon, the legacy duty was not payable; but that if the court acted on the clause in the testator's will, and compelled the trustees to execute the discretionary power given to them, the legacy duty was payable. *Hobson v. Neale*, xx. 394.

5. A testator devised lands to his son for life, with remainders over, and gave power to the son to charge these lands with an annuity for his wife in bar of dower. The

son charged the lands accordingly. *Held*, that such annuity was subject to legacy duty. *Sweeting v. Sweeting*, xvii. 97.

6. The first Lord H., by his will, directed the purchase of estates in Suffolk to be made with the proceeds of estates in Essex. The will contained a clause enabling the tenant for life, who should be entitled to the rents and profits of the estates, to direct them to be sold and a deed of settlement to be made of them, and that there should be inserted therein a clause that the tenant for life should be entitled to the rents, and should have power to charge such estates with an annual sum not exceeding one third part of the annual value thereof, for the benefit of any woman whom he might marry. The first Lord H. was succeeded by his son, who by his will charged the Suffolk estates with an annuity for the benefit of his wife during her life, the said sum to be in the nature of and in full for her jointure, and to be in bar, lieu, or satisfaction of and for her dower or thirds at common law, &c. The defendant was in possession of the estates, and was heir of the deceased Lord H. No deed of settlement was ever executed. *Held*, that the defendant was liable to pay legacy duty in respect of the value of the annuity, as the grant of it could not be considered as a purchase of Lady H.'s right to dower, but was a gift of a legacy in execution of the power in the will of the first Lord H., though upon a condition imposed by the second Lord H. *Henniker v. The Attorney-General*, xvi. 475. Also *The Attorney-General v. Henniker*, xiv. 374.

7. Where a testator, having large sums of stock invested in the names of himself and wife, devised his real estate and gave sundry specific legacies, and, after his death, it was found that the personal estate was wholly insufficient to pay the specialty debts and legacies, whereupon the wife executed an assignment, reciting these facts, transferring to the trustees of the will large sums of the stock invested in the joint names to satisfy the debts, &c., it was *held* that no legacy duty was payable. *Laurie v. Clutton*, ix. 171.

8. A testator devised his real and personal estates, subject to the payment of a clear yearly rent-charge or annuity. *Held*, that the legacy duty was chargeable on the testator's estate, and that the annuitant took the annuity free of legacy duty. *Bailey v. Bolt*, viii. 51.

9. If estates be conveyed to trustees (for a term of years) in trust to sell for the purpose of raising money wherewith to pay a legacy, and afterwards, B. becomes seized of the said estates, subject to the said term of years, and becomes entitled also, as heir, to the said legacy, and by deed between the surviving trustees and B., the said term of years is merged in the inheritance as a full satisfaction and discharge of the legacy, then the amount of the legacy is liable to the payment of legacy duty, as the merger is equivalent to a payment of the same in money. *The Attorney-General v. Metcalfe*, vi. 456.

10. If a sum be raised, in accordance with the will of a testator, by the sale of a portion of a manor, in order to avoid selling certain portions of the personal estate, the sum thus raised to be devoted to the payment of a legacy, it is subject to legacy duty as personalty. *Ib.*

11. N. left his personal estate to trustees to pay to his niece, Mrs. A., an annuity of 2,000*l.* for her separate use; to pay the residue or surplus of the dividends and annual produce to W. A., her husband, authorizing him to receive the same during his life; and after the decease of either, to pay the dividends to the survivor with authority to receive them during his or her life. *Held*, that the legacy duty was to be calculated as on the value of 2,000*l.* a year to Mrs. A. for their joint lives, and on the value of the residue of the income for the single life of W. A. *The Attorney-General v. Wynford*, xxv. 544.

LETTERS OF CREDIT.

1. A letter of credit is not a negotiable instrument, and that it is in the hands of a certain party does not necessarily or naturally import that he is the person

entitled to draw for the amount mentioned in it. *Orr v. Union Bank of Scotland*, xxix. 1.

2. It is not essential to the validity of a letter of credit or an essential prerequisite to its payment that it should be delivered up. Its possession by the person to whom it is addressed might be evidence, but it would be weak evidence of its payment. Per Lord Cranworth. *Ib.*

LIBEL AND SLANDER.

- I. WHAT IS ACTIONABLE.
- II. PRIVILEGED COMMUNICATION.
- III. JUSTIFICATION.

I. What is actionable.

1. *Threat of bankruptcy.* To say, falsely and maliciously, of a trader: "He is indebted to me, and, if he does not come and make terms with me, I will make a bankrupt of him, and ruin him," is actionable without proof of special damage. (See note to this case.) *Brown v. Smith*, xx. 243.

2. *Charging a clergyman with incontinence.* A declaration for slander by charging a clergyman in holy orders with incontinency, is bad without showing actual damage, or that he holds some office or employment producing temporal profit. *Gallwey v. Marshall*, xxiv. 463.

3. *Charge of felony.* A declaration in slander, after stating as inducement that the defendant intended to impute felony to the plaintiff, set out the slanderous words as follows: "I (the defendant) have a suspicion that you (the plaintiff) and B. have robbed my house, (meaning thereby that the plaintiff had feloniously stolen certain goods of the defendant,) and therefore I take you into custody." Held, that the judge rightly directed the jury that the question was, whether the defendant meant to impute an absolute charge of felony, or only a suspicion of felony; and that if the jury believed the latter, the verdict ought to be for the defendant. *Tozer v. Mashford*, iv. 451.

4. *Publication—Justification.* The defendant who had lodged at the plaintiff's house, on leaving, missed a memorandum book and other articles, whereupon he wrote to the plaintiff's wife a letter, in which he accused the plaintiff of having taken them, and threatened to expose him, if he did not return them; the jury found that the letter was a libel, but that there was no malice in fact. Held, first, that sending the letter to the wife, was a publication; secondly, that it was not justified by the occasion. *Wenman v. Ash*, xxii. 509.

5. *Charge of dishonesty—Innuendo.* The declaration stated that the plaintiff was a trader, and employed by the board of ordnance to relay the entrance of their office with new asphalte, and that the defendant falsely said of him in his trade, and in reference to the work: "The old materials have been relaid by you in the asphalte work executed in the front of the ordnance office, and I have seen the work done." Innuendo, that the plaintiff had been guilty of dishonesty in the conduct of his said trade, by laying down again the old asphalte which had been before used at the entrance of the ordnance office, instead of new asphalte, according to his contract. Held, on motion to arrest the judgment, that the declaration was sufficient, and the innuendo not too large, as it put no new sense on the words, but only imputed intention to the speaker. *Baboneau v. Farrell*, xxviii. 339.

6. *Innuendo.* In an action for a libel, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning thereby the said Lord Lieutenant of Ireland,) if he knew any thing about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that

carefully puffed, to Long's, the coachmaker, (meaning thereby the said plaintiff,) the other day? If mere trade was his (meaning thereby the said Lord Lieutenant's) object, he had several respectable houses open to him (meaning thereby that the house and place of business of the said plaintiff was not respectable, and that the said visit was paid thereto for political objects.") *Held*, that the innuendo did not enlarge the sense of these words, which were fully capable of the meaning given to them. *Barrett v. Long*, xvi. 1.

7. *Void innuendo*. The third count repeated the same words, and accompanied them with the following innuendo: "meaning thereby, that the house of business of the said plaintiff was not a respectable house in the trade, and that the plaintiff himself was of such a character, that he would not be visited in the way of his trade and business except from some political, or party, or other improper motive." *Held*, that the words were capable of the meaning thus attributed to them, but that if the innuendo was more extensive than the words, it might be rejected as repugnant and void, and that the words, being libellous, were actionable without its aid. *Ib.*

8. *Statute 32 Geo. III. c. 60*. In actions for libel, although the judge is to leave it to the jury whether, under the circumstances, the publication is a libel, on the general issue, yet if they find a verdict for the defendant on that issue, in a case in which no question is made as to the fact of publication, nor as to its application to the plaintiff, the court can set aside the verdict. *Hakewell v. Ingram*, xxviii. 413.

9. In an article on the subject of the want of some efficient protection for married women, the writer mentioned two cases as showing the necessity for legislation; one case being described as that of a husband who acted towards his wife like a "sot and a brute," and then the article proceeded: "The other is that of Mrs. H." (meaning the wife of the plaintiff,) "who having been restored to her husband's protection by a decree of the ecclesiastical court, found her misery so aggravated by the restitution of her conjugal rights, that she was compelled to resort to the police court for the little help the law gives." And it concluded by saying, that the law did not meet such cases; and that "the condition of the woman, when the brute intervenes, is more oppressive than that of the negro." Plea, not guilty. It was not disputed that the passage applied to the plaintiff, but no evidence was given as to the matters referred to. The court set aside the verdict, and granted a new trial. *Ib.*

10. *Special damage necessary to make words actionable*. Special damage, which is necessary in order to make words actionable, must be such as naturally or reasonably arises from the use of the words. *Haddon v. Lott*, xxix. 215.

II. *Privileged Communication.*

1. *Bonâ fide statements to one's self—Express malice*. Privileged communications comprehend statements made *bonâ fide* in performance of a duty, or with a fair purpose of protecting the interest of their maker. A communication being shown to be privileged, it lies on the plaintiff to prove malice in fact; to have the question of malice go to the jury, circumstances must be shown which raise a probability of malice, and are more consistent with its existence than its non-existence. Plaintiff had been discharged from the service of defendant on a charge of theft. Plaintiff being afterwards at defendant's house, and conversing with his servants, defendant said to his servants: "I discharged that man for robbing me; do not speak any more to him," &c. *Held*, a privileged communication, and that there was no evidence of malice to go to the jury. *Somervill v. Hawkins*, iii. 503.

2. *Express malice—Words spoken in presence of third party*. The defendant having a suspicion that the plaintiff, who was his shopman, had in one instance embezzled money, sent for him, and in the presence of A charged him with embezzlement, and discharged him. The plaintiff being about to enter a fresh service, referred to the defendant for a character, but in consequence of what the defendant said, the intended

master refused to employ him. The plaintiff's brother then called on the defendant to inquire why he had given the plaintiff such a character. The defendant replied: "He has robbed me. I believe he has robbed me for years past; I can prove it by the circumstances under which he has been discharged by me." *Held*, that the circumstances rendered the statements privileged communications, and that the fact of the charge being first made in the presence of a third party did not warrant the judge in leaving the question to the jury, and that the excess of the defendant's statement on the second occasion did not raise any presumption of express malice. *Taylor v. Hawkins*, v. 253.

3. A communication made to a company by one of its directors, stating that a certain person in its employ has been dismissed from another service for "gross misconduct" is a privileged communication, and the defendant's refusal to go into the charges in the presence of the plaintiff and his attorney, is no evidence of malice that could properly be submitted to the jury; for that, such refusal being consistent with *bona fides*, *bona fides* is to be presumed until the contrary is proved. *Harris v. Thompson*, xxiv. 370.

4. Defendant, a county officer, having formerly employed plaintiff to do certain printing, transferred the contract to one who consented to do it cheaper; and wrote a letter to the "finance committee," in which he imputed improper motives to plaintiff in the demand he made, accusing him of "attempting to extort money by misrepresentation." In an action for libel, it was *held*, that the occasion of writing the letter *prima facie* rebutted the presumption of malice, but that it was a question for the jury whether the sentence complained of as exceeding the privilege was evidence of malice. *Cooke v. Wildes*, xxx. 284.

5. A letter addressed by the rector of a parish to his parishioners tending to seriously injure, in his occupation the plaintiff, a school master, who had been discharged from a public school by the rector, is not necessarily a privileged communication; but it is for a jury to say whether it is upon its face malicious, or whether the circumstances show malice. *Gilpin v. Fowler*, xxvi. 386.

6. Express malice may be shown in answer to the plea in slander, of privileged communication. Per Jervis, C. J. *Baboneau v. Farrell*, xxviii. 339.

III. Justification.

1. *Prior publication by third person.* In an action for libel, it is no justification that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication, disclosed the name of the person, and believed all the statements contained in the libel to be true. *Tidman v. Ainslie*, xxviii. 567.

2. *Former publication.* Evidence that the identical charges conveyed in a libel had, before the time of composing and publishing the libel, appeared in another publication, which was brought to the prosecutor's knowledge, but against the publisher of which he took no legal proceedings, is not admissible under a plea of justification under stat. 6 & 7 Vict. c. 96, s. 6. *Regina v. Newman*, xviii. 113.

3. *Plea of justification.* Where a plea of justification under stat. 6 & 7 Vict. c. 96, s. 6, contains several charges, and the defendant fails to prove any of the matters alleged in such justification, the jury must, of necessity, find a verdict for the crown, that is, that the defendant has not proved the whole plea. *Ib.*

4. *Aggravation.* Under the stat. 6 & 7 Vict. c. 96, s. 6, the court is bound to consider whether the guilt of the defendant convicted by a jury, is aggravated or mitigated by the plea, and the evidence to prove or disprove the same, and to form its own conclusion upon the whole case. *Ib.*

5. *Affidavits of mitigation.* Affidavits explaining the defendant's reasons for having placed certain allegations injurious to the prosecutor in his plea of justification,

in support of which no evidence was given at the trial, are receivable in mitigation of punishment, but not as proving the truth of the charges made in them. *Ib.*

6. *Foreign record.* But where a document, purporting to have been an official record of the conviction of the prosecutor, before a foreign police court, was annexed to an affidavit, for the purpose of showing the *bona fides* of an allegation in the plea of justification, it was *held* inadmissible, as its admission would, in effect, put the prosecutor on his trial without his being able to make defence. *Ib.*

7. *Malice—Evidence of.* In an action of libel, the defendant pleaded the general issue, and also a plea under the 6 & 7 Vict. c. 96, denying actual malice, and stating an apology. On the trial, the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of. *Held*, that these publications were admissible in evidence. *Barrett v. Long*, xvi. 1.

8. *Libel.* In an action for a libel imputing to the plaintiff the commission of a crime under aggravated circumstances, it is necessary to justify the aggravating portion as well as the substantial charge of crime. *Helsham v. Blackwood*, v. 409.

9. *Gist not defamation—Truth cannot be pleaded in justification.* An omnibus driver sued his employer for defacing the driver's license by writing upon it: "Discharged for being 1s. 6d. short;" the gist is not defamation, therefore, *held*, that the truth of the accusation could not be pleaded in justification, and, that the act was not authorized by the common law nor by statute. *Rogers v. Macnamara*, xxv. 248.

LICENSE.

1. *Justices bound to hear applicant for.* Justices at their licensing meeting, under 9 Geo. IV. c. 61, are bound to hear an applicant for a license who has given due notice of his application, even if they have come to a resolution not to grant any new licenses. *Regina v. The Justices of Walsall*, xxix. 211.

2. *Keeping open beer-house after eleven o'clock—Density of population.* The stat. 3 & 4 Vict. c. 61, s. 15, prohibits the keeping open of retail beer-houses after eleven o'clock at night, within any place, the population of which exceeds 2,500, or after ten o'clock elsewhere, (except in London, &c.) H. was situate in three different townships; its population was admitted to exceed 2,500. One of the townships, C., had a population of less than 2,500. A license was granted for a beer-house, described therein as being in H., in the township of C., and by the license the house was to be closed at ten o'clock. *Held*, upon an information for keeping this house open until eleven o'clock, contrary to the above statute, that it might be kept open until that hour. The limitation of time for keeping a beer-house open is fixed with reference to the density of population, and the collection of inhabitants of the requisite number is the governing fact in the application of the statute. *Quære*, if the information had been for infringing the license instead of the provisions of the statute. *Regina v. The Justices of the West Riding of Yorkshire*, ii. 296.

3. *License to a publican—"Usual hours of morning and afternoon divine service."* The prohibition in the license granted under the General Licensing Act, 9 Geo. IV. c. 61, that the publican shall not keep his house open "during the usual hours of the morning and afternoon divine service" in the parish church on Sundays, has reference to what are the ordinary hours of the morning and afternoon service as distinguished from evening service. *Regina v. Knapp*, xxii. 157.

4. The words, "usual hours of afternoon divine service," in the form of license given in the schedule to the 9 Geo. IV. c. 61, refer to the usual hours for the celebration of divine service in the afternoon as commonly understood, and therefore a publican is not liable to a penalty, under the 21st section of the act, for an offence against the tenor of his license in keeping his house open between the hours of six and eight P. M., service performed during those hours being evening service, and not afternoon service. *Regina v. The Justices of Buckinghamshire*, xviii. 257.

LIEN.

1. To constitute a lien on any property, there must be a clear agreement for the specific appropriation of that property. *Semble*, the leaning of the court is against creating partial liens in mercantile transactions. *Jones v. Sarkey*, xi. 235.

2. *On estate of testator.* *Quære*, whether a direction in a will, that the produce of a certain estate of the testator should be consigned to A till the testator's debts to A should be discharged, gives A a lien on the estate for the payment of his debt? *Turner v. Cox*, xxvi. 72.

3. *Damage caused by collision, creates a lien on the ship in fault.* As, by the civil law, a maritime lien does not include or require possession, but being the foundation of proceedings *in rem*, (a process requisite only to perfect a right inchoate from the moment the lien attaches,) such lien travels with the thing into whosoever possession it may come, and when carried into effect by a proceeding *in rem*, relates back to the period when it first attached; a vessel is liable for the damages committed by her, though in the hands of a purchaser without notice of the damage, or of the proceedings instituted against her. *Harmer v. Bell*, xxii. 62.

4. *Negligence.* *Semble*, such lien arising out of damage is not indelible, but may be lost by negligence or delay, where the rights of third parties are compromised. *Id.*

LIMITATION OF ACTIONS.

I. PERSONAL ACTIONS.

II. REAL ACTIONS; PURCHASE-MONEY OF REAL ESTATE.

III. AMENDMENT AND RENEWAL OF WRIT TO SAVE THE STATUTE.

IV. PLEADING AND EVIDENCE.

V. MATTERS IN AVOIDANCE OF THE STATUTE.

(a.) PART PAYMENT AND PAYMENT OF INTEREST.

(b.) ACKNOWLEDGMENT OF DEBT.

(c.) OTHER MATTERS.

I. *Personal Actions.*

1. *By foreigner coming into England.* A foreigner who has never been in this country, having a cause of action which accrued to him while abroad, against a person in this country, has six years within which to bring an action in this country, from the time he first comes to this country. *Lafonde v. Ruddock*, xxiv. 239.

2. *For acts done under Ramsgate Harbor Acts.* The Ramsgate Harbor Acts, 32 Geo. III. c. 74 and 55 Geo. III. c. 84, are local and personal acts, within the meaning of the 5 & 6 Vict. c. 97, which gives a period of two years for the bringing of actions for any thing done under the authority of such acts. *Sharp v. Shepherd*, *Moore v. Shepherd*, xxviii. 478.

3. *For offences relating to customs.* The 3 & 4 Will. IV. c. 53, s. 120, enacts, that all suits, indictments, or informations exhibited for any offence against that or any other act relating to the customs in any of his majesty's courts of record at Westminster, shall be brought within three years after the date of the commission of the offence. *Held*, that this limitation was expressly confined to proceedings in the courts at Westminster. *Regina v. Thompson*, iv. 287.

4. *For refusal to make compensation for salt bargained for and destroyed.* Certain salt, which A had contracted to sell to B, having been destroyed, in November, 1831, B demanded its delivery. Negotiations took place as to whether B was entitled to compensation, and continued till 1838, when A finally refused compensation; soon

after which B brought his action against A. *Held*, that the action was barred by the lapse of time. *The East India Company v. Paul*, i. 44.

5. *Against attorneys employed to invest on mortgage—Partnership, liability of.* In 1832, A employed B and C, then in partnership as attorneys, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid the 500*l.* to C, who, however, did not inform either B, his partner, or A of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838; but both before and after the dissolution, and after the death of A, which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A and his representatives up to 1848 by C. In 1846, the 300*l.* was paid to C, and the mortgage deed was given up by C, but no reconveyance was ever executed. Neither A nor his representatives had any knowledge of these facts until 1848. Entries had been made by C in the partnership books of the receipts and payments, but B had no knowledge of the transaction subsequent to the original advance of the 500*l.* *Held*, in an action by the executors of A against B and C, that the Statute of Limitations was a bar to the action. And, *semble*, that B was not liable for these acts of C, as they were not within the scope of his partnership authority. *Sims v. Brutton*, i. 446.

6. *On bills of exchange.* The plaintiff and the defendant were the payee and drawer of three bills of exchange, drawn upon and accepted by A, who at the time was indebted to the plaintiff and the defendant, and also to a banking company, to whom the bills were delivered as a security for the debt due to them. The bills became due on the 4th of May, 1843, and in 1847, the bank sued the plaintiff upon the bills, and signed judgment in December, 1850, and early in 1851, the plaintiff finally settled that action. *Held*, that the Statute of Limitations was a bar to the plaintiff's recovery in an action subsequently brought against the defendant as drawer of the bills. *Webster v. Kirk*, ix. 408.

7. *On blank acceptance.* Where a bill of exchange is accepted in blank, the statute runs from the time the bill becomes due as filled up, and not from the time when it would have become due if completed when it was accepted in blank. *Montague v. Perkins*, xxii. 516.

8. *On promissory note payable five years after date.* Where a promissory note was given by the defendant to the plaintiffs, in 1840, payable five years after date, for value received, it was *held*, that it was evidence of an account stated, against which the Statute of Limitations did not commence running until the maturity of the note. *Fryer v. Roe*, xxii. 440.

9. *Under Church Discipline Act.* By the 3 & 4 Vict. c. 86, (the Church Discipline Act,) every suit or proceeding shall be commenced within two years after the offence committed, and not afterwards. *The Bishop of Hereford v. Thompson*, xxiv. 610.

10. *Bill against representatives of executors, for bad investment of testator's estate—Laches.* A testator, who died in 1796, gave his personal estate to his widow for life, with remainder to B. B. died in 1826, and the widow in 1849. The plaintiffs then filed a bill against the representatives of the executors, to make them liable for investing in 5 per cents, instead of in consols, &c. In 1837, the plaintiffs had notice of the state of the investment. *Held*, that they were barred by laches and lapse of time. *Browne v. Cross*, vii. 263.

11. *Right of executor to pay statute-run debt due to himself.* Where an executor and devisee, subject to debts, of a portion of an estate, pays debts with all the proceeds of the sale, without retaining payment of a statute-run debt due to himself, and the rest of the estate is ordered to be sold for the discharge of debts still due, the devisee of such last-mentioned part may set up the statute against the claim of the executor. But the executor had a right to pay himself with a part of the proceeds of the first sale. *Dring v. Greetham*, xxiii. 224.

12. *Debt for penalty under a by-law.* An action of debt for a penalty due under a by-law made by virtue of a charter is "an action of debt grounded upon a contract without specialty," and is barred by 21 Jac. I. c. 16, s. 3, if not commenced within six years after the penalty becomes due. *The Master, Warden, Assistants, &c. of Co. of Tobacco-pipe Makers v. Loder*, vi. 309.

13. *Set-off.* In cases under stat. 21 Jac. I. c. 16, s. 3, the Statute of Limitations is not a bar to a set-off, unless the six years have expired before the action is brought. Therefore, where, to a plea of set-off, plaintiff replied that the cause of set-off did not accrue within six years of the commencement of the suit or the pleading of the plea, the replication was held bad on special demurrer. *Walker v. Clements*, ix. 332.

14. *Breaches of annuity bond—Each breach a cause of action.* Declaration on an annuity bond, dated the 9th of June, 1828. Plea, the Statute of Limitations. On the trial it was proved that the defendant had become a bankrupt in 1836; that the defendant had, down to 1848, paid the half-yearly instalments of the annuity, but on no occasion until after the days of payment stated in the condition. Held, that a new cause of action arose with each successive breach of the condition, and that by proof at the trial of breaches committed within twenty years, the plaintiff was entitled to the verdict upon the issue raised by the plea of the Statute of Limitations. *Amott v. Holden*, xvi. 142.

15. *Right of contribution.* There is no right of contribution between defendants who have protected themselves against a demand by setting up the statute, and other defendants who might equally have set up the statute, but who, having neglected so to do, are found by the decree to be liable to the plaintiffs. *Fordham v. Wallis*, xvii. 182.

16. As to merchants' accounts, see *Smith v. Winter*, x. 506.

II. Real Actions; Purchase-Money of Real Estate.

1. The 3 & 4 Will. IV. c. 27, limiting the period within which an action may be brought "to recover any land or rent," does not apply to an action on a covenant to pay a rent charged upon land. *Manning v. Phelps*, xxviii. 519.

2. If a tenant in tail has been out of possession of land for more than twenty years, he and his heirs are barred from recovery of the possession. *Austin v. Llewellyn*, xxiv. 418.

3. *Writ of formedon.* Tenant in tail in 1798 made a feoffment of the lands entailed, and received none of the profits of the lands up to his death in 1831. Held, that his issue in tail was entitled to his writ of *formedon* within twenty years of the death of the tenant in tail. *Cannon v. Rimington*, x. 477.

4. *Action to recover mortgaged land.* By the 7 Will. IV. and 1 Vict. c. 28, it is lawful for any person, claiming under a mortgage of land, to bring an action to recover such land within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage. *Doe d. Palmer v. Eyre*, vi. 355.

5. *Encroachment by tenant and occupation more than twenty years.* Where a tenant, without the consent of the landlord, incloses a piece of land adjoining the leased premises, and holds the same for twenty years without payment of rent, or acknowledgment of title, the land thus occupied cannot be considered a part of the demised premises so as to prevent the operation of the Statute of Limitations. *Doe d. Badeley v. Massey*, vi. 361.

6. *Rights of tenant by curtesy waived.* Where a parent held possession of an estate as trustee for his daughter for more than twenty years, and treated the estate as hers, he was held to have waived all rights which he might have had as tenant by curtesy; in this case he was cognizant of his rights. *Stone v. Godfrey*, xxvii. 318.

7. *Claim by adverse possession.* To establish a claim by adverse possession, under

the Statute of Limitations, there must be an uninterrupted adverse possession for twenty years by one party, or by successive parties claiming in the same right. What is not such possession. *Dixon v. Gayfere*, xxiii. 149. See also *Scott v. Scott*, xxvii. 5.

8. *Right of parish officers to enter within twenty-one years.* The plaintiff, a parish pauper, was put into possession of a cottage by parish officers at Whitsuntide, 1818, and continued in possession without paying rent until July, 1839, when the parish officers took proceedings to obtain possession, and turned the plaintiff and his family out of the cottage, and removed nearly the whole of his goods. On the same day the plaintiff resumed possession, and continued in possession until the 24th of July, 1852, when the parish officers entered the cottage, and upon the plaintiff's refusal to deliver it up, destroyed it. On an action of trespass brought by the plaintiff against the parish officers, it was held, that there was an actual determination of the tenancy in July, 1839; and that when the plaintiff afterwards resumed possession, a new right to make entry within twenty-one years from that time, accrued to the parish officers under 3 & 4 Will. IV. c. 27, in exercise of which, it was to be supposed, they entered in 1852, and therefore that the action of trespass could not be maintained. *Randall v. Stevens*, xxii. 192.

9. *Bar of quitrent.* Certain freehold land was liable to heriot and quitrent service down to 1824, when, on the death of the tenant for life, no heriot was seized, nor quitrent demanded. The present lord of the manor came into possession in 1826, and the first heriot and quitrent became due in 1847, when the lord seized a heriot only. Held, that though the quitrent was probably barred by lapse of time, yet the heriot was not thus barred. *Chichester v. Hall*, vi. 340.

10. *What trusts are within the statute—Bill filed sixty-two years after transaction on which it was founded.* A renewable leasehold for lives was vested in A, in trust for B for life, with remainders, in the events that happened, to C and his heirs. Afterwards, on the marriage of B, a settlement was made (on the construction of which it was doubtful whether the leasehold passed) on B for life, remainder to the sons of that marriage in tail; under which D would be entitled. The lease being still subsisting in A, B took a renewal in his own name, without noticing the trust; and after the death of B, D entered and took a renewal in his own name, and the property continued to be enjoyed by him, and those claiming under him, for a time much beyond the period of limitation, and more than twenty years before the commencement of a suit by those claiming under C. D, on his marriage, assigned the leasehold to the trustees of his marriage settlement, and they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed, on the construction of which the doubts arose, took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained those transactions were dead; there was much ground for believing that the parties had intended the deed to include the leaseholds. Held, first, that assuming the possession of D, and those claiming under him, to have been originally wrongful, he and they were not express trustees within the 25th section of the Statute of Limitations, and might set up the statute as a bar. Secondly, that even if there had been an express trust, those claiming under the settlement by D, could, as purchasers, set up the statute. *Petre v. Petre*, xxi. 241.

11. *Equitable right—Property in possession of receiver.* Where the right is equitable, and the court is itself in possession of the property by its receiver, the court is not precluded by the Statute of Limitations, in a suit instituted after the lapse of twenty years, by a purchaser from a party having no rightful claim, and not having acquired adverse right, from determining who is the party rightfully entitled, although that party would have been precluded by the statute from instituting any suit. And held, that in such a case no costs ought to be given on either side. *Dixon v. Gayfere*, xxiii. 149.

12. Whether the produce of real estate directed to be sold is a "sum charged upon

or payable out of land" within the meaning of the 40th section of the Statute of Limitations, 3 & 4 Will. IV. c. 27—*quære*. *Pawsey v. Barnes*, vi. 66.

13. *Claim for share of purchase-money filed more than thirty years after sale.* A testator having devised his real estate to A and B on the usual trusts, for sale, directed that a part of the purchase-moneys be paid to A. More than thirty years after the testator's death, D, the administrator of A, filed a claim against C, the executor of B, for A's share of the purchase-moneys. The claim was dismissed, with costs, but without prejudice to a suit. *Ib*.

III. Amendment and Renewal of Writ, to save the Statute.

1. *Adding parties.* The court may allow the writ and other proceedings to be amended, by adding the names of other plaintiffs, necessary parties, when the Statute of Limitations would be a bar to a fresh action. *Carne v. Malins*, vi. 568.

2. *Indorsement on pluries writ of summons may be amended to save statute.* The court has power, under sect. 222 of the Common-law Procedure Act, 1852, to amend the indorsement upon a pluries writ of summons, issued more than five months before the 24th of October, 1852, by altering the date of the first writ to its true date, in order to save the Statute of Limitations. But the court refused to make a similar amendment in the copy of the pluries writ served upon the defendant. *Cornish v. Hocking*, xvi. 255.

3. *Removal of writ of summons to save statute—Writ in force for six months by statute.* By 15 & 16 Vict. c. 76, s. 11, a writ of summons is of force for six months from the date, and it may be renewed at any time before its expiration for six months from the date of such renewal. Under this act a writ of summons was issued, dated the 7th of November, 1853, with a view to save the Statute of Limitations. It was renewed on the 6th of May, 1854. On the 6th of November following, the plaintiff applied to the officer of the court to renew the writ again; but the latter refused, considering it too late, and that the six months had expired. The court, without deciding that the renewal would be valid, directed that the writ should be renewed as of the 6th of November, *nunc pro tunc*, as the dates would appear on the record. *Anonymous*, xxviii. 224.

4. *Alias writ issued to save statute.* An original writ of summons expired on the 8th of October before the Common-law Procedure Act came into operation. In order to save the Statute of Limitations the court directed an *alias* writ to issue under the Uniformity of Process Act, which repeals the 2 Will. IV. c. 39, so far as relates to the duration of writs, "except so far as may be necessary for supporting any writs that have been issued before the commencement of this act, and any proceedings taken or to be taken thereon." *Gapp v. Robinson*, xiv. 253.

IV. Pleading and Evidence.

1. At the hearing of a claim, a defendant is at liberty to avail himself of the benefit of the Statute of Limitations without pleading it. *Sneed v. Sneed*, vii. 141.

2. *Action for calls.* In an action for calls, a plea that the action is on contracts without specialty, and that the causes of action have not accrued within six years, is bad, the action being founded on a statute. *The Cork and Bandon Railway Co. v. Goode*, xxiv. 245.

3. *Replication of fraud.* To a plea of the Statute of Limitations, that the cause of action did not accrue within six years before the suit, it is no answer that, in consequence of the fraud of the defendant, the plaintiff was prevented from discovering the cause of action before that time, and that he commenced his action within six years after he discovered it. *The Imperial Gas Light Co. v. The London Gas Co.* xxvi. 425.

4. *Replication that suit was commenced within six years after defendant's return.* A replication under the 4 Ann. c. 16, s. 19, to a plea of the Statute of Limitations, need not allege that the defendant has returned from beyond seas, or that the suit was commenced within six years next after his first return from beyond seas since the accruing of the cause of action. *Forbes v. Smith*, xxx. 600.

5. *Writ served after six years must have indorsement required by statute—Roll not sufficient evidence.* Upon a replication to a plea of the Statute of Limitations, stating that the cause of action did accrue within six years next before the commencement of the suit, in order to prove that issue for the plaintiff where the writ actually served has been issued subsequently to the expiration of the six years, it must be shown that the writ served had upon it at the time of service the indorsement required by the 2 Will. IV. c. 39, s. 10. The above requirement is not satisfied by the mere production of the writ at the trial containing the proper indorsement. Nor is the roll containing an entry of the several writs, and stating with reference to the writ served that "such writ contains the indorsement," evidence that it contained the indorsement when it was served. *Pritchard v. Bagshawe*, v. 371.

6. *Evidence of payment of interest to take case out of statute.* To a declaration on a promissory note for 350*l.*, with interest, the defendant pleaded the Statute of Limitations. At the trial, the only evidence given by the plaintiff in support of this issue was the following unsigned entry in a book of the defendant, and in her handwriting: "1843. Cleave's int. on 350*l.*—17*l.* 10*s.*" Held sufficient evidence of payment of interest to the plaintiff to take the case out of the Statute of Limitations. *Cleave v. Jones*, iv. 514.

V. Matters in Avoidance of the Statute.

(a.) Part Payment and Payment of Interest.

1. Payment of interest on a promissory note payable on demand, is a sufficient acknowledgment to bar the Statute of Limitations, although no previous demand has been made. *Bradfield v. Tupper*, vii. 541.

2. *Part payment by bill of exchange.* Where a bill of exchange is delivered by a debtor to his creditor, in payment on account of a larger sum then due, under such circumstances as to raise the implication of a promise to pay the remainder, it amounts to a payment within the meaning of the exception in the 9 Geo. IV. c. 14, s. 1, and answers the Statute of Limitations, as from the time of such delivery, whether the bill be subsequently honored or not. *Turney v. Dodwell*, xxiv. 92.

3. *Payment by wife.* The payment by a wife, without the knowledge of her husband, of the interest on a note given by her *dum sola* will not avoid the Statute of Limitations. *Neve v. Hollands*, xii. 398.

4. *Calculation of interest not part payment.* The mere calculation of the interest on a note with the view of surrendering the whole as a gift to the debtor by the creditor, is no "part payment" such as to prevent the operation of the Statute of Limitations. *Foster v. Dawber*, vi. 496.

5. *Joint and several note, partial payment on, by assignee of one maker.* A partial payment by the assignee of an insolvent, who was one of three makers of a joint and several promissory note, is not sufficient to prevent the operation of the Statute of Limitations as to the other makers. *Davies v. Edwards*, vi. 520.

6. *Payment of interest by surviving partners does not prevent statute running against estate of deceased.* If interest on deposits be received from the surviving partners of a banking house, as a firm, for a period of six years after the death of one, no agency can be implied so as to hinder the operation of the Statute of Limitations as regards the estate of the deceased. *Brown v. Gordon*, xv. 340.

7. *Maintenance of a child equivalent to money payment.* In January, 1833, A gave B, then a *feme sole*, his note for 246*l.* B, after having received part of the amount,

died in 1834, leaving her husband, the plaintiff, surviving, and one child. The plaintiff did not then take out letters of administration, but arranged with A that the interest on the note should go towards the maintenance of B's child, then under the care of A. In September, 1839, A and the plaintiff settled their accounts, and A indorsed on the note a memorandum that all the interest was paid up to that date, but no money passed. The child continued under the care of A until 1848, when he died. In 1853, the plaintiff took out letters of administration and brought an action, as administrator, against A, to recover the amount of the note, alleging a promise by A to himself as administrator after the death of B. *Held*, per Alderson, B., Platt, B., and Martin, B., (*dubitante*, Parke, B.,) that there was a payment of interest sufficient to take the case out of the Statute of Limitations, the maintenance of the child being treated by the parties as a money payment equivalent to the interest. *Bodger v. Arch*, xxviii. 464.

8. *Recital in mortgage of interest paid.* A mortgagor assigned the equity of redemption by a deed, which contained a recital that all the interest had been paid upon the mortgage up to a period within twenty years of the commencement of the action, and a covenant by the assignee to pay the principal and future interest to the mortgagee, and to indemnify the mortgagor in case of default. The mortgagee was no party to the deed, but continued to receive the interest upon the mortgage from the assignee of the equity of redemption. *Held*, in an action by the mortgagee against the mortgagor on the covenant, that the recital in the deed was evidence of an acknowledgment by part payment of interest within twenty years. *Held*, also, that payment of the interest by the assignee of the equity of redemption, was a sufficient acknowledgment to take the case out of the statute as against the mortgagor. *Quære*, whether the recital in the deed was an acknowledgment in writing of the debt being due to take the case out of the statute, it not being made to the person entitled thereto. *Forsyth v. Bristowe*, xx. 484.

9. *Appropriation of payment made generally must be to debt not barred.* Where there is a payment of a smaller sum on account of a larger, that payment takes the case out of the statute as to all sums of money not barred by the statute at the time of the payment, but it can have no effect in reviving a debt then barred by the statute if the payment can be attributed to any sum not then barred by the statute. *Nash v. Hodgson*, xxxi. 555.

10. *Creditor's suit against executors—Statute set up by part of defendants—Part payments.* G. S., by his will, dated in 1837, devised a particular estate, for providing for the payment of his debts, to his trustees, who were also his executors, and beneficially interested under other parts of his will. G. S. died in February, 1843. In August, 1849, a creditor's suit was instituted by F., claiming as personal representative of the payee of a joint and several promissory note made by the testator and another person, and dated 1826; and payments were proved to have been made, on account of interest due on such promissory note, on several different occasions in 1843, 1846, and 1847, by T. and Co., "as the agents and on behalf of the executors, the defendants." One of the executors of the testator had become bankrupt; the other two were stated to be now insolvent. The estate devised for payment of debts had not been sold with proper expedition; and though debts of the testator remained unsatisfied, considerable sums were alleged to have been paid on account of the legacies. The present bill sought to fix the executors for wilful default and breach of trust, and to get back the amounts paid to the legatees. All the defendants, except the executors and one other defendant, set up the Statute of Limitations. *Held*, first, that the executors, who had not set it up, were bound in their beneficial, as well as representative capacities, by the part payments on account proved to have been made. Secondly, that the other defendant, who had not set up the statute, was also bound by the implied admission by the executors. Thirdly, that it was open to the other defendants, (except the residuary legatees,) to avail themselves of the statute; and that those who had set it up were

accordingly entitled to have the bill dismissed as against them, but without costs. Fourthly, that as to the residuary legatees, the payments to them, while there were debts outstanding, being a breach of trust, they could not set up the statute, but must refund the sums received. *Fordham v. Wallis*, xvii. 182.

(b.) *Acknowledgment of Debt.*

1. *Verbal and written.* An acknowledgment of payment, in writing, although unsigned, is sufficient to take a debt out of the Statute of Limitations. *Semble*, a verbal acknowledgment of payment would also be sufficient. *Cleave v. Jones*, iv. 514.

2. *Written, by infant.* An acknowledgment in writing given by an infant, of a debt due for necessaries, is effective for the purpose of taking the debt out of the operation of the Statute of Limitations. *Williams v. Smith*, xxviii. 276.

3. *Insufficient, under stat. 9 Geo. IV. c. 14.* The following letter was written by the defendant to the plaintiff, in respect of a debt more than six years due: "I am much surprised at receiving a letter from H. K., this morning, for the recovery of your debt. I must candidly tell you, once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. was in town." *Held*, not sufficient, under stat. 9 Geo. IV. c. 14, to take the case out of the Statute of Limitations. *Cawley v. Furnell*, vi. 397.

4. *Acknowledgment by devisees in trust for payment of debts.* Where B purchased certain real estate of A, who became bankrupt, the purchase-money not being paid, and twenty-three years after, the attorney for trustees (appointed under the will of B, deceased, to hold his property in trust for the payment of his debts, and then upon trust for his children) gave notice to the assignees of A. that payment-money, interest, and rent were ready to be paid to complete the agreement; and ten years after said notice, said assignees filed a bill against said trustees and the parties beneficially interested under the will of B, and against C, a sub-purchaser and others, praying a declaration that the plaintiffs had a lien on the estate for the unpaid purchase-money, it was *held*, that the notice from the attorney for the trustees was an acknowledgment in writing within the meaning of the 40th section of the stat. 3 & 4 Will. IV. c. 27, that a person by whom "the money is payable," means, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed, and that this acknowledgment being by devisees in trust for payment of debts was good as against the *cestui que trust* under the same will. There being no proof as against the *cestui que trust* that the attorney who wrote the notice was in fact the agent of the devisees in trust, the court granted an inquiry. *Toft v. Stephenson*, ix. 80.

5. *Two debts—Acknowledgment of one by letters.* T. owed P. and Co., on their bankruptcy, 275*l.* on one account, and a larger sum on another; to secure part of the latter, he had given a mortgage. The official assignee of P. and Co., wrote to demand payment of the former sum. P.'s answer spoke of certain arrangements for paying the larger sum, and concluded by expressing the hope of soon transferring the mortgage so as to clear off the whole standing against him. *Held*, that the letters did not contain a sufficient acknowledgment or promise to take the case as to the debt of 275*l.* out of the Statute of Limitations. *Smith v. Thorn*, x. 391.

6. "*Which sum I place to your credit.*" An acknowledgment by the debtor of his indebtedness, with the words "which sum I place to your credit," &c., imports a sufficient promise to take the case out of the Statute of Limitations. *Evans v. Simon*, xxiv. 420.

7. *Expression of hope that "every thing will be arranged" agreeably to creditor's wishes.* Upon an application for payment of 450*l.* due upon two bills of exchange, dated the 25th of March, 1836, upon which interest had been paid up to the 25th of March, 1841, a letter was written by the debtor on the 18th of January, 1846, stating,

"I hope to be in H. very soon, when I trust every thing will be arranged with Mrs. W. agreeable to her wishes." *Held*, a promise to pay, which would take the debt out of the Statute of Limitations, and exceptions to the Master's report allowing the debt were overruled. *Edmonds v. Goater*, ix. 203.

8. *Bill to redeem property which had been more than twenty years in possession of mortgagee.* After a mortgagee had been more than twenty years in possession of property mortgaged, the mortgagor's solicitor wrote a letter asking when the mortgagee would see him on the mortgagor's claims. The mortgagee wrote back to the solicitor: "I do not see the use of a meeting unless some party is ready to pay me off." The mortgagor filed a bill to redeem. *Held*, affirming a decree at the rolls, that this was a sufficient acknowledgment in writing of the title of the mortgagor to his solicitor acting as his agent, to bring the case within the 28th section of the Statute of Limitations, 3 & 4 Will. IV. c. 27. *Stansfield v. Hobson*, xix. 449.

(c.) *Other Matters.*

1. The institution of a suit to establish the right to real property, (the legal estate being outstanding,) has not the effect to stop the operation of the Statute of Limitations. *Dixon v. Gayfere*, xxiii. 149.

2. If a trust is existing, and an estate is to be administered in this court, a claim against that estate will not be barred by the Statute of Limitations, especially if litigation in other courts has prevented the effectual prosecution of the claim. *Playfair v. Cooper*, xxiii. 329.

3. *Covenant not to sue.* A covenant not to sue may prevent the Statute of Limitations from running during the life of the debtor. *O'Brien v. Osborn*, xiii. 420.

4. *Attorney's bill of costs.* An attorney is bound to carry on a suit to its termination, unless he gives a notice that he shall discontinue if he be not paid or supplied with the necessary funds, or the client dies; and the Statute of Limitations does not begin to run against his right to sue for his bill of costs until the happening of one of those events. *Whitehead v. Lord*, xi. 587.

5. *Arrears of annuity—Subsisting term.* A testator, by his will, gave to the plaintiff certain annuities, and devised his real estate to trustees upon trust for securing the same. Some of the annuities had fallen into arrear for eighteen years and upwards. *Held*, that the term being a subsisting term, the plaintiff was entitled to recover the entire arrears. *Cox v. Dolman*, xvii. 429.

6. *Cause of action accruing against parties abroad.* A cause of action on simple contract accrued against the defendant and G. jointly, while both were abroad. G. having died abroad, an action was commenced against the defendant within six years from G.'s death, but more than six years from the defendant's return to this country. *Held*, that the 4 Ann. c. 16, s. 19, saved the action from being barred by the Statute of Limitations, 21 Jac. I. c. 16. *Quære*, whether the application of the 21 Jac. I. c. 16, to such a case, is not excluded altogether by the 4 Ann. c. 16, s. 19. *Townes v. Mead*, xxix. 271.

7. *Marshalling, to give longer period of limitation.* The doctrine of marshalling ought not to be resorted to merely for the sake of giving to a simple contract creditor a longer period of limitation. *Fordham v. Wallis*, xvii. 182.

8. *Proceedings in lunacy.* A petition in lunacy, after the death of the lunatic, by his committee, and a reference to the Master thereon, followed by a report, finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a proceeding which will take the claim of the committee out of the Statute of Limitations, as against the heir at law of the lunatic, who was not a party to the application. *Wilkinson v. Wilkinson*, xii. 191.

9. *Creditor's bill—Reference as to incumbrances—Claim by incumbrancer not a party.* On a bill to enforce a charge acquired by a judgment creditor on the estate of the debtor, a receiver was appointed, and, at the hearing, a reference as to incum-

ances on the estate was directed. A state of facts and claim carried in before the master under such inquiry by an incumbrancer, not a party to the suit, was held to make the charge as to the interest out of the Statute of Limitations, 3 & 4 Will. IV. c. 27, s. 42; and the incumbrancer was held to be entitled to arrears of interest for six years antecedent to the time of such claim. *Greenway v. Bromfield*, xii. 189.

10. Where the last day upon which an act must be done to take a case out of the Statute of Limitations, falls on Sunday, to preserve the plaintiff's right of action, the act should be done on or before the previous Saturday. Per Crompton, J. *Anonymous*, xxviii. 224.

LIS PENDENS.

1. *Decree in India—Bill afterwards filed in England.* Where a bill was taken *pro confesso* in a court in India, but the decree could not be enforced on account of the defendants having returned to England, and a bill was filed afterwards in England, stating these facts and praying relief, it was held, that the pendency of the suit in India, which was pleaded by the defendant, was no bar to the English suit, the former decree not being final. *Semble*, that the proper course is, where there is a final decree in a foreign court for the same matters, to apply to stay proceedings in the English suit. *Ostell v. Lepage*, x. 250.

2. *In admiralty—Proceedings in personam and in rem.* In the case of a Scotch steamer which ran down an English vessel in the Humber, arrested under process of the high court of admiralty in England, and an action for damage commenced in that court, while an action for the same cause was still pending in Scotland; on the owner of the steamer pleading "*lis alibi pendens*," it was held, by the judicial committee that the plea of *lis alibi pendens* was bad, as the suit in Scotland was in the first instance in *personam*, the proceedings being commenced by process against the persons of the owners of the vessel, (the defendants,) and the arrest of the steamer only collateral to secure the debt, while the proceedings in the admiralty court in England were, in the first instance, in *rem*, against the vessel, and, therefore, the two suits being in their nature different, the pendency of one suit could not be pleaded in suspension of the other. *Harmer v. Bell*, xxii. 62.

3. *Right to abandon suit.* Collision in December, 1848, and a warrant of arrest issued in the same month, but never served, as the ship was removed out of the jurisdiction and taken to Scotland. In January, 1849, an action was entered, and the ship arrested at the suit of the same parties, in Scotland, and released on bail. In August, the ship was found within the jurisdiction of the court of admiralty, and arrested under a fresh warrant. Measures were then taken by the plaintiffs to abandon the action in Scotland, &c.; and that action, after opposition on behalf of the owner of the ship proceeded against, was finally dismissed in December. The ship was sold in June, 1849, to her present owner. Held, that the plaintiffs had a right to abandon the suit in Scotland, and that the plea of *lis alibi pendens* could not be maintained. *The Bold Buccleugh*, ii. 536.

LUNACY.

I. *Inquisition of Lunacy.*

1. *Leave to attend inquisition.* An application by persons interested under a settlement executed ten years back by an alleged lunatic, for leave to attend by counsel at the inquisition, allowed; the object of the commission being to carry the lunacy back over a period of thirty-five years. *Ex parte Richards*, xi. 230.

2. *Traverse of inquisition.* It is a matter of right that a person found lunatic under an inquisition shall, if desirous, have a traverse of the inquisition. The Lord Chancellor has nevertheless, a discretion to exercise upon the application for the writ being made to him, as to whether the writ ought to issue in the particular case. But the court will not, in exercising this discretion, enter into the question of whether the lunacy was or was not proved before the jury, but merely ascertain, by a personal examination of the lunatic, whether he is capable of volition in the matter, and whether he really desires the traverse. *In re Cumming*, xi. 202.

3. *Semble*, if the court, upon the examination of the lunatic, entertains a doubt as to the existence of a desire, on the part of the lunatic, to traverse, the court will look to other matters in forming its determination. *Quære*, whether it is necessary for a lunatic, found so by inquisition, who is desirous of traversing the inquisition, to come by petition to the Chancellor, under the 6 Geo. IV. c. 58, or whether he may go direct to the petty-bag office and lodge his traverse? *Ib.*

4. A person found lunatic by inquisition may traverse as a matter of right. *Ex parte Loveday*, viii. 235.

5. *Costs on successful traverse.* On a successful traverse, the costs of the parties suing out the commission will not be allowed as a matter of course out of the property of the alleged lunatic. On the contrary, unless a grant has actually been made under the prior inquisition, or unless there is property belonging to the alleged lunatic in the hands of the court, the court has no jurisdiction to allow such costs, either under the 6 Geo. IV. c. 53, or otherwise. *Ib.*

6. *Solicitor suing out commission of lunacy—Lien of, for costs on lunatic's estate.* Where a commission *de lunatico inquirendo* has been properly sued out by a solicitor, at the instance of the lunatic's wife, and there is no fund in the lunacy, the solicitor may, in the event of the death of the lunatic, proceed by summons upon his personal representatives, calling upon them for payment of his demand for the costs of the commission, or for the usual administration accounts. *Chester v. Rolfe*, xxiii. 100.

II. *Committee of Lunatic's Person and Estate.*

1. *Liability of committee.* If a sum of money be lost to the estate of a lunatic through the fault of a committee in not taking steps to enforce payment, the loss must be made up by the committee. *In re Swindell*, xiii. 159.

2. *Responsible for default of solicitor.* The committee of a lunatic's estate are responsible for the default of their solicitor in managing the funds. But circumstances may more or less vary the decree. *In re Moore*, xxiii. 219.

3. *Surviving committee.* Two committees of the estate of a lunatic were appointed, one of whom died, and no new committee was appointed in his place. The estate being small, the court permitted the income to be paid to the survivor on the production of an affidavit of his solvent circumstances. *In re Noble*, xiii. 158.

4. *Right to receive rents.* Where the income of a lunatic consisted of rents payable weekly, the committee was allowed to receive them before perfecting his securities, he undertaking to perfect them within a given time. *In re Rutter*, xv. 418.

5. *Assent to a settlement on lunatic's wife.* The assent of a committee, with the approval of the Master, to the settlement of a fund on a woman on account of the lunacy of her husband is not a completion of the settlement. *Baldwin v. Baldwin*, xv. 158.

6. *Committee of the person accepted as surety for committee of the estate.* Contrary to the general rule, that the committee of the person shall not be surety for the com-

mittee of the estate, the circumstances of the case being peculiar, an order was made that, upon the allowance to the lunatic being paid direct to the committee of the person, instead of passing intermediately through the hands of the committee of the estate, the committee of the person be accepted as one of the sureties for the committee of the estate, the general rule, however, to remain unaltered. *Ex parte Mount*, ix. 169.

III. *Estate of Lunatic; Liability of.*

1. *Lunatic mortgagee—Costs of vesting order.* Upon the petition of the committee of a lunatic mortgagee, an order was made vesting the estate in the mortgagor; the costs of the order to be paid out of the lunatic's estate, with the exception of the stamp, which was to be paid by the mortgagor. *In re Thomas*, xxi. 351.

2. *Lunatic mortgagee—Order to overseers of poor—Funds in hands of mortgagee.* The mortgagor of an estate conveyed, three days before his trial for murder, of which he was acquitted on the ground of insanity, his interest in the estate to trustees, in trust to sell and apply the proceeds for the benefit of his children. *Held*, that no order could be given under sect. 2 of stat. 3 & 4 Vict. c. 54, directing the overseers of the poor of a certain township to seize the balance of funds in the hands of the mortgagee who had sold the premises, the object of the proposed seizure being to obtain funds to satisfy the charges of the maintenance of the lunatic. *In re Simpson's Trust Estate*, v. 344.

3. *Allowance out of estate—Payment to committees—Separate property of lunatic's wife.* Where a lady who had separate property married, and an agreement was made that out of her income certain domestic expenses should be defrayed, and the agreement was acted upon until her lunacy, and the husband continued the same expenses out of her property till his death; and where the lady was under a moral obligation to give her nephew 500*l.*, part of which she gave, and a further part her husband, after her lunacy, paid out of her property; the court allowed the executors of the husband to deduct all the money paid for keeping up the establishment, after the lunacy, till his death, and also the money paid by him to the nephew, before paying over the separate income of the wife to her committees. *In re Hewson*, xiii. 197.

4. *Maintenance of lunatic—Estate settled for the benefit of his younger children.* Father, tenant for life; lunatic, (aged 38,) tenant in tail in remainder of landed property of the yearly value of 4,000*l.* Application by the father, who was committee both of the estate and the person, to have the expense of the lunatic's maintenance made a charge upon the settled estate for the benefit of his younger children, refused. *In re Pugh*, xxiii. 1.

5. *Costs of commission chargeable to lunatic's estate.* The costs, properly taxed, of suing out a commission of lunacy are a debt against the assets left by the lunatic, although at his death a traverse of the lunacy is pending. *In re Cumming*, xxiii. 120.

6. *Surplus proceeds of sale of lunatic's estate—Character of.* Where freeholds of inheritance belonging to a lunatic were sold by order of the court, under the stat. 9 Geo. IV. c. 78, and the surplus proceeds, not required for the purposes for which the sale was directed, had been paid into court and invested, it was *held*, that the character of realty impressed upon such surplus proceeds, by the language of the 2d section of the statute, continued through successive descents, till a person capable of electing to take the fund as personalty, should have so elected. *In re Wharton*, xxiii. 485.

7. *Part of fund in court ordered to be invested in an annuity.* Part of the capital of a fund in court, belonging to a person of unsound mind, not found so by inquisition, ordered to be sunk in the purchase of a government annuity for her life, in order to increase the annual sum to be appropriated to her maintenance. *Davies v. Davies*, x. 266.

8. *Decree of dissolution of partnership for lunacy of partner—Recovery of lunatic.* In a case where the dissolution of a partnership had been decreed, in consequence of

the lunacy of one of the partners, and large sums had been paid into court to the separate account of the lunatic in respect of his share of the capital and profits of the business, the Lord Chancellor on being subsequently satisfied of the complete recovery of the lunatic, ordered the fund to be paid out to him. *Leaf v. Coles*, xii. 167.

9. *Advowson—Tenant in tail.* A lunatic, who, previously to his lunacy, professed the Roman Catholic religion, was tenant in tail of an advowson. The court refused to make an order for the sale of the next presentation to the living. *In re Vavasour*, vii. 114.

IV. Contract and Conveyance by Lunatic.

1. *Notice of insanity—Evidence.* In an action to recover money paid by the plaintiff under a contract made by him when insane, upon an issue whether the defendant had notice of such insanity, evidence is admissible of the plaintiff's conduct, both before and after signing the contract, in order to show that his disease was such that the defendant must have known it. *Beavan v. M'Donnell*, xxvi. 540.

2. *Writ de lunatico inquirendo issued after purchase at auction.* The defendant had contracted for the purchase of the premises in question at an auction; before completion, a writ *de lunatico inquirendo* issued, under which he was declared *non compos* from a time anterior to the date of the contract. An order was made, declaring the contract to be null and void, and directing that the plaintiff should retain out of the deposit money all his costs, charges, and expenses, and return the residue to the committee of the estate of the purchaser. *Frost v. Beavan*, xix. 25.

3. *Quære*, whether a conveyance executed by a lunatic is absolutely void, in the absence of notice and fraud? *Price v. Berrington*, vii. 254.

V. Jurisdiction and Practice in cases of Lunacy; Costs.

1. *Lords Justices' vesting order—Jurisdiction.* *Semble*, that the Lords Justices intrusted by warrant under the sign-manual to make orders in lunacy, have jurisdiction to make a vesting order under the Trustee Act, where the heir of the deceased trustee is of unsound mind; but for greater certainty, the Lord Chancellor made the order. *In re Waugh's Trust*, xix. 154; *In re Pattinson*, ix. 199.

2. *Justice's order to convey lunatic to asylum—Jurisdiction.* By 1 & 2 Vict. c. 14, where any person is apprehended under circumstances denoting a derangement of mind and a purpose of committing crime, two justices of the county, on proof that he is insane, may order such person to be conveyed to the lunatic asylum, "and may also ascertain, by the best legal evidence that can be procured under the circumstances, the place of the last legal settlement of such person," and make an order on the parish where they adjudge him to be settled, for the costs of examining and conveying him to the asylum, and of his maintenance; "and where such settlement cannot be ascertained, such order shall be made on the county, &c., where such person shall have been apprehended." *Held*, that the jurisdiction of the justices to inquire into the settlement of the lunatic was not limited to the time of making the order by which he was conveyed to the asylum; and that no order could be made on the county for the expenses, until they had inquired into and failed to ascertain the place of settlement. By the same act, an appeal is given to the overseers, &c., of the parish in which the justices shall adjudge such person to be settled, giving reasonable notice to the clerk of the peace of the county, &c., who is to be respondent in such appeal. *Held*, that these provisions come into operation only when an appeal has been commenced; and that the keeper of the asylum was a proper person to serve the notice of chargeability and other documents required to be sent to the overseers of the parish to be affected by the order of settlement. *Regina v. The Clerk of the Peace, West Riding, Yorkshire*, i. 271.

3. *Jurisdiction under Trustee Act, 1850.* The Trustee Act of 1850 gives the court of

chancery jurisdiction, where a trustee had become lunatic, to grant a vesting order in new trustees, notwithstanding the former petition, order, and other proceedings had been under the Trustee Act, 1 Will. IV. c. 60; but it does not give jurisdiction to make an order for the costs of the former proceedings. *In re Fulham*, i. 199.

4. *Levy of debt due lunatic—Jurisdiction of justices.* Under stat. 3 & 4 Vict. c. 54, s. 2, justices cannot authorize the overseers of a parish to levy a debt claimed as due to a lunatic, by ordering them to seize a sum of money in the possession of the alleged debtor. *Regina v. Longhorn*, xxiv. 175.

5. *Practice—Mandamus.* The court of queen's bench may, on cause shown, refuse a *mandamus* moved for at the instance of the overseers, calling upon the alleged debtor to pay them such money, although the prosecutors produce evidence of the debt, and prove that the debtor possesses the sum of money demanded. *Ib.*

6. *Reference to chambers refused.* The court refused a motion for a reference to chambers to inquire into the state of the defendant's mind, the object being to save the expense of a commission of lunacy. *Adams v. Smyth*, xxi. 447.

7. *Payment for support—Trustees' Relief Act.* Under the Trustees' Relief Act it was held that the court was placed in the position of the trustees, and a payment, which the trustees might have made, was ordered for the support of a lunatic. *In re Upfull's Trust*, vii. 10.

8. *Purchase of life annuity for lunatic, out of the capital of her fortune.* Part of the capital of a fund in court, belonging to a person of unsound mind, not found so by inquisition, ordered to be sunk in the purchase of a government annuity for her life, in order to increase the annual sum to be appropriated to her maintenance. *Davies v. Davies*, x. 266.

9. *Notice of applications.* Where the interest of the sole next of kin of a lunatic had been assigned, it was held that no notice need be given to the assignees of any applications in the matter except those respecting payments to the next of kin. *In re Pigott*, vii. 7.

10. *Deceased lunatic—Fund in court—Petition for transfer to executors—Service of, upon committee.* Where, after the death of the lunatic, the committee of his estate had duly passed his accounts, paid the balance certified to be due from him into court, and had his security discharged under the 44th of the New Orders in Lunacy, it was held that a petition for payment out of court of the lunatic's estate to the executors of the lunatic, must nevertheless be served upon the committee. *In re Wylde*, xxiii. 103.

11. *Lunatic trustee—Court will not inquire as to.* The court will not take upon itself to inquire into the fact whether a lunatic is a trustee within the meaning of the Trustee Act, 1850; there must be a reference to a master to ascertain that fact. *In re Ramshay*, i. 200.

12. *Service of writ of summons upon lunatic.* The Common-law Procedure Act, 1852, contains no provision for the service of a writ of summons upon a lunatic; and as the writ of *distringas* is abolished, there is no means of proceeding in an action against a lunatic. *Holmes v. Service*, xxviii. 355.

13. *Service on lunatic in asylum, how made.* The keeper of a private lunatic asylum refused to allow an officer, seeking to serve a writ of summons upon the lunatic, to see him without an order from his friends. The officer was unable to ascertain the residence of the lunatic's family, and finally attempted to make service by leaving a copy of the writ at the asylum, with notice thereof to the keeper, and also with two different persons connected with the defendant. Held, an insufficient service, the court suggesting that the keeper should be informed that it was his duty to allow the writ to be served, or else a *habeas corpus* might be issued to bring up the lunatic, so that service could be effected. *Ridgway v. Cannon*, xxviii. 125.

14. *Order of maintenance.* By stat. 8 & 9 Vict. c. 126, two justices of the county, or members of the committee of visitors of an asylum, are empowered to make an

order of maintenance. By the interpretation clause, "county" means "county of a city." *Held*, that the court is bound to take judicial notice that the city of York is a county of a city, and therefore that an order for the maintenance of a lunatic, made by "two justices in and for the city of York," is good. *Regina v. The Inhabitants of St. Maurice*, iv. 317.

15. *Appeal against order for maintenance.* An appeal against an order for the maintenance of a lunatic pauper, must be to the quarter sessions having jurisdiction in the place from which the lunatic removed to an asylum. *Regina v. The Justices of Lancashire*, xi. 372.

16. It cannot be made a valid ground of appeal against an order for the maintenance of a lunatic pauper under the 8 & 9 Vict. c. 126, that the order adjudicating the place of the pauper's settlement was made on hearsay evidence only, the third section of the 11 & 12 Vict. c. 31, which does away with all objections to the depositions taken when an order is made, applying equally to orders of removal and orders of maintenance. *Regina v. St. Peter, in Barton-on-Humber*, vii. 381.

17. *Lunatic trustee.* Order made under the Trustee Act, 1850, appointing a new trustee and vesting the trust premises in him jointly with the continuing trustees, in a case where one of three trustees was a lunatic, and though the will contained a power to appoint new trustees. *In re Davies*, vii. 8.

18. *Costs—Trustee Act, 1850.* Where, through the lunacy of a mortgagee, not found lunatic by inquisition, a petition under the Trustee Act, 13 & 14 Vict. c. 60, is rendered necessary, in order to enable the mortgagor to pay off the mortgage debt, the costs must be paid out of the mortgage debt. There being no committee, but only a receiver of the mortgagee's estate under the 8 & 9 Vict. c. 100, the costs of the appearance of the heir at law and next of kin were allowed. *In re Biddle*, xxiii. 179.

19. *Lunatic defendant—Liberty given to committee to defend—Appointment of guardian refused.* A lunatic was made a defendant as one of the next of kin of an intestate. He and his committee presented a petition entitled in the suit, and also in the lunacy, praying that the lunatic might defend by his guardian, and that the committee might be appointed such guardian. The committee prayed that, as such, he might be at liberty to prosecute the claim of the lunatic as next of kin, and that all such costs as should be properly incurred, and as should not be paid out of the estate to be administered in the suit might be raised and paid out of the lunatic's estate. The court gave liberty to the committee to defend the suit, but refused to appoint a guardian as being unnecessary, or to make any prospective order as to costs, and directed the title in the cause to be struck out. *In re Manson*, ix. 184.

20. For practice as to lunatic answering where he is made defendant to a bill filed by the committee of his person and estate, see *Worth v. Mackenzie*, vii. 36.

21. A party, wishing to object to the confirmation of the Master's report in lunacy, must present a counter petition in the nature of exceptions to the report. *In re Saunders*, vii. 105.

22. The Lord Chancellor declined to order the transfer of funds standing in the joint names of the lunatic and another to the party claiming such transfer, without a previous reference to the Master. *In re Were*, vii. 4.

23. Order made on the application of the curator of a lunatic resident in Holland for the transfer to him of the corpus of funds in England to which the lunatic was entitled. *In re Elias*, vii. 5.

24. Guardian *ad litem* to lunatic defendant (not so found by inquisition) appointed without a commission. *Piddocke v. Smith*, viii. 95.

VI. Miscellaneous Cases.

1. *Pledge of lunatic's credit by wife for necessities.* The wife of a lunatic, though

he be confined in an asylum as dangerous, may pledge his credit for necessities for herself; and debt will lie therefor. *Read v. Legard*, iv. 523.

2. *Care of lunatic's person and application of the estate pending a traverse.* Where, in the opinion of the court, it will be for the benefit of the lunatic that the care of the person should remain undisturbed, pending a petition to traverse the inquisition, it will so direct, and also direct that, in the mean time, the whole income of the property be paid to the lunatic; although the court will confirm the report of the Master in Lunacy appointing a committee of the person and a committee of the estate. *In re Cumming*, xiii. 161.

3. *Funeral expenses of lunatic—Payment out of court.* A lunatic died without leaving ready money to pay the expenses of his funeral, and there was no committee of the person or estate. The heir at law, who was one of the next of kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of court for that purpose; but the court directed the persons with whom the lunatic had resided, to proceed with the funeral, and as to the payment out of court ordered the petition to stand over. *In re Townsend*, xiii. 157.

4. *Detention of lunatic—Medical certificate.* A medical certificate, under 16 & 17 Vict. c. 96, s. 2, for the detention of a lunatic is bad if it omit the number and street where the examination was made; and one so committed will be discharged on *habeas corpus*, unless it appear dangerous to himself or others. *Regina v. Pinder*, xxx. 180.

5. *Husband's care of lunatic wife.* The defendant was indicted under the 16 & 17 Vict. c. 96, s. 9, for that he, having the care of his wife, a lunatic, did abuse and ill-treat her. *Held*, that he was not a person having the care of a lunatic within the meaning of the statute, the provisions of which do not apply to persons whose care is purely of a domestic nature. *Regina v. Rundle*, xxix. 555.

MALICIOUS PROSECUTION.

1. *What is—Perjury.* In an action for maliciously prosecuting the plaintiff for perjury, the judge directed the jury: "That if the plaintiff had, in fact, sworn falsely; or if the defendant, at the time he preferred and prosecuted the indictment, acting upon the information he had received, believed and had reasonable grounds for believing that the plaintiff had sworn falsely, then there was reasonable and probable cause for preferring and prosecuting the indictment; but if the defendant, at the time he preferred and prosecuted the indictment, did not believe the information he had received to be true, but in his own mind believed and had reasonable grounds to believe that the plaintiff had not sworn falsely, or still more, if he believed that the plaintiff had spoken the truth, then there was no reasonable or probable cause for preferring and prosecuting the indictment." *Held*, that this direction was correct. *Heslop v. Chapman*, xxii. 296.

2. *What is.* Prosecuting a person with any other motive than that of bringing a guilty party to justice, is a malicious prosecution in law. *Stevens v. The Midland Counties Railway Co.* xxvi. 410.

3. *Action for, against corporation.* *Quære*, whether an action for malicious prosecution is maintainable against a corporation. *Id.*

4. *Action for, when it will lie—Pleading.* The declaration alleged that the defendant, upon a writ of *ca. sa.*, properly issued, for a large amount, but a great part of which had been afterwards satisfied, had falsely and maliciously, &c., procured the sheriff to issue a warrant to take and keep the plaintiff, &c., and had falsely and maliciously, &c., procured the said warrant to be indorsed to levy the larger amount; whereupon the plaintiff had been taken and detained for four weeks, and whereby he had suffered in his business and credit. *Held*, that the wrong was actionable, that the declaration contained sufficient allegations of damage, and connected this damage

with the wrongful acts of the defendant sufficiently to support the action. *Churchill v. Siggers*, xxvi. 200.

5. *County court has no jurisdiction of action for.* A summons from a county court in the following terms: "For that your wife assaulted the wife of the plaintiff on, &c., and maliciously caused the plaintiff to be wrongfully charged with stealing, &c., and to be detained in custody, &c., whereby the plaintiff was put to expenses in clearing his wife from the said malicious assault and charge," &c., with particulars annexed in terms similar, claiming for damages 10*l.*, is an action for malicious prosecution, and by the 9 & 10 Vict. c. 95, the county court has no jurisdiction. *Jones v. Curry*, iv. 325.

6. *Allegation of damage essential.* No action lies for commencing and prosecuting an action maliciously and without reasonable or probable cause in the name of a third party, without an allegation showing that legal damage has been sustained. *Cotterell v. Jones*, vii. 475.

MANDAMUS.

I. WHEN THIS WRIT WILL LIE.

II. PRACTICE, COSTS, &C.

I. *When this Writ will lie.*

1. *To visitor of college.* If the visitor of a college refuse to exercise his visitatorial power by hearing an appeal, the court of queen's bench will grant a *mandamus* to set him in motion, but cannot afterwards review his decision, even if it be erroneous. *Ex parte Buller*, xxx. 356.

2. *To restore master of grammar school of Rochester cathedral.* The court of queen's bench will not interfere by *mandamus* to restore the head master of the grammar school of the cathedral church of Rochester, who has been removed by the dean and chapter. *Regina v. The Dean and Chapter of Rochester*, vi. 269.

3. *To review decision of magistrates respecting illegal lottery.* A complaint was made before justices against K. for keeping an illegal lottery, and it was alleged that the facts proved brought him within the 42 Geo. III. c. 119, s. 2, and rendered him liable to be punished as a rogue and vagabond; but the magistrates thought, wrongly as it was suggested, that the provision as to such punishment was repealed, and that no punishment now existed for the offence. *Held*, that, however erroneous the decision of the magistrates, this court could not review it either on *mandamus*, or on rule under 11 & 12 Vict. c. 44, s. 5. *Regina v. The Justices of Bristol*, xxviii. 160.

4. *To compel recorder of borough to hear appeal respecting rates.* A party rated in respect of his property within the borough, appealed to the court of quarter sessions, on the ground that he was rated at too large a sum. The act which authorized the rate gave the appeal, and empowered the court to amend and quash the rate, provided that the net annual value of the property, in respect of which the person was liable to be rated, was to be ascertained according to the meaning of the words, "net annual value," in the act to regulate parochial assessments; and that it should "be taken and estimated according to such value as the same was or should be rated or assessed in the rate or assessment for the relief of the poor in the year preceding." The assessment, in the rate appealed against, was made according to the poor-rate of the preceding year. On the appeal, the appellant proposed to show that the assessment, although according to the poor-rate, was too high; but the recorder decided that he could not go into evidence as to the value, and dismissed the appeal. The court refused to grant a *mandamus* to compel the recorder to hear the appeal, on the ground that the dismissal was not a declining of jurisdiction by him, but a decision on the appeal, and that, therefore, the court had no power to issue the *mandamus*, whether the construction which the recorder had put upon the act were right or wrong. The court held, also, that the decision of the recorder was right, and that, under sect. 156, the poor-rate of

the preceding year was, on an appeal against the rate under the Local Act, conclusive as to the value of the property assessed. *Regina v. The Recorder of Liverpool*, i. 291.

5. *To elect clerk to board of guardians.* The office of clerk to a board of guardians, appointed by order of the poor-law board, under sect. 46 of stat. 4 & 5 Will. IV. c. 76, is an office for which an information in the nature of a *quo warranto* will lie. Therefore, a *mandamus* to elect such a clerk, on the ground that an election which had taken place was void, will not lie. *Regina v. The Guardians of St. Martin's-in-the-Fields*, v. 361.

6. *To lords of treasury to issue warrant to pay queen's annuity.* By the 1 & 2 Will. IV. c. 11, the king was empowered to grant to the queen an annuity, to commence from his death, and to be paid out of the consolidated fund. The king granted to trustees in trust for her majesty the said annuity, directing that it should be paid at the exchequer, that the auditor should issue debentures for paying the same, and that the commissioners of the treasury should cause the same to be paid out of the consolidated fund. By the 4 & 5 Will. IV. c. 15, the office of auditor of the exchequer is abolished, and in all grants charged on the consolidated fund, instead of such debentures, the said commissioners are required to issue warrants for payment of the moneys granted. *Held*, that a *mandamus* would lie to the lords of the treasury to issue such warrant. *Regina v. The Lords of the Treasury*, iv. 277.

7. *To county court judge.* Where a judge of a county court has entered upon the hearing of a plaint, and, from the evidence adduced before him, has decided that he had no jurisdiction to adjudicate between the parties, a *mandamus* will not lie commanding him to hear and determine it, even although he may be wrong in point of law. *Contrà*, if, in a case in which he has jurisdiction, he refuses to hear it, upon the mistaken notion that he has no jurisdiction to do so in respect of some preliminary matter. *Ex parte Milner*, vi. 371.

8. *To compel county court judge to hear claim.* The goods on G.'s premises having been seized in execution on a judgment against him in a county court, H. put in a claim in respect of them, but did not furnish an inventory specifying which of the goods and chattels seized by the bailiff were claimed by him. On the hearing of the interpleader summons, the county court judge held that the notice and particulars of claim were insufficient, and consequently refused to adjudicate upon the claim. The court made absolute a rule for a *mandamus* calling upon the county court judge to proceed upon the interpleader summons, and to hear and determine upon the claim. *Regina v. Slapton*, vii. 390.

9. *To compel registry of transfer of shares.* A purchaser of shares in a railway company is not entitled to a *mandamus* to compel the registry of a transfer of the shares under the 8 & 9 Vict. c. 16, s. 15, if it does not appear that the circumstances showed that the purchaser is acting *bonâ fide* to enforce the rights of a shareholder. *Regina v. The Liverpool, Manchester, &c. Railway Co.* xi. 408.

10. *To compel railway company to produce register of shareholders.* When the shareholders of a railway company are liable to satisfy the claims of a judgment creditor against the company, the creditor is entitled to an inspection of the register of shareholders, and the court will grant a *mandamus* to compel its production for this purpose. *Regina v. The Derbyshire, &c. Railway Co.* xxvi. 101.

11. *To command clerk to issue execution.* A plaintiff who has recovered a judgment for debt and costs in the county court, and has received the debt out of court, is entitled to have a writ of execution issued for the costs, and this court will grant a *mandamus* to the clerk of the county court, commanding him to issue such writ of execution. *Regina v. The Clerk of the County Court of Surrey*, xii. 428.

12. *To compel sessions to allow entry of appeal.* The sessions of D. had, as it was alleged, a rule by which appeals could not be entered after the day preceding the first day of the sessions, except by leave of the court. G. had given the necessary notices, but had not entered his appeal in accordance with the above rule. On the first day

of the sessions a special application was made to the court to allow him to enter the appeal, which was refused. *Held*, that although the court would not interfere with the discretion of the sessions where a distinct rule of practice was shown to exist, yet, as it did not distinctly appear upon the affidavits what the rule of practice really was, or how far it had been acted upon, a *mandamus* might go. *Regina v. The Justices of Derbyshire*, xiv. 178.

13. *To compel lord to admit heir of copyholder.* The court will grant a *mandamus* to compel the lord of a manor to admit a person who claims as heir of a deceased copyholder, if he has made out a *prima facie* case of title by descent, according to the custom of the manor, even though the lord suggests that the tenement has escheated to himself for want of an heir. *Regina v. Dendy*, xvi. 169.

14. *To order a fresh election.* Where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, this court refused to grant a *mandamus* ordering a fresh election, though the persons, whose votes had been rejected, were parties to the application. *Ex parte Mauby*, xxviii. 308. See also *Ex parte Joyce*, xxvi. 158; *Regina v. The Vicar, &c. of Bourne*, xxviii. 126.

15. *To compel restoration of parish registers.* A writ of *mandamus* will not lie to compel the restoration of parish registers by a person who obtained possession of them by wrong. It is granted only to enforce a right for which there is no other remedy. *Ex parte Holloway*, xxx. 240.

16. *To compel East India Company to pay arrears of pay.* There is no legal obligation upon the East India Company to pay to the commander-in-chief of the queen's or of the native forces in India the arrears of pay due to him, as such commander-in-chief, and a *mandamus* to pay such arrears cannot be granted. *Ex parte Napier*, xii. 451.

17. *To compel county justices to pay county surveyor's bill.* The county surveyor's bill, after it had been examined by the finance committee, was 177*l.* odd.; the justices of the county offered 100*l.* only in discharge of the whole amount, offering no reason why they refused the remainder. *Held*, that by the 25 Hen. VIII. c. 5, the surveyor was not entitled to a *mandamus* calling on them to pay the whole, as the amount of charges to be allowed was in their discretion. *Regina v. The Justices of Southampton*, xxviii. 171.

18. *To compel railway company to repair road.* A railway company, in pursuance of the powers of their act, pulled down a county bridge and erected another, at the same time entering into an agreement with the trustees of the road to repair such portions of the approaches to the bridge as had previously been repaired by the county. *Held*, that the county had not interfered with the road so as to bring the case within the 58th section of the 8 & 9 Vict. c. 20, and consequently a *mandamus* to the company commanding them to repair the road, would not be granted. *Ex parte The Exeter Road Trustees*, xi. 441.

19. A *mandamus*, and not an information, is the proper proceeding by which the public may compel the building of a railway. *The Attorney-General v. The Birmingham, &c. Railway Co.* vii. 283.

20. The existence of a legal right or obligation is the foundation of every writ of *mandamus*. *Ex parte Napier*, xii. 451. See also *Regina v. The Trustees of the Balby and Worksop Turnpike Road*, xvi. 276.



II. Practice, Costs, &c.

1. *Amendment.* Where a company was incorporated as the "D., S., and W. Junction Railway," and a *mandamus* had issued directed to them by the name of the "D., S., and W. Junction Railway Company," the court, upon the argument of the *mandamus*, ordered the name to be amended. *Regina v. The Derbyshire, &c. Railway Co.* xxvi. 101.

2. *Amendment—Common-law Procedure Act.* A *mandamus* recited the letters-patent incorporating a company, and alleged that D. was duly qualified for, and elected to, an office in it; had been removed without cause; and prayed for his restoration. The return alleged that the letters were not fully set out; that D. was not duly qualified, and had been rightfully removed; quoted a by-law, by which insolvents were ineligible; and stated that D. had falsely represented himself as solvent, had become insolvent, and been duly removed. *Held*, that under sec. 52 of Common-law Procedure Act, there was no ground for calling on defendants to amend their allegations; the latter part thereof showing on what defendants relied, so that D. was not "embarrassed, prejudiced, or delayed" in trying the question. *Quære*, whether the 52d section applies to *mandamus*. Where one party, under sect. 56, sets out an omitted part of a document pleaded by the other, the latter need not answer it. *Regina v. The Sadlers' Co.* xx. 152.

3. *Costs.* The court will generally order that the costs of a *mandamus* shall be paid to the successful party. This rule applies where, on the one hand, there has been a wrongful refusal to do the act which the court afterwards compels the party to do; or where, on the other hand, the party applying for the writ fails on a discussion of the merits. In either case, however, it is essential that no blame should have attached to the successful party. *Regina v. Langridge*, xxix. 177.

4. *No cause shown against rule for mandamus.* Where no cause was shown against a rule for a *mandamus*, and it appeared from affidavits that the litigation was substantially at an end, the court made the rule absolute, with costs, and did not require a separate application for costs. *Regina v. The East Anglian Railway Co.* xxii. 274.

5. *Inspection of documents—Pleading several matters.* An order may be made under stat. 14 & 15 Vict. c. 99, s. 6, compelling parties to allow an inspection of documents, in a proceeding by *mandamus*, if the *mandamus* be for the purpose of enforcing a civil right, and also, in such a *mandamus*, an order may be made under the stat. 1 Will. IV. c. 21, s. 3, that the prosecutor be allowed to plead several matters. *Regina v. The Ambergate, Nottingham, &c. Railway Co.* xi. 469.

6. *Return to mandamus commanding railway company to complete line.* To a *mandamus* commanding a railway company to complete their line, it is not a sufficient return that the compulsory powers for the purchase of land expired before the issuing of the writ, and that the defendants never were in actual possession or entitled to acquire possession of all the lands required for the purpose of making the line; they must go on to show that they cannot get all the necessary land without exercising their compulsory powers. *Regina v. The Great Western Railway Co.* xviii. 364.

7. *Option given by act of parliament.* Where an act of parliament directs that, under certain circumstances, one or other of two things shall be done, the party to do the act has the option of doing which act he pleases; and a *mandamus* not giving such option, or not stating a sufficient reason why such option no longer exists, is bad in law. *Regina v. The Southeastern Railway Co.* xxv. 13.

8. A writ of *mandamus*, which omits a necessary fact, cannot be cured by the return. *Ib.*

9. An application for a *mandamus* to a railroad company to complete the railway may be made by a shareholder. *Regina v. The Ambergate, Nottingham, &c. Railway Co.* vi. 328.

10. If a *mandamus* commands two things and one of them fails, the whole fails. *Regina v. The East and West India Docks, &c. Railway Co.* xxii. 113.

11. See also RAILWAYS.

MARRIAGE.

1. *Construction of marriage contract made in London in Scotch form.* A contract of marriage made in London, in the Scotch form, will be construed in England according to the law of Scotland. The domicile of the parties must determine the

remedies by which the contract will be carried into effect. *Duncan v. Cannan*, xxiii. 288.

2. *Marriage of minor by license—Consent of father presumed.* Where a marriage of a minor was celebrated by license, to which the consent of the father was requisite, his consent (the presumption of law being in favor of marriage and legitimacy, and against the commission of any crime or offence) must be presumed, until proved to the contrary; and the mere fact that the mother's name appeared in the register as the consenting party was not sufficient to contravene the presumption. *Harrison v. The Corporation of Southampton*, xxi. 343.

3. *Refusal of clergyman to marry parties.* Where a man and woman, notice of whose intended marriage had been published at the board of guardians, called at the private house of the clergyman of a chapel in the district, at nine o'clock in the evening, and, showing him the superintendent registrar's certificate, requested him to appoint a time for their marriage, when the clergyman declared he would marry them when they had expressed a desire to be confirmed, and not till then—*held*, that this was no proper tender of the parties for marriage, nor a legal demand of marriage, and the clergyman was not liable to an indictment for his refusal at such time and place. The indictment should have shown that the man and woman were parties who might lawfully have been married. *Regina v. James*, i. 552.

4. *Certificate of baptism—Evidence of marriage.* A certificate of the baptism of a child by a minister, which does not purport to be drawn from any public record, is no evidence of the marriage of the parents. *Parlby v. Parlby*, vi. 593.

5. *Breach of promise of, by single woman against a married man.* An action for breach of promise of marriage will lie against a married man by a single woman, who, at the time of the promise, had no notice of his then marriage. *Millward v. Littlewood*, i. 408.

MARRIAGE SETTLEMENT.

I. CONSTRUCTION AND VALIDITY OF MARRIAGE SETTLEMENTS.

H. MISCELLANEOUS CASES.

I. Construction and Validity of Marriage Settlements.

1. A and B, mother and daughter, held an estate in trust for the benefit of A for life, and afterwards for B absolutely. B on her marriage settled her interest in the estate in trust for the issue of the intended marriage, and for a niece and her issue, A having notice, but not joining. *Held*, that even if the settlement was voluntary as regarded the trusts in favor of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter, and the trustees of another settlement which she made upon a second marriage, inconsistent with the former settlement. *Kekewich v. Manning*, xii. 120.

2. *Real estate of settlor primarily liable for payment of annuity.* Where an intended husband demises real estate for a term to trustees as security for the payment of an annuity to the intended wife, and the settlor's personal estate is not augmented by the settlement, then his real estate is primarily liable for the payment of the jointure. *Loosemore v. Knapman*, xxiii. 194.

3. *Scotch settlement—Covenant to pay annuity to wife—Life-interest in wife's estate—Bankruptcy.* By a settlement made, in the Scotch form, between a Scotchman domiciled in Scotland and an English woman, the husband covenanted to pay after his death an annuity to the wife and portions to the children; for which causes she assigned all her estate, giving the husband a life-interest with remainder to herself absolutely; the husband became bankrupt after their domicile had been changed to

England. *Held*, that his life-interest could not be impounded to secure the payment of the annuity and the portions. *Duncan v. Cannan*, xxi. 443.

4. *Covenant by husband to settle wife's future real and personal estate if she would consent.* Where an intended husband covenanted to settle the wife's future real and personal estate, "in case the said intended wife would voluntarily consent thereto, but not otherwise," it was *held*, that this clause applied only to the real estate, and that the covenant was absolute with respect to the personal estate. *Re Trusts of Will of Mary Daniel*, xxiii. 595.

5. *Restraint upon anticipation.* By an ante-nuptial settlement a fund was declared to be held by the trustees upon trust for the intended wife for life, for her separate use without power of anticipation, and after her death in trust for the intended husband for life, and after the decease of the survivor, in trust for the children of the marriage as the intended husband and wife should jointly appoint, and (subject thereto and to a separate power of appointment in the survivor) in trust for the children equally, to be vested in sons at twenty-one and in daughters at twenty-one or marriage. There was also a power for the trustees, at the request of the husband and wife, during their joint lives, to advance, for the benefit of any child whose portion should not be vested, any part of his or her presumptive portion, and to apply for or towards the maintenance or education of any such child or children all or any part of the income of such his, her, or their presumptive portions. The only children of the marriage were two sons and a daughter. The husband and wife appointed the trust fund to the three children equally, to be vested in sons at twenty-one and in the daughter at twenty-one or marriage, with trusts for accruer in the event of any child dying before attaining a vested interest. By the same deed, the husband and wife requested the trustees to pay, for five years after the date of the deed, certain sums for the maintenance of the three children, and after the expiration of that period to pay 150*l.* towards the maintenance and education of the children during the residue of the life of the wife. *Held*, that the maintenance clause did not enable the wife to affect her life-interest by such a prospective provision, at all events as regarded any period beyond the minority of the sons, or the minority or marriage of the daughter. *Horlock v. Horlock*, xix. 221.

6. *One moiety for children, the other as wife should appoint—Default of appointment.* By a marriage settlement the trusts of a fund were declared to be as to one moiety for the benefit of the children, after the death of the parents; and as to the other moiety after the death of the wife, if she died in the lifetime of the husband, as the wife should appoint, and in default of appointment for such persons as at the death of the wife would have been entitled to the residue of her personal estate, "in case she had died intestate and without being married." The wife died in her husband's lifetime, leaving two children. *Held*, that the children were entitled to the second moiety. *Re Norman's Trust*, xvii. 39, reversing s. c. xvii. 127.

7. *Power not authorizing exclusive appointment—Children taking vested interests at birth.* By a marriage settlement rents were to be paid to the husband for life and then to the wife for life, and after the death of the survivor towards the maintenance of "all and every the child, or children" of the marriage until they attain the age of twenty-one; and then the trustees were to convey the same premises to such children in such shares, &c., as the husband and wife jointly, or the survivor of them, should appoint; and in default thereof to convey all the said premises to the children as joint-tenants. If there should be only one child, the whole to that. If no issue, or all such issue should die without issue, in the lifetime of the parents, then gift over. *Held*, that the power did not authorize an exclusive appointment to some only of the children. *Held* also that, under the gift in default of appointment, all the children of the marriage were entitled to vested interests on their respective births. *Held*, further, that the children took estates in fee-simple under the gift in default of appointment. *Strutt v. Braithwaite*, xiii. 381.

8. *Limitation to children—Absolute interests.* By settlement, personal estate was limited, after the death of the husband and wife, in trust for all the children as tenants in common, and the several issue of the body of such children; and, failing issue of any such children, their shares to the use of the surviving children, as tenants in common, and the issue of their bodies. There was a gift over, in case there should be no issue of the marriage, or any issue of such issue, or, being such, all should die before their shares should become payable. *Held*, that the children of the marriage took absolute interests, and that the representatives of a child who died an infant, without issue, in the life of his parents, were entitled to a share. *Mount v. Mount*, xvii. 493.

9. *Life-interest in wife by implication.* Where it was provided in a marriage settlement that in case the wife should survive the husband, the fund should be held in trust for such person as the wife should by will appoint, it was *held*, that the wife took, by implication, a life-interest in the trust fund. *Allin v. Crawshay*, xii. 243.

10. *Covenant to discharge lands from payment of legacies.* J. F., by will, charged certain real estates with the payment of four legacies of 5,000*l.* each, and left the estates so charged to J. B. By his marriage settlement, J. B. covenanted with the trustees of the settlement to discharge the lands, and to pay the legacies, and to settle the lands, free from the legacies, to the usual uses and trusts upon a marriage. He, however, only paid off one of the said four legacies, and died. In a suit between his personal representatives and the persons entitled to the real estate, it was *held*, that the land was, by the covenant in J. B.'s marriage settlement, entitled to be exonerated out of his personal estate. *Barham v. Clarendon*, xvii. 310.

11. *Wife's receipt for rents of her leaseholds a sufficient discharge to tenants only.* By a marriage settlement, leaseholds of the wife were assigned upon trust to pay or permit the wife to receive the rents and annual profits during her life, for her separate use, &c. During the coverture, the wife received some of the rents from the trustee, and deposited a portion with the defendant, and then died. It was provided by the deed, that the wife's receipt, and no other, should be a valid discharge for the said rents and annual profits. *Semble*, that a discharge to the tenants only, and not to the trustee, was meant. *Held*, that an action for money lent, would lie by the husband in his own right to recover the money deposited. *Bird v. Pegrum*, xxii. 498.

12. *Former part of settlement restricted by subsequent part—Property which might be given to wife during coverture.* Upon the marriage of one of several residuary legatees under her father's will, the intended husband and wife assigned to trustees all and every the sum and sums of money, legacy and legacies, and other personal property then due and payable, or belonging to, or to become due and payable to the intended wife under or by virtue of her father's will, "or otherwise howsoever," upon trusts for her separate use for her life, without power of anticipation, with trusts in remainder in favor of the children of the marriage. By the next witnessing part of the same settlement, it was agreed, that in case any real or personal property should, during the coverture, be given or bequeathed to the wife, the husband should settle it upon trust so that the wife should have the sole power of disposing of the same. *Held*, that a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for the children, the latter witnessing part of the settlement showing that the former must be read in a restricted sense. *Re Stephenson's Trusts*, xxvii. 487.

13. *Settlement in foreign form.* A husband and wife who have made a marriage settlement of personal estate in a foreign form must be taken to have contracted not only for such powers of disposition over the property as are expressly reserved, but also for all such as by the law according to which the settlement is to be construed, are incident to the estates created by it, and such powers are not lost by the parties afterwards becoming domiciled in a country by the law of which those powers are not incident to the estates. *Duncan v. Cannan*, xxxi. 443.

14. *Settlement by deed to trustees only, and not to them and their heirs—Will.* For a consideration stated, J. P. executed an indenture of settlement, whereby he bargained, sold, &c., to trustees, in trust, for M. C., his intended wife, to the use of the first son of the said J. P. on the body of the said M. C. lawfully begotten, and to the heirs male of the said son lawfully begotten, a certain free estate called "Horsecroft," belonging to the said J. P. The said J. P. had a son, who was also called J. P. More than fifty years after the making of the indenture, J. P., the father, made his will as follows: "I give Horsecroft, my estate, that I now live in, to my son, John P." The son died unmarried and intestate. *Held*, that the deed was inoperative, inasmuch as the gift was only to the trustees, and not to them and their heirs; and that the son J. P. took by the will an estate in fee in Horsecroft. *Doe d. Pottow v. Fricker*, v. 443.

15. *Post-nuptial settlement—Assignees of bankrupt husband—Trustees.* By a post-nuptial settlement, a legacy of 600*l.*, belonging to the wife, was settled by husband and wife on the wife for life, for her separate use, with remainder to her children. At the time of the settlement the husband was insolvent. *Held*, that the assignee of the husband was entitled to one moiety of the legacy, and the other moiety was ordered to be paid to the trustees of the settlement. *In re Wray's Trusts*, xv. 265.

16. *Shifting clause.* By a marriage settlement, estates A and B were limited to the husband for life, with remainder, as to estate A, to the first son of the marriage in tail male, with remainder to the second and other younger sons in tail male; and as to estate B, to the second son in tail male, with remainder to the third and other younger sons, &c. Proviso, that if such second or other younger son should become an eldest son, and, as such, entitled, under the limitations of the settlement, to the possession of the estate A, then estate B should go over to the person next entitled under the limitations. There were several sons of the marriage, the eldest of whom died in the lifetime of his father, without issue. The father and the second son (the plaintiff) joined in suffering a recovery of estate A, to such uses as they should jointly appoint, and, subject thereto, to the old uses of the settlement. The father and the plaintiff then executed a mortgage of estate A, for a sum expressed to be paid to them jointly, and the deed provided for a reconveyance, on payment of the mortgage money, to the uses of the recovery deed. *Held*, that on the death of the father, the plaintiff, notwithstanding the recovery and mortgage, came into the possession of estate A, under the limitations of the settlement, and that, under the shifting clause, estate B passed over to the third son. *Held*, also, that the father and the plaintiff had power to have so dealt with the estates as to prevent the operation of the shifting clause. *Harrison v. Round*, xv. 563.

17. *Construction of.* Where a testator directs a settlement to be made of property on a married woman for life, for her separate use, the trust is to be framed "without power of anticipation." *Turner v. Sargent*, xxiii. 580.

18. *Consideration extending to whole of settlement.* Consideration for a settlement being found to exist, it was *held* to extend to the whole and not to a part only of the property which was the subject of it. *Harman v. Richards*, xvii. 548.

19. *Assignment by married woman of life-interest in separate estate—Consideration.* The release and assignment by a married woman of her life-interest in her separate estate, although fettered by a restriction against anticipation, was *held* to form a consideration for a settlement by another person; for, though the married woman could not pass her future interest, she might and did thereby release her past income; and the question of consideration moreover depended, not upon the point whether her assignment passed her interest, but upon the question whether her concurrence enabled the settlement to be made. *Id.*

20. *Infant wife.* By a marriage settlement, made whilst the intended wife was an infant, the husband covenanted to assign to trustees certain property to which she

was entitled to her separate use. *Held*, that the settlement was inoperative. *Re Waring*, xii. 351.

21. *Infant*. A marriage settlement, the husband being adult and the wife a minor, is binding on the former, though not on the latter. *Cave v. Cave*, xix. 280.

22. *Proviso in settlement*. Where a father, upon the marriage of his son, settled certain real estates upon the parties to the marriage, but introduced a proviso materially varying, in favor of his son, the interests under the settlement, in the event of a separation taking place between the intended husband and wife after the marriage, it was *held*, that the proviso was void, as against the policy of the law. *Cartwright v. Cartwright*, xix. 613.

23. *Settlement upon wife of real estate, in consideration of mortgaging personal estate*. The settlement on a wife of her husband's real and personal estate, in consideration of her mortgaging her separate estates for the payment of his debts, is a valid settlement against the assignees of the husband who afterwards becomes insolvent. *Carter v. Hind*, xxiii. 614.

II. Miscellaneous Cases.

1. *Appointment under marriage settlement*. Under a marriage settlement power was given to a father to appoint the trust estates among all or any of his children. The estates were converted into money, and the father obtained a large portion of the trust funds without giving any security for their repayment to the trustees. The father having one son and four daughters, executed the power in favor of the daughters, to the exclusion of the son, and a few days afterwards the daughters transferred their appointed shares in the trust property to their father, who conveyed some real estates of which he was seised to them in exchange. The son, after the death of his father, filed a bill to set aside the appointment, and also the deeds effecting the exchange, on the ground of fraud, based upon a collusive agreement between the father and his daughters, by which the father, who was not able to replace the trust moneys, obtained a discharge from the claims of the trustees. *Held*, that no benefit had accrued to the father, and that the appointment was good. *Askham v. Barker*, xix. 525.

2. *Deed of settlement after marriage—Income of trust fund ordered to be applied to maintenance of children*. By a deed of settlement after marriage a sum was vested in trustees upon trust to pay the dividends to the husband and wife for life; it was declared that the true intent was that the income was reserved to the husband and wife "upon condition that they, or the survivor of them, should, at all times during the minority of their children, provide them with suitable diet, &c." The parents became embarrassed, raised a sum of money, and assigned their interest in the trust fund to secure it. Their six infant children filed a bill alleging that the parents had omitted to give them suitable diet, &c. The whole income of the trust fund was ordered to be applied to the maintenance and support of the children. *In re Dalton's Settlement*, x. 97.

3. *Trustees' Relief Act—Practice*. Money was paid into court by the trustees of a marriage settlement, under the stat. 10 & 11 Vict. c. 96. A petition was presented for payment of the money by a party who claimed by a title adverse to the settlement. *Held*, that a bill must be filed, as the court would not adjudicate upon a conflict between claimants supporting and disputing the settlement. *In re Fozard's Trust*, xxxi. 343.

4. *Semble*, that the court will not assist persons claiming under parties to a marriage settlement, where the effect of such interference will be to defeat the scope and object of the settlement. *Duberly v. Day*, xii. 268.

5. *Bill to rectify a settlement*. A marriage with a ward of court, a tenant in tail of real estates, took place without consent; proposals were made under various orders of

the court, that the personal and real estate of its ward should be settled, and that the income should be secured for the separate use of the wife. A deed of covenant was afterwards executed by the husband, and the income of the personal and real estates was to be paid to the wife for life for her separate use, with a provision against anticipation as to the personal estate, which was omitted as to the rents of the real estate. The deeds executed to bar the entail and resettle the estates, according to the proposals, were informal, and the wife alleged that she executed them under duress, and for fear of an attachment. The wife separated from her husband and charged the rents of the estate with the payment of several annuities, after which the husband died. Upon a bill by the wife to rectify the settlement and obtain payment of the rents, it was *held*, that the wife having dealt with the property upon the footing of the settlement, was so far bound; and that, assuming there was a mistake, the court would not assist her to defeat transactions *bonâ fide* entered into with third parties on the faith of the settlement being correct; and the cross-bill was dismissed, but without costs. *Cock v. Clark*, xvii. 371.

6. As to appointments under marriage settlements, see *Holliday v. Overton*, xiii. 302; *Ewart v. Ewart*, xxi. 192.

MARRIED WOMAN.

As to suits by married women, &c., see NEXT FRIEND. See also HUSBAND AND WIFE. MARRIAGE.

MASTER AND SERVANT.

I. WHAT CONSTITUTES THE RELATION OF MASTER AND SERVANT.

II. LIABILITY OF MASTER FOR ACTS OF SERVANT.

III. MUTUAL RIGHTS AND DUTIES; ENTICEMENT OF SERVANT.

I. *What constitutes the Relation of Master and Servant.*

1. *Laborer employed to cleanse drain.* Defendant employed P., a laborer, whom he had never before employed, to cleanse a drain running under a highway. P. left the drain in a dangerous state, and plaintiff's horse fell in. *Held*, a case of master and servant, and that defendant was liable. *Sadler v. Henlock*, xxx. 167.

2. *Journeyman tailor—No contract for time.* A journeyman tailor, employed to do any work given him, there being no contract to serve for any specific time, but only that he should work exclusively for his master on his premises, and finish any job he undertook,—is a servant within 4 Geo. IV. c. 34, s. 3. *Ex parte Gordon*, xxx. 309.

3. *Servant in husbandry.* One hired to serve at a farm for a year as a dairymaid—to assist in the harvesting—to cook for the laborers, &c., &c., is a "servant in husbandry," within 20 Geo. II. c. 19. *Ex parte Hughes*, xxv. 228.

4. *Servant of clerk of peace.* By the 59 Geo. III. c. 28, two courts may be held at quarter sessions, and the clerk of the peace is to appoint a fit and sufficient person to record the proceedings in the second court. *Quære*, whether the person so appointed is the servant of the clerk of the peace, so as to render the latter liable for the negligence of the former, or so as to make a receipt by such person, of a fine imposed at quarter sessions, a receipt by the clerk of the peace? *Wildes v. Morris*, xiv. 181.

5. *Fines.* *Quære*, also, if such person has authority to receive fines imposed at quarter sessions, so as thereby to charge the clerk of the peace with the receipt of them? *Ib.*

6. Where such person had received in court a fine so imposed, and had handed it over to the undersheriff, but made no record of such payment, and the clerk of the peace not knowing that such payment had been made, inserted the fine on the roll

as unpaid, and the sheriff thereupon levied the fine, it was *held*, that the clerk of the peace was not bound to enter the fine as paid unless his appointee was his servant, acting within his authority. *Ib.*

7. *Agreement creating this relation, and not that of landlord and tenant.* By an agreement, not under seal, made between the defendant, described as a common brewer, of the one part, and the plaintiff of the other part, reciting that the defendant was in possession of a messuage and premises, wherein the sale of beer had been for some time past carried on by A B, on the defendant's account, and that the plaintiff was desirous of carrying on such trade and business for the defendant, to which he had agreed, it was witnessed, that the defendant agreed, for the consideration therein stated, that the plaintiff should enter upon the said premises and carry on therein such trade or business for the defendant, in the place and stead and in the same manner and with and on the same privileges and terms as the said A B had theretofore done, until the agreement should be determined by the notice thereafter mentioned; and the plaintiff thereby agreed, during all the time he should carry on the said trade on the said premises for the defendant, that all beer sold by him on the said premises should be had by him from the defendant, and that the plaintiff should not part with the said trade or the occupation of the said premises to any person without the license of the defendant; and that, whenever either party should be desirous of putting an end to the agreement, the plaintiff should, on receiving from the defendant such notice, quit the said trade and deliver up possession of the said premises, and should be at liberty to leave the said trade and quit the occupation of the said premises, on giving one month's notice to the defendant. *Held*, that this did not create the relation of landlord and tenant between the parties, but that the occupation of the plaintiff was that of servant to the defendant. *Mayhew v. Suttle*, xxviii. 266; s. c. xxvi. 139.

II. Liability of Master for acts of Servant.

1. *General doctrine of liability.* A master is liable for the negligent or tortious acts of his servant, when done in the course of his employment; but he is not liable if the acts are wilful, or unauthorized and not in the course of his employment. Note to *Mitchell v. Crassweller*, xvi. 448.

2. *Negligent driving of carman not at the time in masters' employ.* It was the duty of the defendants' carman after having delivered his masters' goods for the day to return to their house, get the key of the stable, and put up their horse and cart in a mews in an adjoining street. On his return one evening he got the key, but instead of going to the mews, and without the defendants' leave, he drove a fellow servant in an opposite direction, and on his way back injured the plaintiff by his negligent driving. *Held*, that the defendants were not liable. *Ib.*

3. The declaration also stated, that whilst the plaintiff was crossing a certain street, the defendants, by their servant, negligently drove and injured the plaintiff. *Held*, that the defendants, under not guilty, might show that the driver was not at that time acting as their servant. *Ib.*

4. *Liability of boarding-house keeper for negligence of servant—Duty as to employing servants.* The keeper of a boarding-house agreed to furnish attendance; a servant being sent on an errand by a guest, in the evening, left the front door ajar, and a thief entered and stole a box belonging to the guest. On an action by the guest for the value of the box, the jury found for the defendant on the general issue of "not guilty." *Held*, by the court, that it was the duty of the defendant to take such care of her house and the things of her guests in it as every prudent householder would take; and, by Lord Campbell, C. J., and Coleridge, J., that if there had been a want of due and reasonable care, it was immaterial whether the negligent act was that of the defendant or her servant, even though every care had been taken in employing

such servant; but, by Wightman, J., and Erle, J., that her duty extended only to care in employing none but trustworthy servants; if that had been done, the defendant was not liable for the single act of negligence by the servant. Rule for new trial discharged. *Dansey v. Richardson*, xxv. 76.

5. *Liability of harbor commissioners for negligence of master of steam-tug.* The plaintiff's vessel received damage through the negligence of the master of a steam-tug towing it in the harbor of N. By an act of parliament, which appointed commissioners of the harbor, it had been provided that it should be lawful for the commissioners to provide steam-tugs, and that any person requiring a towing-vessel should pay to the commissioners such compensation as the commissioners should fix. An arrangement had been entered into, that the proprietors should employ their boats at reduced charges, and that the commissioners should pay them a compensation for the reduction. The steam-tugs had been placed under the control of the harbor-master, who was authorized by the act to give directions respecting the management of vessels in the harbor. The plaintiff recovered judgment for the injury to his vessel against the commissioners, on the ground that they were responsible for the negligence of the master of the tug. *Held*, on appeal, that the judgment ought to be reversed, as on no inferences of facts that could legitimately be drawn from the case, could the judgment of the county court have been arrived at without an error in law. *Cuthbertson v. Parsons*, x. 521.

6. *Tortious act of servant not authorized or ratified by master—Arrest in railway train—Excursion ticket—Trespass for false imprisonment.* Plaintiff bought an excursion ticket on the railway of defendants, having been misinformed by the ticket clerk as to the time of the return of the train. Returning in a train at the time directed by the clerk, he gave up his ticket, when the person in charge of the train, informing him that he ought not to have gone by that train, demanded 2s. 6d. more. Payment being refused, a railway servant and the superintendent took the plaintiff into custody. The point disputed being the admissibility of certain evidence, and the question whether there was evidence for the jury of the railway servant, who made the arrest, being a servant of the defendants, it was *held* that, at all events, there being no proof of the defendants having the power of arresting the plaintiff, there was no evidence of their having expressly or impliedly authorized or ratified the arrest made by the railway servant, and therefore that they were not liable for his tortious act. *Roe v. The Birkenhead, &c. Railway Co.* vii. 546.

7. *Unlawful act done by servant of contractor employed to do it:* Where a person is employed to do an unlawful act, by which an injury is occasioned to a third person, the employer is liable to an action for such injury, though the party employed be a contractor, and the act that of his servants. *Ellis v. The Sheffield Gas Consumers Co.* xxii. 198.

8. *Negligence of sub-contractor.* A railway company entered into a contract with A to construct a branch line; A contracted with B to erect a tubular bridge, parcel of the works. B had a surveyor, C, whom he paid by a salary of 250*l.* a year to attend to his general business; and after obtaining the contract for the bridge, contracted with C to provide the necessary scaffolding, for which he was to receive 40*l.* irrespective of his salary, B to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and owing to the want of sufficient light to warn the passers-by, D stumbled over the pole and was injured; subsequent to which additional lights were placed on the spot, and B paid for them. *Held*, that B was not liable, and that D's remedy lay against C. *Knight v. Fox*, i. 477.

9. *Servant committing public nuisance.* If A employs another to do a lawful act, and he in doing it commits a public nuisance, A is not responsible. *Aliter*, if the act to be done necessarily involves the committing a public nuisance. *Peachey v. Rowland*, xvi. 442.

10. In America, the cases are generally, though not uniformly, in favor of the responsibility of A. See note. See also *Orrerton v. Freeman*, viii. 479.

III. *Mutual Rights and Duties ; Enticement of Servant.*

1. *Governess—Determination of service.* A governess is not within the rule applicable to menial or domestic servants, that upon a general hiring, the service may be determined by a month's notice or payment of a month's wages. *Todd v. Kerrich*, xiv. 433.

2. *Truck Act.* *Quære*, if employers of workmen are also interested as partners in a shop for the sale of goods adjoining or near to the office where the men's wages are paid, and wages are expended there in goods, whether they can be recovered as having been paid in violation of the Truck Act? *Semble*, they can, if any constraint has been used by the employers to induce the workmen to spend their wages at their shop. *Olding v. Smith*, xi. 424.

3. *Refusal to employ servant according to agreement—Damages.* Declaration that plaintiff agreed to enter into defendant's service as courier, from a certain day, defendant agreeing to start on a journey of three months at least on that day, and pay certain wages. Before the day arrived, defendant refused to fulfil the contract, at any time, and the action was at once brought. *Held*, that plaintiff was not bound to wait till the day came, but could maintain this action. In assessing damages in such a case the jury are justified in looking at all that had happened or was likely to happen down to the day of trial, to increase or mitigate the plaintiff's loss. *Hochster v. De Latour*, xx. 157.

4. *Voluntary service.* A person who voluntarily undertakes a duty for a railway company, and receives an injury caused by the want of another person to assist him, is not entitled to recover from his employers a compensation for the injury. *Skip v. The Eastern Counties Railway Co.* xxiv. 396.

5. *Miner killed by stone falling from roof of mine—Question for jury.* In an action by the widow of A, a miner, to recover compensation for his death, alleged to have been caused by the negligence of the defendants, his employers, it appeared from the plaintiff's evidence that A worked in the main road of the pit, taking out coal there; that he had often complained of a large stone in the roof, which was in a dangerous position; that on the morning of the accident defendants' manager had said there was no danger, but promised to remove it, and had sent two men to do this; that on reaching the spot, they found A filling his hutch with coals, and they waited till he should finish it, but before that had been done the stone fell and killed A. There was conflicting evidence as to whether the men told A to fill his hutch first, before they would remove the stone, or whether A, for his own benefit, asked the men to wait till he filled it. *Held*, reversing the judgment of the court of session in Scotland, that there was evidence to go to the jury; and the two questions for them were—first, was the stone negligently allowed by defendants to remain in a dangerous position too long; and, secondly, did A lose his life in consequence of that negligence, and not in consequence of his own rashness. *Paterson v. Wallace*, xxviii. 48.

6. *Workman not to incur extraordinary danger.* Where a master is employing a servant in a work, he is bound to take all reasonable precaution that there shall be no extraordinary danger incurred by the workman. Per Lord Cranworth. *Id.*

7. *Accident to one servant by fault of another.* The master is liable to third persons for accidents occasioned by the neglect of his servants, but is not liable to his servants for an injury caused by the fault of their fellow-servant. Per Lord Cranworth. *Id.*

8. *Grounds of dismissal.* The declaration stated that the plaintiff entered into the service of the defendant for a term of three years, under an agreement that he, the plaintiff, would during that time use his best endeavors to promote the interests

of the defendant, and would attend to and carry out all reasonable requests. *Held*, in an action for wrongful dismissal before the end of the term that a plea that the plaintiff did not whilst in the defendant's employ use his best endeavors to promote the interests of the defendant according to the agreement, wherefore he was dismissed, disclosed a good defence, although the plea would have been held bad on special demurrer. *Arding v. Lomax*, xxviii. 543.

9. *Non-interference by court of chancery.* Under a contract of hiring and service, containing stipulations of such a nature that specific performance could not be enforced, the court of chancery will not restrain the employer from excluding, or enjoin him to retain, a servant, agent, or manager. *Semble*, even if there has been no breach of covenant by the latter. *Stocker v. Brockelbank*, v. 67.

10. *Loss of servant's luggage on railway—Action in his own name.* A servant travelling with his master on a railway may have an action in his own name against the railway company for the loss of his luggage, although the master took and paid for his ticket. *Marshall v. The York, &c. Railway Co.* vii. 519.

11. *Contract for exclusive personal service—Enticement of opera singer.* Defendant prevailed upon J. W., a dramatic singer, to break her contract to sing at plaintiff's theatre, and not elsewhere, during a certain term; accordingly, J. W. refused to sing there during any part of the term. *Held*, that the action was maintainable at common law, as the maliciously procuring J. W. to break her contract was a wrongful act from which damage accrued to the plaintiff; that the rule of law giving a remedy for enticing away servants, is not confined to menial servants, or to such as fall within the statute of laborers, but extends to all cases where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service for a given time under the direction of an employer who is injured by the wrongful act, and whether the employee had actually entered upon his duties or not. *Semble*, (per Crompton, J.) that the contract need not be for exclusive service. Coleridge, J., *contra*. The persuading, &c., is not actionable; the general rule of law confining the remedy for breach of contract to the contracting parties. The case of master and servant is excepted by a special statute, and this case is not within it. *Lumley v. Gye*, xx. 168.

MERGER.

1. *Prima facie* when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with, and which he does not except. *Johnson v. Webster*, xxxi. 98.

2. *Owner of estate, having charge upon it—Intermediate estate.* When the owner of an estate has also a charge upon it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say, that without some special act, no presumption can be made of an intention to merge the charge in the fee, for that might be against the interest of the owner, by letting in the intermediate estate; but where the intermediate estate is created by the act of the owner himself, this reasoning has no application. *Ib.*

3. *Reversion in fee descending upon tenant for life under will—Bar of contingent remainder.* A, by will, took a life-estate in certain premises, with a contingent remainder in B. The reversion in fee of the same premises descended to A, at the same time, as the immediate heir at law of the testator. *Held*, that the devolving of both estates upon A at the same time, did not operate as a merger so as to bar B's contingent remainder; but that a deed by A to such uses as required a union of the two estates would, if well executed, operate as such a merger. *Bancks v. Ollerton*, xxvi. 508.

4. Whether a declaration in a separate instrument, that a bond given upon an original simple contract debt was not to operate as a release, can prevent the legal effect of merger, *quære*. *Owen v. Homan*, iii. 112.

5. A term for years assigned by way of mortgage by the lessee to the lessor is merged. *Cottee v. Richardson*, viii. 498.

6. Merger of a charge in the inheritance is not to be assumed, if it would be contrary to the interest of the owner of the estate and charge. *Davis v. Barrett*, xi. 317.

MINES.

1. *Mutual rights of owners of surface and of mines.* When the surface of land belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. The owner of the surface close, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata; and if the surface subsides and is injured by the removal of these strata, although the operation of removal may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Humphries v. Brogden*, i. 241. See also *Jeffries v. Williams*, i. 433.

2. The mutual rights of the owners of the surface and of the subjacent mines may be varied by express stipulation. They were held not to be varied by a deed reserving the mines, with full power to do every thing needful or convenient for working them, the grantor paying to the grantee treble damages for any loss sustained thereby. The entire removal of all the coal, leaving the surface unsupported, was held not necessary, and contrary to the approved practice at the date of the reservation, (1671,) to which period a plea was held to refer, that defendants acted in accordance with the approved practice. *Smart v. Morton*, xxx. 385.

3. *Mutual rights of lessees of coal mines and alum mines.* A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in strata above the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached. Held, that the coal pillars could not be removed. *The Earl of Glasgow v. The Hurlet and Campsie Alum Co.* viii. 13.

See EASEMENT.

MISDEMEANOR.

To bring a horse infected with the glanders into a public place, to the danger of infecting the Queen's subjects, is a misdemeanor at common law. *Regina v. Henson*, xviii. 107.

MONEY.

When to be deemed land and *e converso*, see EQUITABLE CONVERSION OF PROPERTY. Also, *Harcourt v. Seymour*, v. 203, *In re Wharton*, xxiii. 485.

Money paid into court, see PAYMENT INTO AND OUT OF COURT.

MORTGAGE.

I. OF THE MORTGAGOR.

II. OF THE MORTGAGEE.

III. FORECLOSURE OF MORTGAGE.

IV. REDEMPTION.

V. SALE OF MORTGAGED PREMISES.

VI. OF RECEIVERS IN CASE OF MORTGAGE.

VII. PRIORITY OF INCUMBRANCES.

VIII. EQUITABLE MORTGAGE.

IX. MORTGAGE OF PERSONAL PROPERTY, &C.

X. MISCELLANEOUS CASES.

I. *Of the Mortgagor.*

1. *Compensation for loss of title-deeds.* A mortgagor who has paid off the mortgage debt, and to whom the mortgaged property has been reconveyed, is entitled to compensation from the mortgagee for the unaccountable loss of the title-deeds whilst in the possession of the mortgagee, unless the latter can show something to discharge himself. *Brown v. Sewell*, xxi. 508.

2. *Right of mortgagor to distrain.* A mortgagor in possession is, *præsumptione juris*, authorized to distrain as the bailiff of the mortgagee. A mortgagor in possession distrained for rent accruing due after the mortgage, but the notice of distress described the rent as due to himself. *Held*, in replevin, that he could make cognizance as the bailiff of the mortgagee. *Trent v. Hunt*, xxii. 546.

II. *Of the Mortgagee.*

1. *Liability of mortgagee when in part possession of premises.* A mortgagee in possession of part, and allowing the mortgagor to retain possession of the rest, is not, at the suit of a subsequent incumbrancer, to be charged constructively, as in possession of the whole. *Soar v. Dalby*, xv. 124.

2. *Right of mortgagee to maintain action for use and occupation.* A mortgagee who has never been seised or in actual possession of the mortgaged premises, cannot maintain an action of trespass, or use and occupation. *Quære*, supposing the plaintiff to have been in possession, and the defendants to have trespassed and occupied it to his exclusion, whether he would be entitled to recover for use and occupation on the principle that he might waive the trespass and recover in *assumpsit*. *Turner v. Cameron's Coalbrook, &c. Railway Co.* ii. 342.

3. *Paying off mortgage—Mortgagee must state his account.* Upon the expiration of a notice to pay off mortgage money, the mortgagees are bound to know and to state the amount due for principal, interest, and costs. And if the mortgagees refuse to receive the amount tendered by the mortgagor as due for principal, interest, and costs, they do so at their own risk. *Harmer v. Priestley*, xxi. 496.

4. *Liability of mortgagee in possession.* Where a tenant for life has a mortgage upon the inheritance, and an account is directed to be taken between him and the remainder-man of the rents received, and the interest on the mortgage, such tenant for life cannot, excepting upon special grounds, be charged with wilful default as in the case of a mortgagee in possession. *Kensington v. Bouverie*, xxxi. 345.

5. *Title of mortgagees not better than mortgagors.* Solicitors for trustees for sale, purchased part of the trust property and mortgaged it to A and B. The purchase was set aside. *Held*, that A and B, who had notice of the relation in which their mortgagors stood to the vendors, could claim no better title than their mortgagors. *Cookson v. Lee*, xxiii. 400.

6. *Arrears of interest—Tacking covenant against heir.* Where there is a mortgage of land, and a covenant by the mortgagor, for himself and his heirs, to pay the mortgage money and interest, if there has been no payment for a long period, the land is only charged with six years' arrears of interest under the 3 & 4 Will. IV. c. 27, s. 42, but twenty years' arrears may be recovered by an action on the covenant, under the 3 & 4 Will. IV. c. 42, s. 3. In such a case, in a suit by the heir of the mortgagor to redeem, the mortgagee may tack the personal liability on the covenant as against the heir. *Elvy v. Norwood*, xi. 224.

7. *Covenant to insure—Right to policy moneys.* A lessee who had covenanted to

insure against fire in the joint names of himself and his lessor, with a proviso that the policy moneys should be expended in reinstating the premises, assigned them by way of mortgage, with a power of sale under which the mortgagee sold. The mortgage-deed did not notice the policy. The premises were subsequently damaged by fire, and were reinstated by the mortgagee. On a claim filed by the mortgagee and his vendee, the mortgagor was decreed to deliver up the policy and join with the lessor in signing the receipt to the insurance office to enable the mortgagee to receive the money payable under the policy. *Garden v. Ingram*, xxiii. 408.

8. *Action for mesne profits.* A party having mortgaged his premises to the plaintiff in 1846, and being allowed to remain in possession, let them, in 1848, to the defendant. In October, 1849, the plaintiff, without having made an entry on the premises, or having been otherwise in possession, brought ejectment against the defendant, who gave his consent to a judge's order dated the 31st of October. The order directed proceedings to be stayed till the 15th of November then next, the tenant in possession undertaking on that day to give up possession to the plaintiff, and that in default the plaintiff should be at liberty to sign final judgment and issue execution against the tenant for the costs of such judgment, execution, writ of possession, costs of levy, &c. On the 15th of November the plaintiff first entered into possession of the premises, and brought an action for mesne profits accrued between November, 1848, and the 15th of November, 1849. *Held*, that the plaintiff not having been in possession of the premises prior to the 15th of November, could not maintain the action, his entry not having relation back to his title as mortgagee. *Litchfield v. Ready*, i. 460.

9. A legal mortgagee may maintain a creditor's suit, for the administration of an estate. *Groves v. Lane*, xiii. 376.

10. As to the rights of a mortgagee of freight, see *Brown v. North*, xvi. 486.

III. Foreclosure of Mortgage.

1. *Mortgagee with power of sale.* A mortgagee of a reversionary interest in stock in the public funds, with a power of sale, cannot be called on to submit to a decree for sale, but may proceed by bill for foreclosure; and is entitled to a decree in the common form for an account, and, in default of payment, for foreclosure. *Wayne v. Hanham*, iv. 147.

2. *Discretion of court.* The court has a discretion, under the 15 & 16 Vict. c. 86, s. 48, and it will not direct a sale of an incumbered estate, unless it is manifestly for the benefit of all parties; and where, under the circumstances, it would not be beneficial, a common decree of foreclosure was made. *Hurst v. Hurst*, xix. 374.

3. *Foreclosure upon a trust for sale.* If, in an indenture containing trusts for sale made between the owner of premises and the lender of a sum of money, there are covenants to pay the principal money and interest in six months; and, also, absolute covenants by the owner for title, as upon a mortgage, and for quiet enjoyment by the lender after six months, these covenants do not, nevertheless, make the case one for foreclosure, but only one for sale. *Jenkin v. Row*, xi. 297.

4. *Vesting order against infant's estate.* If a mortgagee foreclose against an infant devisee of the estate, a vesting order under the Trustee Act is unnecessary, and will not be granted. *In re Williams*, xi. 95.

5. *Validity of deed.* Where a mortgage deed, of a person afterwards found a lunatic, is good *primâ facie*, the mortgagor cannot be permitted to show its invalidity in a suit for foreclosure, (except, *semble*, by cross-examination of attesting witnesses,) and the court will act upon it until it is set aside by a court of law. *Jacobs v. Richards*, xxiii. 436.

6. *Who bound by foreclosure.* A party to a suit, in which a decree of foreclosure

has been made, in the absence of another party interested in the estate, whose interest was not disclosed on the pleadings, is, notwithstanding the imperfection of the suit, bound by the decree of foreclosure. *Bromitt v. Moor*, xii. 241.

7. *Offers to redeem.* If a first mortgagee files a bill for foreclosure, making several persons parties to the suit, simply alleging that they claim an interest in the premises, this act and allegation are not equivalent to an offer to redeem the subsequent mortgages. *Mansfield v. Ogle*, xxxi. 357.

8. *Bill of foreclosure by sub-mortgagee—Representative of mortgagee unknown.* A sub-mortgagee filed a bill of foreclosure; the mortgagee had died and his representative was unknown. *Held*, that the court could not, under sect. 44 of the Chancery Amendment Act, direct the suit to proceed in the absence of a representative of the mortgagee, against whose estate a decree was asked. *Bruiton v. Birch*, xix. 583.

9. In a foreclosure suit, a creditor by judgment, subsequent to the plaintiff, put in his answer, disclaiming all interest, stating at the same time that no application had been made to him to release his interest previous to the filing of the bill. To this answer the plaintiff filed a replication. *Held*, that the plaintiff was entitled to a decree of foreclosure, but that the defendant was not entitled to any costs from the plaintiff. *Ford v. Chesterfield*, xix. 434.

10. *Decree for foreclosure against infants—Supplemental bill—Practice.* Where a decree for foreclosure has been made against the defendants, subsequently discovered to be infants, the court will not rehear the cause, nor expedite the foreclosure of their equity of redemption, but a supplemental bill must be filed, or another suit instituted. *Scawen v. Nicholson*, xix. 436.

11. *Practice upon foreclosure.* A claim for foreclosure by a mortgagee with power of sale, and a proviso that the power should not prejudice his right to foreclose or his other rights as mortgagee, is a special claim, and requires the leave of the court to file it. *Varney v. Forward*, xv. 454.

12. The court is not authorized, by the Trustee Act, s. 30, to add to the order of course to make a foreclosure decree absolute, a declaration that the mortgagor, being out of the jurisdiction, is a trustee for the mortgagee, although the former order *nisi* was, that he should convey to the mortgagee, the mortgage being equitable. *Smith v. Boucher*, xvii. 63.

13. To a foreclosure claim parties interested under a trust should be made parties, or evidence given that they know of the proceedings and do not object. *Tudor v. Morris*, xxi. 502.

14. *Judgment creditor.* On a claim by a judgment creditor against his debtor in respect of certain real estate belonging to the debtor, the court refused to give a decree of foreclosure. *Footner v. Sturgis*, xiii. 150.

15. A decree for a foreclosure, where a subsequent incumbrancer is discovered, may be had on a supplemental claim. *Robinson v. Turner*, xv. 163.

16. In a suit by claim for foreclosure, it is optional with the plaintiff to take the usual order at the hearing, or an inquiry as to other incumbrances. *Robinson v. Turner*, vii. 138.

17. In a foreclosure suit, after decree for the payment of the mortgage-money had been made absolute and the order had been signed and enrolled, the court, upon motion by the defendant, enlarged the time for payment of the principal, interest, and costs. *Thornhill v. Manning*, vii. 97.

18. Upon a bill of foreclosure by first mortgagee, there was a contest between the defendants, the *puisné* mortgagees, as to their respective priorities. The court held that it must, in the first instance, direct an inquiry. *Duberly v. Day*, vii. 188.

19. Even in the case of infants, the court will only extend the time for payment of the mortgage money, upon the terms of immediate payment of the interest and costs. *Coombe v. Stewart*, vii. 167.

20. The deposit to be made by a mortgagor, requesting a sale instead of a foreclosure, should be sufficient to cover the expenses of an abortive attempt to sell. *Bellamy v. Cockle*, xxiii. 388.

21. In a foreclosure claim, the defendants appeared to the claim, but, though duly summoned, did not appear at the hearing. The plaintiff asked for an immediate sale. The court declined to direct an immediate sale, but ordered that an account should be taken, and that, in default of payment within a short period, the property should be sold. *Smith v. Robinson*, xvii. 450.

22. See also *Staines v. Rudlin*, xiii. 429, and *Phipps v. Budd*, ii. 187.

IV. Redemption.

1. *Redemption of separate estates.* A mortgaged an estate X to B for 200*l.*, and an estate Y to B for 1,200*l.* This latter mortgage was transferred to a trustee for C. Then A made a further charge of 400*l.* upon both X and Y in favor of B; and afterwards D contracted to purchase Y of A for 1,500*l.*, and to have the benefit of the mortgage to C in the mean time, paying her off with 1,200*l.*, part of the 1,500*l.*, "in discharge of her said mortgage," but stipulating to have the full benefit of her mortgage security. On a bill filed by B against A and D for payment or foreclosure, it was held, reversing the decree below upon both points, first, that the 1,200*l.* debt was not so extinguished by the payment by D to C as to deprive D of his priority on the estate Y; secondly, that D could not redeem B's interest in the estate Y on payment of 400*l.* only, but must pay the debt of 200*l.* as well. *Watts v. Symes*, viii. 247. See *contra*, *Smeathman v. Bray*, viii. 46.

2. *Right of party to redeem who acquires an interest subsequent to a foreclosure.* A party to a foreclosure suit, whose interest is thereby foreclosed, and who afterwards becomes entitled to an interest in the same estate, by devise or otherwise, from another person who was not a party to the foreclosure, may bring his bill of redemption. *Bromitt v. Moor*, xii. 241.

3. *Mortgage to building society—Terms of redemption.* If a mortgage be given to a building society to secure the payment of future contributions, the mortgagor cannot redeem by paying the advances made to him minus the subscriptions paid. *Seagrave v. Pope*, xv. 477.

4. The owner of shares in a benefit building society gave a mortgage security on leaseholds for sums advanced to him by the society in respect of his shares; he subsequently gave notice of his desire to redeem the mortgaged premises, and a difference having arisen as to the terms of redemption, he filed a claim. The Lord Chancellor made a decree for redemption, directing the terms thereof. *Fleming v. Self*, xxvii. 491.

5. *Settlement—Appointment—Right of redemption.* By a deed of settlement, lands were conveyed to such use as W. R. and his wife should appoint; and in default of such appointment, to W. R. the younger. W. R. and his wife appointed several times, by way of mortgage, with provisos for reconveyance to the former uses; and at length appointed, with a power of sale, and a proviso for reconveyance to W. R. and his wife in fee. W. R. survived his wife, and sold his supposed equity of redemption. On a bill filed by parties claiming under the trusts of the original settlement, against the representatives and other persons claiming under W. R., it was held, that under the last mortgage deed, W. R. and his wife did not take an absolute fee in the equity of redemption; and, therefore, that the plaintiffs were entitled to redeem against the representatives of the purchaser, the intention to alter the original devolution of the estate not being sufficiently apparent. *Whitbread v. Smith*, xxiii. 551, and see *xxi. 290.*

6. As to the right to redeem and time for redemption under a conveyance in trust to pay debts, see *Bell v. Carter*, xix. 56.

7. As to an acknowledgment of a right of redemption sufficient to take a case out of the Statute of Limitations, see *Stanfield v. Hobson*, xix. 449.

V. Sale of Mortgaged Premises.

1. *Discretion of court to order sale.* The court of chancery has a discretion, under the 15 & 16 Vict. c. 86, s. 48, to direct a sale of an incumbered estate, but the power will not be exercised unless it is manifestly for the benefit of all parties. *Hurst v. Hurst*, xix. 374.

2. A sale will not in general be ordered, under the 15 & 16 Vict. c. 86, s. 48, instead of foreclosure, unless there is such complication that the common decree cannot be conveniently worked. *Hiorns v. Holtom*, xiii. 596.

3. Under stat. 15 & 16 Vict. c. 86, s. 48, the court will not make a decree for sale, instead of foreclosure, without the consent of the mortgagor, except under special circumstances. *Probert v. Price*, xvii. 38.

4. *Petition for sale.* The court will not, upon an interlocutory application, direct a sale of a mortgaged estate under the terms of the 48th section of the Chancery Procedure Amendment Act. *Wayn v. Lewis*, xxi. 501.

5. Upon a claim by an equitable mortgagee against a mortgagor, asking for a sale, and also that the several other mortgagees might be summoned before the Master, or that a decree might be made to ascertain what mortgages there were, and their priorities, the court refused the order. *Burgess v. Sturgis*, viii. 270.

6. *Effect of assignment upon power of sale.* A mortgage contained a power of sale. The mortgage was transferred, with the benefit of all provisos, &c., contained therein. The mortgagor concurred and covenanted to pay a different sum on a different day. *Held*, that the power of sale still existed, and that a good title could be made upon a sale under the power. *Young v. Roberts*, xxi. 571.

7. Where a mortgagor and mortgagee, with a power of sale, joined in demising the premises to a receiver upon trust, the trust not being declared subject to the power of sale in the mortgage, it was *held*, that it was so in effect, and that the receiver was bound to join in conveying the premises to a purchaser from the mortgagee, without the concurrence of the mortgagor. *King v. Heenan*, xxvii. 470.

8. When there are several incumbrances on property the court may order it to be sold for the benefit of the mortgagees. *Cator v. Reeves*, xv. 334.

9. Against a mortgagee claiming by title paramount, no sale can be decreed without his express consent, except subject to his mortgage. *Langton v. Langton*, xxxi. 422.

10. On a claim by an equitable mortgagee under a deposit of title deeds, with a memorandum for securing a running balance, limited to a certain amount, the court will direct a sale. *Lloyd v. Whitey*, xxi. 23.

11. See also, as to sale under an equitable mortgage, *Bell v. Carter*, xix. 56.

VI. Of Receivers in case of Mortgage.

1. A provision in the act of incorporation of a railway company that any mortgagee whose interest is in arrear for twenty-one days, may have a receiver appointed on application to two justices, does not oust the jurisdiction of the court of chancery to appoint a receiver with the usual powers. *Fripp v. The Chard Railway Co.* xxi. 53.

2. *Seemle*, that if a mortgagee, claiming to have the management of the company changed, come under suspicious circumstances and have only a small interest, there will be a ground for not listening to the application. *Id.*

3. *Receiver for payment of incumbrances—Bill by subsequent incumbrancer—Parties.* Where a mortgagor, who had only a life-interest, had, by arrangement with the several incumbrancers on the mortgaged property, appointed a receiver of the rents and

profits, which it was agreed between all the parties he should apply in keeping down the several incumbrances, and pay over the surplus to the mortgagor; on a bill filed by a subsequent incumbrancer against the receiver and the mortgagor, praying that the receiver might be restrained from paying over the surplus of the said rents, &c., to the said mortgagor, and that he might pay them into court, to be applied in satisfaction of the plaintiff's debt, and praying a foreclosure or a sale in default of payment of the residue of his debt by the mortgagor, it was *held*, that, though the bill could be maintained against the receiver, it was defective by reason of the prior incumbrancers (to whom he was bound to account, and who might therefore institute another suit against him for the same object) not being made parties. Leave was given to amend. *Ford v. Rackham*, xxiii. 622.

4. *Receiver—Judgment creditors.* Where judgment creditors had duly taken out writs of *elegit*, but possession could not be given by the sheriff in consequence of the existence of prior outstanding mortgages, the mortgagees being alleged not to be in possession, and to refuse to take possession, the court appointed a receiver of the mortgaged premises, without prejudice to the rights of the mortgagees, the prior incumbrancers. *Rhodes v. Lord Mostyn*, xxi. 198.

5. *Appointment of receiver.* A receiver was granted after decree against a first and third mortgagee in possession, on the application of the second mortgagee, a co-defendant, it not appearing from the affidavit of the first-named mortgagee that any thing remained due on the first mortgage. *Hiles v. Moore*, xv. 130.

VII. Priority of Incumbrances.

1. *Mutual rights of legal and equitable mortgagee.* A legal mortgagee will not be postponed to a prior equitable one, on the ground of not having got in the title-deeds, unless there has been fraud or gross or wilful negligence on the part of the legal mortgagee. *Hewitt v. Loosemore*, ix. 35.

2. One party having a charge on freehold and copyhold estate, and another party on the freehold estate only, it was *held*, that the latter was entitled to require that the former should be satisfied out of the copyhold estate, so far as it would extend. *Tidd v. Lister*, xvii. 560, and xxiii. 278.

3. *Notice of prior incumbrance.* Where the question was, whether a mortgagee had notice of a prior judgment applicable to the property, and it was proved that the clerk of the mortgagee's solicitor examined the records for such prior judgments, but could not swear what report he made to the solicitor, it was *held*, that the mortgagee had sufficient notice of the prior judgments which existed, and were recorded in the books examined by the clerk, and this notice affected a subsequent purchaser of the mortgaged property from the mortgagee. *Procter v. Cooper*, xxxi. 216.

4. *Effect of concurrence of prior incumbrancer in puisne incumbrance.* If a widow who has a charge on her husband's estate, is also one of the trustees of his will, whereby it is directed that a sum shall be raised for her benefit, and, subject thereto, the estates shall be conveyed as A shall appoint, and A mortgages the estate to secure the repayment of a sum of money, and, by the direction of A, the widow and her co-trustee convey to the mortgagee, on trust for sale, &c., such mortgage does not pass the beneficial interest of the widow, but her concurrence therein, without reserving her priority, postpones her charge until after the mortgage. *Stronge v. Hawkes*, xxvii. 541.

5. *Arrears of interest—Repairs—First and second tenants for life.* A second tenant for life of an estate subject to a mortgage is not liable to discharge out of his income arrears of interest accruing during the life of the first tenant for life; but if he has expended money in repairs which should have been executed by the first tenant for life, he is not entitled to have them charged on the inheritance, no case of wilful waste by the former tenant having been made out. *Sharshaw v. Gibbs*, xxiii. 381.

6. Prior to an action on a policy against a guarantee company by the mortgagees of the policy, the mortgagees charged their interest in the policy in favor of a bank; and, pending the proceedings in the action, application was made to the bank by the attorneys to make them some advances for carrying on the action. The bank did not make those advances, whereupon the mortgagees assigned their property, including the policy, to trustees for their creditors, who sold the policy to B., who made advances exceeding the costs recovered. *Held*, (*dissentiente*, Sir Knight Bruce, L. J.) that the omission of the bank to furnish funds was not a ground of postponing its interest in the policy to that of B., but that the bank was bound to pay B. his advances, with interest. *Myers v. The United Guarantee, &c. Co.* xxxi. 538.

7. A tenant for life, in possession, having power to charge the inheritance with a certain sum and interest for his own benefit, executed the power and assigned the charge as part security for a greater mortgage. The rents of the estates were insufficient to pay the interest, and the tenant for life paid the deficit out of his own money. *Held*, that the estate of the tenant for life, who had died, was entitled to be reimbursed such payment out of the *corpus* of the inheritance. *Lord Kensington v. Bouverie*, xxxi. 345.

8. A tenant for life of real estates, with a power to charge 20,000*l.* for the portions of younger children, mortgaged his life-estate; he covenanted with some of the mortgagees that he would not execute the power without their consent. He subsequently exercised the power for the benefit of his children, and created a term of 1,000 years to secure payment of the 20,000*l.*, and upon the marriage of one of his daughters he appointed 5,000*l.* to her for a portion. The trustees and also the appointees had notice of the mortgages and of the covenant entered into by the tenant for life. *Held*, that the appointees were not entitled to any priority, and that they must be postponed to the previous mortgage. *Hurst v. Hurst*, xix. 374.

VIII. *Equitable Mortgage.*

1. *Possession of title deeds.* Possession of title deeds by a bond creditor is not of itself sufficient evidence of a deposit by way of equitable mortgage. *Chapman v. Chapman*, iii. 70.

2. Where the original deposit of title-deeds with a lender of money was invalid for usury, and there was a subsequent parol agreement for legal interest and the execution of a mortgage, an equitable mortgage was declared to exist, though there was no new delivery of the deeds, they having all the time remained in the hands of the creditor. *James v. Rice*, xxvii. 342, and xxiii. 567.

3. Affidavits of a deposit of an agreement for a building lease, to secure the payment of money, afford evidence of such deposit, and the court is bound to act upon them. When such deposit is made, it gives the mortgagee a title to the mortgage, and he has a right to payment; and the court will make a decree for an account and sale of the houses comprised in the agreement. *Sims v. Helling*, ix. 45.

4. *Tenants in common—Expense of surrender.* A and B were tenants in common with cross remainders. B obtained a loan for A from C, for which A gave his promissory note, and deposited the title deeds with C as security, with a memorandum by which he engaged "To make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required;" and B wrote at the foot: "I join in the deposit." A died unmarried, and without having surrendered or barred the remainders. *Held*, that this was a good equitable charge, not merely upon A's interest in his moiety, but also upon B's estate in remainder, and that B must bear the expense of surrendering that moiety. *Pryce v. Bury*, xxvii. 178, and xxiii. 75.

5. *Practice.* Where the plaintiff failed to prove his right to an equitable mortgage,

the court refused to direct a reference to the Master for further inquiry. *Chapman v. Chapman*, iii. 70.

6. *Assignment of shares of stock without notice.* A holding only sufficient shares or stock in each of two companies to qualify him for the office of director, and being director in each, executed an assignment of certain stock and shares to B as security for money lent. Of this transfer no notice was given to the companies until eight years after the assignment. At this time the bankruptcy of A was inevitable, and it took place a few weeks afterwards. *Held*, that there being no evidence of a contract between the parties that no notice should be given to the companies, B was the equitable mortgagee of the stock and shares. *Ex parte Littledale*, xxxi. 270.

7. Freehold property was conveyed to A B in trust for sale, and to pay himself his debt. The deed contained a proviso for reconveyance on payment of principal and interest, and a covenant by A B not to sell under the trust until six months after notice to pay. *Held*, that the object of the trust being to secure money, it was in the nature of a mortgage, though no equity of redemption was expressly reserved; and that A B was not entitled to a decree for an immediate sale, but that the debtor ought to have six months to redeem. *Bell v. Carter*, xix. 56.

8. A., in 1838, mortgaged certain real estate to S., with a power of sale, under which the property was sold in 1842, to a purchaser who transferred his contract to S. There was a balance after paying off S., and there being accounts between A. and M., this balance was placed, under a deed of 25th June, 1842, in the hands of trustees to be dealt with by arbitration between A. and M. In 1834, A. had made an equitable mortgage of the property to M. In January, 1840, M. deposited these deeds with W., the plaintiff, by way of equitable mortgage. In April, 1842, M. applied to the plaintiff for a loan of the deeds, telling him he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the plaintiff never applied to have the deeds back for more than four years. In May, 1843, M. deposited the deeds, by way of mortgage, with P., who now held them. In 1846, M. became bankrupt. W. filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842, paid to him. *Held*, that, as between W., the plaintiff, and P., the defendant, the plaintiff had, by his laches, enabled M. to commit a fraud, and had no equity against the defendant. *Waldron v. Sloper*, xix. 111.

9. See also *M'Neillie v. Acton*, xxi. 3.

IX. Mortgage of Personal Property, &c.

1. *Mortgage—Chattel—Deed.* A mortgage of a chattel may be made without deed. *Flory v. Denny*, xi. 584.

2. *Mortgage of tools and materials, validity of.* Trustees were empowered under a local act to purchase land, &c., for the purpose of making public docks, and to raise funds by borrowing money on the security of the rates and tolls to be levied under the act, and of any property vested in the trustees by virtue of the act, and the mortgages executed for this object were to be pursuant to a certain form, and to be registered. In the course of the execution of the works a large quantity of tools, machinery, and materials were purchased by the trustees for the purposes of the works, which they subsequently mortgaged to the contractor by two deeds, which were not in the form given by the statute, or registered. Subsequently these materials, tools, and machinery were seized under an execution against the company. *Held*, that the mortgage was valid, and the materials, &c., were not liable to be seized. *M'Cormick v. Parry*, xi. 551.

3. As to mortgage of ships and freight, see SHIPS AND SHIPPING.

X. *Miscellaneous Cases.*

1. *Exeter Canal Act, 1829—Power to raise money by mortgage—Misapplication of funds raised under—Right of mortgagees under—Lien.* A corporation owning a canal, obtained an act of parliament giving them powers to raise an unlimited sum upon mortgage of the canal for the purpose of completing improvements in the canal, which had been commenced prior to the passing of the act. Under the powers given by the act, the corporation raised a considerable sum, most of which they applied in paying off certain mortgages, which, prior to the passing of the act, they had effected upon their corporate property other than the canal; the money raised thereby having been expended in improvements in the canal prior to the act. One of several mortgagees under the act filed a bill challenging such an application of the funds raised under it. *Held*, that the corporate property other than the canal, was the first fund for paying the mortgages created prior to the passing of the act, it not being within the powers of the corporation, under the act to raise money to pay previous mortgages; that the moneys so applied by the corporation ought to have been paid to the statutory mortgagees ratably; and that the amount of such moneys constituted a debt due to the canal property, for which the mortgagees under the act had a lien upon the corporate property, other than the canal, comprised in the mortgages created prior to the act, so far as such property remained vested in the corporation. *Trevilian v. The Mayor of Exeter*, xxvii. 578.

2. A and B raised 2,500*l.* to lend on mortgage to C. A enabled B to receive the money for the purpose of the loan. B prepared the mortgage deed, and through his agents procured C, who knew that the money was in B's hands, to execute it, and sign a receipt on the back for the 2,500*l.* The agents took the deed away, procured A to execute it, and sent it to B. B paid into the bank to C's credit a sum of 513*l.*, and another of 1,050*l.*, in part of the 2,500*l.*, and then died insolvent. *Held*, that as between A and C, A was to be treated as mortgagee for the whole 2,500*l.* *West v. Jones*, iii. 225.

3. In 1821, N., being seised in fee of land, leased it to W. In 1822, W. mortgaged it for a term of years. In 1834, the mortgage was paid off, and the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the lessor of the plaintiff claimed. *Held*, that the lessor of the plaintiff was a person claiming under a mortgage within stat. 7 Will. IV. and 1 Vict. c. 28, and therefore, might bring ejectment within twenty years after the mortgage was paid off, though after the expiration of twenty years from the payment of rent to the mortgagor, or acknowledgment of title in him by the tenant in possession. *Doe d. Badeley v. Massey*, vi. 361.

4. Where there were cross-covenants in a mortgage deed, and the mortgagees did not execute, it was *held*, that they might nevertheless bring their action against the mortgagor who did execute. *Morgan v. Pike*, xxv. 281.

5. *Bond to the crown—Power of disposition—Record.* A bond to the crown under the 33 Hen. VIII. c. 39, binds all lands of the obligor over which he has a disposing power at the time he entered into the bond. The giving such a bond is a voluntary act upon the part of the obligor, and he cannot, by afterwards exercising the power, defeat the right of the crown. Such bond is within the 33 Hen. VIII. c. 39, though made payable to "the king, his heirs and successors," and, being a record, can be looked at by the court, although it be not set out in the pleadings. *Ellis v. Regina*, vi. 438.

6. *Mortgage of tolls and toll-gates.* The 49th section of the Turnpike Act, 3 Geo. IV. c. 126, provides, that any mortgagee of tolls, toll-gates, &c., may obtain possession of the said toll-gates, &c., in order to pay the principal and interest due to him by an ejectment on his own demise, without joining the other mortgagees; but the person who has so obtained possession is to apply the tolls received to the use and benefit of all the mortgagees *pari passu*, in proportion to the sums due to them respectively. The lessor of the plaintiff, a mortgagee of tolls, brought ejectment against

the trustees under this section upon his own demise. After the action was commenced one of the trustees, who was also a mortgagee, brought another ejectment, laying the demise on a day prior to that in the present action, upon which judgment was confessed by the trustees before the trial of the present action. *Held*, that notwithstanding this, the plaintiff was entitled to have the verdict entered for him at the trial. *Doe d. Butt v. Rous*, xvi. 213.

7. Where a mortgage deed, in the form prescribed by the General Turnpike Act, 3 Geo. IV. c. 126, s. 81, assigned the tolls and toll-houses of a turnpike road, to hold for the residue of the term for which the tolls were granted, unless the mortgage-money, with interest, were sooner repaid, it was held that a mortgage was *bona notabilia* where the road and toll-houses were situated, and not where the deed was at the time of the death of the mortgagee. *Regina v. The Trustees of the Balby, &c. Turnpike*, xvi. 276.

8. Under such a mortgage, the mortgagee has only an equitable right to enforce the payment of the principal and interest, and consequently, no *mandamus* will be granted to compel the trustees of the road to pay the interest. *Ib.*

9. *Petition by personal representative of deceased mortgagee—Vesting order.* Petition by the personal representative of a deceased mortgagee in fee, stating that the mortgagee died intestate as to the mortgaged premises, not having entered into possession nor having taken the rents and profits thereof; and that his heir was unknown; and praying an order vesting the legal estate of said premises in the petitioner, as the person entitled to receive the mortgage debt. Order refused on the ground that the case did not come within the Trustee Act, 1850. *In re Meyrick's Estate*, iv. 144.

10. A mortgagee in fee died intestate, as to the mortgaged premises, but appointed an executor. His heir at law could not be found, or was unknown. The mortgage-money was still due, and was not intended to be paid off; but the executor, wishing to make a transfer of the mortgage, petitioned, under the 19th section of the 13 & 14 Vict. c. 60, the Trustee Act, 1850, for an order vesting the mortgaged premises in him. *Held*, that the court has jurisdiction upon such a petition to make the order, and that the legislature did not mean to confine its authority to the case of a simple "reconveyance." *In re Boden's Estate*, ix. 223, and xv. 223.

11. Leases were granted to A B for certain terms of years. He subdemised to C D for the terms, less ten days. C D mortgaged to E F and Co. for securing money, and subdemised for the last mentioned terms, less one day, with a power of sale, and covenanted to assign the last day of each term to a purchaser. The mortgagees (E F and Co.) sold to G H, and assigned the mortgage terms. G H then bought of A B the improved ground-rents, and took an assignment of the leases granted to him. C D, the mortgagor, being abroad, G H petitioned under the Trustee Act, 13 & 14 Vict. c. 60, that the court would declare the last day of each of the terms, created by the underlease to him, vested in the petitioner; but the court dismissed the petition, C D having had no notice. *In re Proper's Purchase*, xix. 604.

12. A's solicitor agreed with B, that 1,000*l.* of A's money should be advanced to B on a second mortgage of property already in mortgage for 1,000*l.* A mortgage, dated the 16th February, 1842, was prepared accordingly, and executed by B, no money passing. As soon as A heard of the transaction he repudiated it, but agreed to advance 2,000*l.* on a transfer of the first mortgage and a further charge. This was carried out by a deed of transfer and further charge, dated the 28th February, 1842. The deed of the 16th February was not cancelled, but remained in the possession of A's solicitor. In 1844, the solicitor advised C to advance 1,000*l.* on a transfer of the security of the 16th February, 1842. C paid the money to the solicitor, who handed over to C the deed, with a memorandum, which he had fraudulently induced A to sign, undertaking to transfer the mortgage. The solicitor employed the money for his own purposes. In 1848, the solicitor, by fraud, induced A to execute to C a deed of transfer of the mortgage of the 16th February, 1842, and to sign a receipt for the 1,000*l.* This deed

contained words sufficient to pass the legal estate, which A had in him by virtue of the deed of the 28th February, 1842. *Held*, that as A, by signing the memorandum of 1844, had enabled the solicitor to commit the fraud, the consequences of such fraud must, as between A and C, be borne by A; and that C was entitled to half the benefit of the security of the 28th February, 1842. *Quære*, whether the deed of 1848 passed the legal estate, when its only object was to transfer the benefit of a deed which did not pass, nor purport to pass, the legal estate? *Held*, that A must pay all the costs of the suit instituted by C to obtain her rights, except the costs of the mortgagor and those of a defendant who ought not to have been made a party. *Held*, also, that the mortgagor was to blame in not having taken care that the deed of the 16th February, 1842, was cancelled, and that he, therefore, must bear his own costs. *Hiorns v. Holton*, xiii. 596.

13. In ordinary cases, a tenant for life paying off a charge on an inheritance is not presumed to have intended to exonerate it. *Kensington v. Bouverie*, xxxi. 345.

14. The words, "securities for money," are sufficient, in the absence of any thing contradictory, to pass the legal estate in mortgaged property. *In re King's Estate*, xiii. 128.

15. An assignment of a mortgage, without express words as to rent then in arrear, does not carry rent accrued due prior to the assignment. *Salmon v. Dean*, v. 107.

MORTMAIN.

I. VALID GIFTS.

II. VOID GIFTS.

I. *Valid Gifts.*

1. A gift for the benefit and ornament of a town is valid, the presumption being that the trustees will use it in a lawful manner. *The Mayor, &c. of Faversham v. Ryder*, xxvii. 367.

2. *Gift to endow churches and chapels for the poor.* A testatrix directed her executors, as opportunity might offer, to apply the residue of her personal estate, or such parts as by law might be legally applied to such purposes, in the endowment of district churches and chapels in populous places, so that the poor might have the gospel preached to them; and the testatrix expressed her wish that a preference should be given to those parishes the churches of which were under the patronage of the trustees of her late friend the Rev. Charles Simeon, and other similar trusts. *Held*, not to be a gift within the Statutes of Mortmain. *Edwards v. Hall*, xxi. 525.

3. *Bequest in trust for advancement of learning.* A bequest upon trust to be applied and appropriated in such manner as the trustee or trustees for the time being should, in their absolute and uncontrolled discretion, think proper and expedient for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances would permit, was *held* to be a valid charitable bequest. *Whicker v. Hume*, x. 217.

4. The Statute of Mortmain, 9 Geo. II. c. 36, is inapplicable to lands in New South Wales. *Ib.*

5. *Shares—Debentures—Railway scrip.* Shares in incorporated companies having interests in land, as canal companies, railway companies, &c., constituted by acts of parliament, under which the shares are declared to be personal estate; debentures given by incorporated companies having interests in land, which merely contain a personal obligation, and do not convey the undertaking, tolls, &c., to the holder; shares in an unincorporated banking company, authorized to hold lands by way of mortgage, and which might have had interests in lands, and the shares in which were, by its deed of settlement, to be considered personal estate, and railway scrip, are not within the Mortmain Act. *Ashton v. Langdale*, iv. 80.

6. *Shares in joint-stock company.* A bequest of the proceeds of shares in a joint-stock banking company, formed under a deed of settlement, and which possessed freehold and copyhold property, does not come within the Statute of Mortmain, 4 Geo. II. c. 36. *Myers v. Perigal*, xiv. 229.

II. Void Gifts.

1. *Railway mortgages.* Mortgages by a railway company of the undertaking and tolls, rates, and sums arising by virtue of the act of parliament under which it was constituted, are within the Mortmain Act. *Ashton v. Langdale*, iv. 80.

2. *Legacy for establishing school.* A bequest of a legacy, to be applied towards establishing a school at A., provided a further sum could be raised in aid thereof, if necessary, was held, to import an intended outlay of the sum in building a school-house at the place referred to; and, therefore, to be a void bequest within the Statute of Mortmain. *The Attorney-General v. Hull*, xv. 182. See also *Longstaff v. Rennison*, xi. 267.

3. *Bequest for purchasing land, letting to poor, and applying rent to "benevolent purpose."* A testator bequeathed to A, B, and C the residue of his property, "in trust to be purchased into the funds," for the purpose of "opening new schools, subscribing to some already opened, and in purchasing land to be let out to the poor at a low rent, and the rent to be applied to any benevolent purpose," the said A, B, and C might think proper. Held, that the residue was to be divided into two equal parts—one to be applied to the purposes of education according to a scheme, and the other to be paid over to the next of kin of the testator, that part being obnoxious to the mortmain laws. *Crafton v. Frith*, v. 201.

4. *Devise to incorporated church building society.* A devise upon trust to make over, after the death of a tenant for life, the purchase-money of the devised estates, "to the treasurer for the time being of the incorporated society for promoting the enlargement, building, &c., of churches and chapels, to be applied to the uses and purposes of that society," is void under the Mortmain Act. *The Incorporated Church Building Society v. Coles*, xxxi. 492. But see *The Church Building Society v. Barlow*, xv. 582.

5: A bequest which tends to bring fresh land into mortmain is void. *Trye v. The Corporation of Gloucester*, vi. 73.

• MURDER.

Prisoners were indicted for the murder and manslaughter of A, *inter alia*, by a series of beatings and assaults. At the trial, certain assaults were put in evidence, and relied upon by the crown as being the cause of death. But the surgeon who made a *post mortem* examination being of opinion that the death was occasioned, not by the assaults so proved and relied upon, but by a blow upon the head, of the cause of which there was no evidence whatever, the judge directed the jury that the prisoners were entitled to an acquittal. Held, by all the judges, that the judge had rightly so directed the jury. *Regina v. Bird*, ii. 428, 448.

NE EXEAT.

1. Where a writ of *ne exeat* had been granted on affidavits sworn before the plaintiff's own solicitor in the cause, the court discharged the writ with costs, and refused to put the defendant under terms not to bring an action. *Semble*, that the affidavits should state expressly that the property would be endangered if the writ was not granted. *Hopkin v. Hopkin*, xvii. 11.

2. *Quere*, whether a second writ can be granted where the defendant has been arrested, and has put in bail on which he is afterwards discharged, on the ground that the affidavits were improperly sworn. *Id.*

NEGLIGENCE.

- I. LIABILITY OF PARTIES FOR NEGLIGENCE, IN GENERAL.
- II. EFFECT OF NEGLIGENCE OF INJURED PARTY.
- III. EVIDENCE IN CASES OF NEGLIGENCE, &C.

I. *Liability of Parties for Negligence, in general.*

1. *Trustees neglecting to repair road—Manslaughter.* Trustees appointed, under a local act, for the purpose of repairing the roads in a district, with power to contract for executing such repair, are not chargeable with manslaughter, if a person, using one of such roads, is accidentally killed in consequence of the road being out of repair through neglect of the trustees to contract for repairing it. *Regina v. Pocock*, xxiv. 190.

2. *Liability of contractor for negligence of a sub-contractor.* A contracted to pave a district, and B entered into a sub-contract with him to pave a part. A supplied the stones, and his carts were used to carry them. In the course of the work, B's men negligently left a heap of stones in the street, so as to cause serious injury to the plaintiff. *Held*, that A was not liable, and that the fact that the act complained of amounted to a public nuisance, made no difference. *Semble*, if the contract of A with B had been to do what might in itself be a nuisance, A would have been liable. *Overton v. Freeman*, viii. 479.

3. *Commissioners of sewers not obliged to fence.* The commissioners of sewers were the owners of and had the powers of control and repair over an ancient, open, and unfenced sewer, which ran beside a public highway. *Held*, that it was not their duty to fence the sewer, and that they were, therefore, not liable for an accident which happened from the want of a fence. *Cornwell v. The Commissioners of Sewers*, &c. xxx. 548.

4. *Sale of an unsound article by tradesman, and consequent injury to a third person.* A tradesman who sells an article which he at the time believes to be sound, but which is actually unsound and not fit for the use intended, is not liable for an injury subsequently sustained by a third person, not a party to the contract of sale, in consequence of such unsoundness. *Longmeid v. Holliday*, vi. 562.

5. *Breaking down of carrier's cart—Personal injury of his employer.* The plaintiff employed the defendant to remove her goods in his cart for hire. With the consent of the defendant's carman, the plaintiff got on the cart with the goods, and on the way the cart broke down, and the plaintiff was seriously injured, and her goods broken. *Held*, that the plaintiff was not entitled to recover damages for the personal injury. *Lygo v. Newbold*, xxiv. 507.

6. *Gratuitous steward of horserace.* A person gratuitously undertaking the duties of steward of a horserace, is not liable for negligent nonfeasance in not appointing a judge, unless it appears that he commenced to perform the duties of the office. *Balfe v. West*, xxii. 506.

7. *Factory Act, 7 & 8 Vict. c. 15—Mill-owner—Duty of fencing mill gearing.* The occupier of a cotton mill is bound by the stat. 7 & 8 Vict. c. 15, to provide a secure fence for the mill gearing and machinery, and to keep up the fence when the parts required to be fenced are in motion for manufacturing purposes, but not when they are in motion for other purposes. *Coe v. Platt*, xi. 556.

8. *Negligence of valuers of dilapidations.* The declaration stated that the plaintiff, a rector, agreed with the executrix of the late incumbent that dilapidations should be valued as between them, by valuers appointed on each side; that the plaintiff, at the request of the defendants, employed them as valuers, for reward, on his behalf, and the defendants accepted the employment, and entered upon it, with a valuer appointed by the executrix. *Breach*, that through the defendants' negligence the amount of dilapidations was settled at too small a sum, whereby the plaintiff was obliged to

accept from the executrix a smaller sum than he ought to have received. The evidence was, that the defendants were employed as alleged, and agreed in valuing the dilapidations at too small a sum, having, through ignorance, valued as between incoming and outgoing tenant, instead of as between incoming and outgoing incumbent. *Held*, first, that the defendants were not sued as *quasi* arbitrators; but that the cause of action was their undertaking that they were competent, and the breach of that undertaking; and, secondly, that, although the defendants could not be expected to supply minute knowledge of the law, they ought to have known the broad distinction between the case of an incoming and outgoing tenant and the case of an incoming and outgoing incumbent, and that their ignorance in that respect was a breach of their engagement. *Jenkins v. Betham*, xxix. 283.

9. *Against owner of dog—Scienter.* Blame can only attach to the owner of a dog, when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits. *Fleeming v. Orr*, xxix. 16.

10. *Negligence of one enabling another to commit a fraud.* Where one man by his negligence has enabled another to practise a fraud upon a third person, who has no means of defeating it, the consequences of the fraud must be visited upon him who enabled the other to practise it. Per Pollock, C. B. *Barker v. Sterne*, xxv. 502.

11. As to the liability of railway companies for negligently omitting to keep their roads properly fenced, and their gates closed, see *The Manchester, Sheffield, &c. Railway Co. v. Wallis*, xxv. 373; *Sharrod v. The London and Northwestern Railway Co.* iv. 401; *Fawcett v. The York and North Midland Railway Co.* ii. 289. And as to the general liability of railways for negligence, see, further, *Collett v. The London and Northwestern Railway Co.* vi. 305; *The Great Northern Railway Co. v. Harrison*, xxvi. 443. See also RAILWAYS.

12. As to the liability of the master for the negligence of his servant, see MASTER AND SERVANT; *Sadler v. Henlock*, xxx. 167; *Wildes v. Morris*, xiv. 181; *Knight v. Fox*, i. 477; *Cuthbertson v. Parsons*, x. 521; *Peachey v. Rowland*, xvi. 442; *Mitchell v. Crassweller*, xvi. 448; *Ellis v. The Sheffield Gas Consumers Co.* xxii. 198; *Dansey v. Richardson*, xxv. 76; *Paterson v. Wullace*, xxviii. 48.

13. As to negligence in respect of collisions, see SHIPS AND SHIPPING, div. Collision.

14. *Bursting of sewer—Lessor's liability to lessee.* The lessor of premises is responsible to the lessee for injury done to his goods by the bursting of a sewer near the premises, which sewer had been constructed in a negligent manner more than twenty years before by the lessor, and had been suffered to remain in an imperfect state. *Alston v. Grant*, xxiv. 122.

II. Effect of Negligence of injured Party.

1. *Collision.* In case of a collision of vessels, a neglect by the vessel injured to observe certain statute regulations, will not prevent a recovery if such neglect did not contribute to the injury. *The Panther*, xxiv. 585.

2. *Quære*, whether in an action for negligence in a transaction based on a contract between the plaintiff and the defendant, e. g. by a railway passenger against the company, it is a good defence that the plaintiff's own negligence contributed to the injury. *Martin v. The Great Northern Railway Co.* xxx. 473.

III. Evidence in Cases of Negligence, &c.

1. *Injury by a bull—Scienter—Evidence.* Case for an injury done to the plaintiff by the defendant's bull. The plaintiff, whilst walking along a public street, wearing a red handkerchief, was attacked and injured by the defendant's bull, which was being driven along the street. The defendant stated, after the accident, that the red

handkerchief was the cause of the injury, for that he knew *the* bull would run at any thing red. He also stated, on another occasion, that he knew that *a* bull would run at any thing red. *Held*, that this was evidence for the jury in support of the averment of the *scienter*. *Hudson v. Roberts*, v. 514.

2. The declaration alleged that the plaintiff became a passenger for hire in a train of the defendants, and that from the negligence of the defendants and their servants, the train ran against another train on the line, whereby the plaintiff was injured. The defendants pleaded the general issue, with a traverse of the plaintiff being a passenger, &c. At the trial, it appeared that the train in question was hired for an excursion by a society, from whose secretary the plaintiff purchased his ticket, and that the accident was occasioned by the train running, in the dark, against another train which was standing still at an intermediate station on the line. *Held*, first, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendants; and, secondly, that there was evidence to go to the jury in support of the allegation that the plaintiff became a passenger for hire with the company. *Skinner v. The London, Brighton, &c. Railway Co.* ii. 360.

3. *Kicking of horse and breaking the shafts of defendant's cart, causing his horse to run against the plaintiff's.* In an action in a county court, for negligently driving a horse and cart, the plaintiff having simply proved the fact of a collision, under circumstances which might or might not amount to negligence; the defendant proved that the accident arose from the horse suddenly beginning to kick, whereby the shafts of the cart were broken, and the driver thrown out, when the horse started off, and ran against and injured the plaintiff's horse. The judge of the county court, upon this evidence, ordered a verdict for the plaintiff,—“being of opinion that the breaking of the shafts, even under the circumstances stated by the defendant's witnesses, showed a defect in the cart, which raised a presumption of negligence in the owner.” An appeal against this decision was dismissed with costs. *Templeman v. Haydon*, xxii. 412.

4. A declaration charging that defendant, by “carelessness in and about galvanizing certain wire,” spoilt it, is maintained by evidence that the injury was caused by his having exposed it to heat, in order to prepare it for the galvanizing process, though it was necessary to do so, and no express evidence is given that it was done carelessly. *Coomb v. Symons*, xxii. 487.

NEW TRIAL.

- I. IN UNDEFENDED SUITS.
- II. WHEN EVIDENCE HAS BEEN IMPROPERLY RECEIVED OR REJECTED.
- III. BECAUSE OF SURPRISE AND NEWLY DISCOVERED EVIDENCE.
- IV. FOR MISDIRECTION OF JUDGE.
- V. BECAUSE OF INSUFFICIENT OR EXCESSIVE DAMAGES.
- VI. WHERE VERDICT IS AGAINST EVIDENCE.
- VII. BY REASON OF AMENDMENT.
- VIII. FOR PERJURY OF WITNESSES.
- IX. SPECIAL CASES IN WHICH GRANTED OR REFUSED.
- X. MOTION FOR NEW TRIAL; PRACTICE, &c.

I. *In undefended Suits.*

1. *Mistake as to time of trial by attorney.* A verdict having been entered for the plaintiff, as for an undefended cause, a new trial was granted, on payment of costs by the attorney, on his making affidavit of having mistaken the time of trial. *Neave v. Milns*, xxix. 306.

2. Where judgment has been given for the plaintiff on the merits of the case as presented by him in the absence of the defendant, the excuse presented by the defendant's attorney, that he did not suppose from the position of the case on the list that it could be reached so early, is not a ground for a new trial. *Earl v. Dowling*, xi. 420.

II. *When Evidence has been improperly received or rejected.*

1. *Materiality of evidence.* Where, at a trial in Bengal, the judge (acting as judge and jury) received certain documentary evidence, the supreme court will not grant a new trial on the ground of such evidence being improperly received, unless it be shown that such evidence might have materially influenced the verdict. *The East India Co. v. Paul*, i. 44.

2. If, in a case of appeal, the court decides that certain evidence has been improperly received, it can do no more than order a new trial if there has been a verdict of a jury. *Jonas v. Adams*, vi. 188.

3. The improper rejection of a witness as incompetent, is ground for a new trial, since the 14 & 15 Vict. c. 99. *Boyle v. Wiseman*, xxix. 473.

4. See, also, *Rawlings v. Chandler*, xxviii. 562.

III. *Because of Surprise and newly discovered Evidence.*

1. To entitle a party to a new trial on the ground of surprise, it is not enough to state that the new evidence came upon him unexpectedly by way of defence, without being first touched upon in the cross-examination of his witnesses, when he might have recalled the latter to contradict the defendants, but did not do so. *Roberts v. Holmes*, xxv. 420.

2. If by the evidence the applicant for a new trial must have been guilty of perjury and forgery, or a servant of the plaintiff guilty of embezzlement, and the verdict points to the former conclusion, and he shows to the court the discovery of evidence that the servant was discharged for embezzlement, that might be a ground for a new trial, without any "surprise" shown. But if the affidavit in answer distinctly contradicts this allegation, and no reason is shown why the evidence was not discovered before the trial, a new trial will not be granted. *Lewis v. Trussler*, xxv. 422.

3. *Action against two—Motion for new trial against one.* In an action against two defendants in which a verdict was returned for the defendants, the plaintiff moved for a new trial against one of the defendants, upon the ground of surprise, alleging that said defendant had by affidavit and in conversations furnished evidence that he was liable; and he proposed to let off the other defendant. At the time of hearing, the Statute of Limitations had run against a fresh action. *Held*, that the plaintiff, having brought his action against both, and having failed, must bear the loss resulting from his own delay and indiscretion. New trial refused. *Cowburn v. Waring*, xxii. 572.

4. *Indictment for a misdemeanor.* A new trial will be granted on an indictment for a misdemeanor on the ground of surprise, as in civil cases. *Regina v. Whitehouse*, xviii. 105.

5. Where a new trial on an indictment removed into the queen's bench by *certiorari* at the instance of the defendant, is ordered on the ground of surprise, the court may, in its discretion, order the costs to await the event of the new trial. *Ib.*

IV. *For Misdirection of Judge.*

1. *Mistake of judge on collateral point.* Where a judge, in summing up to the jury, mistakes the law upon a collateral point, upon which a bill of exceptions would not lie, a new trial will not be granted as of right, but the court will exercise its discretion. *Black v. Jones*, iii. 559.

2. *Judge taking opinion of jury on immaterial issue.* If a judge rightly directs a verdict on the undisputed questions of fact, it is no misdirection, because he takes the opinion of the jury on an immaterial issue which is disputed by the parties. *Clarke v. Arden*, xxx. 455.

3. *Failure to instruct as to measure of damages—Point not taken below.* If a judge at *nisi prius* does not inform the jury what is the proper measure of damages on an issue on which it is admitted that the plaintiff is entitled to a verdict and to damages, the court will direct a new trial, although the point was not taken by the plaintiff's counsel at the trial. *Knight v. Egerton*, xii. 562.

4. *Omission to state rule of damages.* Where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the judge to bring it to their notice, and direct them in accordance with it; and his omitting to do so is ground for a new trial. *Hadley v. Bazendale*, xxvi. 398.

5. The judge, at a trial, informing the jury what amount of damages will carry costs, is no ground for a new trial. *Atkinson v. Newton*, xxix. 479.

6. *Factory Act.* In an action for not keeping the machinery of a factory securely fenced as required by law, the question was left to the jury whether the machinery was fenced in the ordinary manner used and approved as sufficient at the best regulated mills in the district. *Held*, a misdirection; the proper question being whether the mill was securely fenced according to the best known method of fencing at the time. *Schofield v. Schunck*, xxx. 283.

7. *Sole issue on which the defendants rested left to jury.* In an action against a railway company for negligence, plea not guilty, the judge left it to the jury to say whether the accident occurred from negligence of defendants, or whether plaintiff's negligence was the sole cause, this being the only ground taken by defendant's counsel. Verdict for plaintiff. On motion for new trial for misdirection, in not instructing the jury to find for defendants, even if negligent, provided plaintiff's negligence contributed to the accident, it was *held* that the defendants were not entitled to a new trial, the issue on which alone they rested their defence having been left to the jury. *Martin v. The Great Northern Railway Co.* xxx. 473.

8. *Misrepresentation—Verdict negating fraud.* In an action for falsely and fraudulently representing a ship to be sound, the jury were directed to find for the plaintiff if the representation was false to the defendant's knowledge, and the plaintiffs sustained damage in consequence. The jury returned a verdict: "We find for the plaintiff, but acquit the defendant of any fraudulent intention." The judge thereupon directed the verdict to be entered for the plaintiff. *Held*, no misdirection. *Milne v. Marwood*, xxviii. 373.

9. *Action for penalty—Several directions taken together.* An action having been brought for a penalty under the 25 Geo. II. c. 36, the judge charged the jury that they were to consider whether a certain room was used for the ordinary purposes of a refreshment room in a hotel, music being incidental, or whether it was used principally for musical performances; and, finally, whether it was used for both purposes. *Held*, that there was no misdirection, though the single direction that they should consider whether the keeping of the room as a hotel was a primary, or secondary object would have been incorrect. *Hall v. Green*, xxiv. 453.

10. *Libel—Lottery Acts.* A company consisting of a large number of persons subscribing small sums, was formed for buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot. In connection with this company was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the company; and as part of the same concern, a bank in which the subscribers of the company might place their savings for purchasing their land from the company. The judge, in an action of libel, directed the jury that the whole of this scheme was illegal, on the grounds of its being contrary to the Lottery Acts, and also to the Bank Act.

Held, that the scheme being illegal, as being contrary to the Bank Act, there was no misdirection, and the rule for a new trial upon that ground was discharged. *O'Connor v. Bradshaw*, i. 466.

11. *Use and occupation—Constructive occupation.* In an action for use and occupation of a house, the undersheriff directed the jury that actual occupation by the defendant was not necessary to support the action, but that a constructive occupation would do, but did not tell them what a constructive occupation was. *Held*, a misdirection. *Towne v. D'Heinrich*, xxiv. 235.

V. *Because of insufficient or excessive Damage.*

1. *Excessive damages.* The court will not disturb a verdict merely on the ground that they would not, in their private judgment, have given such large damages as were given by the jury. They must be satisfied that the jury in awarding those damages either were actuated by some improper motive, or proceeded on some erroneous principle of assessment. *Creed v. Fisher*, xxvi. 384.

2. *Insufficient damages—Question of character.* The court, in the absence of special circumstances, will not grant a new trial on the ground of the insufficiency of the damages, merely because a question of character is involved. *Apps v. Day*, xxvi. 335.

3. *Nominal damages.* The court refused, in an action for the negligent construction of a building, whereby it fell and injured the plaintiff, to grant a new trial, on the ground that the jury had given merely nominal damages,—there being no reason for supposing them to have been actuated by improper motives. *Howard v. Barnard*, xx. 286.

4. A new trial will not be granted on the ground that from the small amount of damages, the jury must have come to a compromise, unless, from the circumstances of the case, it is evident that there has been a total refusal on the part of the jurors to discharge their duty, and the verdict is necessarily wholly inconsistent. *Richards v. Rose*, xxiv. 406.

5. *Contingent assessment of damages.* Upon a verdict for the defendant, with leave to the plaintiff to enter a verdict for a sum at which his damages have been contingently assessed, the court will not grant a new trial that there may be a fresh assessment of damages, unless the plaintiff's counsel objected to such contingent assessment at the trial. *Booth v. Clive*, iv. 374.

VI. *Where Verdict is against Evidence.*

1. *Judge declaring verdict grossly wrong—Costs.* The plaintiff and defendant in a cause were examined as witnesses at the trial, and gave contradictory testimony. There was, however, other evidence, and the jury found for the plaintiff. The judge declaring that in his opinion the verdict was grossly wrong, the court granted a rule for a new trial, without costs; and after argument made it absolute, costs to be costs in the cause. *Skiffington v. Clark*, xx. 356.

2. *Action for extras under contract—Admissions.* An executor brought an action for extras incurred, beyond the stipulations of the agreement in work done for the defendant by the testator. The agreement was unstamped in the hands of a third party, and was not produced. It was proved that the defendant had ordered the alterations, &c., and that the testator had admitted the receipt of money from the defendant on account of the extras. Verdict for plaintiff. *Held*, that the defendant was not entitled to a nonsuit; but a new trial was granted, as the evidence did not justify the verdict. *Edie v. Kingsford*, xxv. 320.

3. *Libel.* In actions for libel, although the judge is to leave it to the jury whether, under the circumstances, the publication is a libel, on the general issue, guilty or not

guilty, yet if they find a verdict for the defendant on that issue, which is against the evidence, in a case in which no question is made as to the fact of publication, nor as to its application to the plaintiff, the court can set aside the verdict. *Hakewell v. Ingram*, xxviii. 413.

4. In an article on the subject of the want of some efficient protection for married women, the writer mentioned two cases as showing the necessity for legislation; one case being described as that of a husband who acted towards his wife like "a sot and a brute;" and then the article proceeded: "The other is that of Mrs. H.," (meaning the wife of the plaintiff,) "who, having been restored to her husband's protection by a decree of the ecclesiastical court, found her misery so aggravated by the restitution of her conjugal rights, that she was compelled to resort to the police court for the little help the law gives." And it concluded by saying that the law did not meet such cases; and that "the condition of woman, when the brute intervenes, is more oppressive than that of the negro." Plea, not guilty. It was not disputed that the passage applied to the plaintiff, but no evidence was given as to the matters referred to. The court set aside the verdict for the defendant, and granted a new trial. Maule, J., *dissentiente*. *Ib.*

5. *Penal trial*. The fact that a verdict is against evidence is no ground for a new trial in a penal action. *Hall v. Green*, xxiv. 453.

VII. *By reason of Amendments.*

1. *Amendment made after time of agreement*. The parties having, during a trial, agreed to the terms of an amendment, and that it should be made after the trial was over on the same day, the amendment was not actually made until eight days after the trial, but in the terms agreed on, and before the following term. *Held*, no ground for a new trial. *Jones v. Hutchinson*, iv. 329.

2. *Leave to amend refused*. The judge at a trial offered the plaintiff's counsel leave to amend, which was refused by him, owing to the strong adverse opinion expressed by the judge. *Held*, no ground for a new trial. *Lucas v. Beale*, iv. 358.

3. A declaration alleged, that in consideration that the plaintiff, at the request of the defendant, would make such a number of aerometers as the defendant should from time to time require, and deliver the same when completed, the defendant would accept the same and pay for them. Breach, by not accepting part completed according to order, and discharging the plaintiff from continuing the making of other part, commenced to be made according to order. It was proved that the contract was an order to make 2,000 aerometers, that 300 had been accepted, and the rest were in course of being made when the defendant discharged the plaintiff from completing them. The judge at *nisi prius* having allowed the declaration to be amended, the court refused to grant a new trial on that account. *Jones v. Hutchinson*, iv. 329.

VIII. *For Perjury of Witnesses.*

1. The mere fact that a witness has committed perjury in a trial is no ground for a new trial, unless such testimony was material to the case. *Honeyman v. Lewis*, xxv. 505.

2. Where it is clear that one side or the other has committed perjury, the court will not disturb the finding of the jury. *Solomon v. Todd*, xxiv. 366.

IX. *Special Cases in which granted or refused.*

1. *Title to land made out by neither party*. Where the jury, on the trial of an issue relating to the title to land, find for the defendant, on the ground that neither party has made out a satisfactory title, the court will not regard such finding as establishing

the defendant's right, but will direct a new trial. *The Freeman, &c. of Sunderland v. The Bishop of Durham*, x. 210.

2. *Juror answering by wrong name by mistake.* Before verdict in a special jury cause, it was discovered that one of the jurors impanelled had been summoned in another cause, and had by mistake answered to a wrong name. The defendant objected to the verdict being received, and the judge offered to discharge the jury and try the cause over again. This was not assented to, and the plaintiff claiming to have the verdict taken, the jury returned their verdict in favor of the plaintiff. *Held*, a mis-trial; and that, as the defect had been objected to before the verdict, the court was bound to award a *venire de novo*. *Doe d. Lord Ashburnham v. Michael*, iv. 244.

3. *Indictment for an offence not punishable by fine and imprisonment—Civil right coming in question.* By Lord Campbell, C. J., and Crompton, J. Where, in an indictment not charging an offence for which the defendant, if guilty, might suffer fine and imprisonment, a civil right comes in question, and the right would be bound by the verdict, a new trial may be granted after a verdict for defendant. But by Coleridge, J. Wherever the substance of a criminal proceeding is civil, a new trial may be granted after a verdict for defendant, on the ground either of misdirection, or of the verdict being against the evidence. *Held*, accordingly, by Lord Campbell, C. J., and Crompton, J., (Coleridge, J., dissenting,) that where an indictment charged defendant with erecting an obstruction to the navigation of the Menai Straits, and the right to an oyster fishery was in question, the court ought not to grant a new trial after verdict for defendant. *Regina v. Russell*, xxvi. 230.

4. A new trial will not be granted because a judge has wrongly ruled at *nisi prius* as to which party must begin, unless such ruling did clear and manifest injustice. *Branford v. Freeman*, i. 444, and *Leete v. The Gresham Life Insurance Co.* vii. 578.

5. *Privilege of client violated by order of court.* *Semble*, if the privilege of a client has been violated by an order of the court with reference to the production of title deeds, the party to the action against whom the evidence was admitted, cannot make it a ground of application for a new trial. *Phelps v. Prew*, xxiv. 96.

6. *Interpleader—Verdict.* In an interpleader issue, the question being, whether goods seized on execution belonged to the creditor (the defendant) or to the claimant, (the plaintiff,) the jury found, "as to the goods at C.," for the plaintiff, and as to the rest, for defendant. The value of the whole goods was greater than the debt, and was paid into court. *Held*, that the verdict was bad, and could be cured only by a new trial; as it did not specify the value of the goods at C., and it did not appear whether the rest would satisfy the debt. *Allsopp v. Brittain*, xxv. 432.

● X. Motion for New Trial; Practice, &c.

1. *Motion for new trial, when to be made.* No motion for a new trial shall be allowed after the expiration of four days from the day of trial, even if the defendant had no notice before the trial, but had notice of the verdict within the four days. *Ellaby v. Moore*, xxiv. 280.

2. Where a bill of exceptions has been tendered by one defendant, the other defendant may, notwithstanding, move for a new trial. Per Lord Campbell, C. J. *Gregory v. Cotterell*, xviii. 99.

3. Where a defendant means to move for a new trial in the case of a criminal information, the motion must be made, or an intimation that the defendant intends to move given to the court, during the first four days of term; and it will be too late when the defendant is brought up for judgment. *Regina v. Newman*, xviii. 113.

4. *Statement of grounds of rule nisi—Amendment.* Where a rule *nisi*, drawn up on reading an affidavit and deposition, called on the defendant to show cause why a new trial should not be had "on the grounds set forth in the said affidavit and

deposition," it was *held*, that this was not a compliance with the 17 & 18 Vict. c. 125, s. 33, which enacts, that in every rule *nisi*, for a new trial, &c., "the grounds upon which such rule shall have been granted, shall be shortly stated therein," but the plaintiffs were allowed to amend, and thereupon the rule stood over. *Drayson v. Andrews*, xxviii. 468.

5. Where a bill of exceptions has been tendered, the party cannot afterwards move for a new trial upon a point which might have been (but was not) included in the bill of exceptions, without abandoning the bill of exceptions. *Semble*, that if the point could not have been included in the bill of exceptions, the motion for a new trial might have been made concurrently. *Adams v. Andrews*, i. 305.

6. *Presence of defendant at time of motion.* Where defendant had been found guilty upon an indictment for perjury, and sentenced to transportation, but he was not in custody under the sentence, a motion for a new trial cannot be made unless he is present in court. *Semble*, by Lord Campbell, C. J., that where several defendants have been convicted upon an indictment, it is not necessary that all should be present in court in order to move for a new trial on behalf of one or more of them. *Regina v. Caudwell*, vi. 352.

7. Where a defendant has been found guilty upon an indictment for an offence which does not subject him to corporal punishment, it is not necessary that he should be present in court in order to move for a new trial. *Regina v. Parkinson*, vi. 352.

8. *Misdirection—Objection not taken at trial.* A rule *nisi* for a new trial, on the ground of misdirection, was discharged, the objection not having been taken at the trial, and it was *held*, that it would be unjust towards the other side to grant a new trial where the case had been conducted irrespectively of the point raised, and the defect, if pointed out at the trial, might have been then supplied. *Pell v. Daubney*, i. 450.

9. *Verdict for joint defendants—Rule for new trial as to one defendant granted upon terms.* A verdict was found for two joint defendants, and the plaintiff moved for a rule for a new trial, on the ground of misdirection; but it being admitted that there was no evidence against one of the defendants, the court in granting the rule *nisi*, imposed as a term that his name should be stricken out of the declaration, and that the plaintiff should pay his costs. *De Bernardy v. Harding*, xx. 545.

10. *Rule nisi for new trial granted after first four days of term.* Where a party has obtained a rule *nisi* for a new trial by leave of the court, after the expiration of the first four days of term, but without giving notice within that period to the opposite party of his intention to move, and the opposite party has signed judgment without any notice of the motion, the court will not permit the rule to be made absolute, if the objection is raised on showing cause. *Doe d. Whitty v. Carr*, ii. 167.

11. The discretionary power to grant a new trial is not interfered with by the 141st of the county court rules, made under sect. 12 of the 12 & 13 Vict. c. 101, which is merely a directory rule of practice. Therefore, notwithstanding the omission to give the seven days' notice required by such rule, the judge has jurisdiction to entertain an application for a new trial. *In re Carter and Smith*, xxx. 171.

12. When a cause is heard before a county court judge without a jury, and a new trial is afterwards granted generally at the instance of the plaintiff, the latter may demand to have the case tried by a jury on the second occasion. *Regina v. Harwood*, xvi. 194.

13. Where counsel at a trial does not ask that a certain point should be submitted to the jury, but gets leave to move reserved, he cannot afterwards ask for a new trial, on the ground that that point was not submitted to the jury. *Morgan v. Couchman*, xxiv. 321.

14. *Costs of rule for.* Where the court are equally divided in opinion upon a rule for a new trial, and it consequently drops, neither party is entitled to any costs of the rule. *Dansey v. Richardson*, xxvi. 138.

NEXT FRIEND.

1. *Who may be.* The clerk of the solicitor to the defendant in the first suit was made the next friend of the infant in the second suit. *Held*, that he was not necessarily an improper next friend. *Ashley v. Allden*, x. 314.

2. A defendant cannot act as next friend of a plaintiff *feme covert*. *Payne v. Little*, vii. 169.

3. *Married woman, bill by, in respect of her separate estate.* A married woman, though a pauper, cannot *ex parte* obtain an order for leave to file a bill in respect of her separate estate without the intervention of a next friend; and an order so obtained was discharged for irregularity. *Page v. Page*, xix. 567.

4. *Married woman—Leave to sue in formâ pauperis without a next friend.* A married woman, living apart from her husband, allowed to sue in *formâ pauperis*, without a next friend. Order made *ex parte*. *In re Lancaster*, xxiii. 127.

5. *Amendment.* Petition by a *feme covert* in a suit, not naming a next friend, directed to be amended by inserting a next friend. *Howard v. Prince*, vii. 215.

6. *Changing next friend—Costs—Security—Surety.* If the next friend of a married woman is changed during the suit, he must not only give his own security for the costs incurred, but find a surety to join him in such amount as the Master in his discretion shall fix. *Payne v. Little*, xxi. 491; s. c. xi. 339.

7. *Discharge of—Feme covert.* Where it appeared that the next friend of a *feme covert* plaintiff was insolvent, and was in contempt for non-payment of costs, she was discharged from being next friend without prejudice to her liability already incurred; and all proceedings were stayed until a new and sufficient next friend should be appointed, or the plaintiff should have obtained an order to sue in *formâ pauperis* without a next friend. *Wilton v. Hill*, xxi. 602.

8. *Infant's next friend.* A motion was made to dismiss a suit of infant *cestuis que trust* by their next friend against trustees, or to inquire into facts connected with the institution and mode of prosecution thereof. Evidence for the motion did not show a sinister motive for the suit, or any imputation upon the character or solvency of the next friend, and the court dismissed the motion, but without costs, observing, that the questions as to the propriety of the suit, and of the form of proceeding therein, might properly be dealt with at the hearing. *Smallwood v. Rutter*, iii. 210.

9. *Guardian, petition for.* A petition by infants for the appointment of a guardian ought to be presented by them by their next friend. *In re Russell's Estate*, vi. 65.

10. *Motion by next friend—Change of solicitor.* In a suit by adult plaintiffs and infant plaintiffs an order was obtained by the former for a change of solicitor. The next friend of the infants moved for a discharge of the order, but it was *held*, that he had no right to make such a motion in his individual capacity. *Pidduck v. Boulbee*, xiii. 170.

11. *Security for costs.* Security for costs ordered to be given in a suit in which a married woman was plaintiff by her next friend, the next friend being a laborer. *Stevens v. Williams*, vii. 91.

12. *Liability for costs.* Where a solicitor filed a bill, and afterwards named B. as next friend of the plaintiff, without his knowledge, in place of the previous next friend, deceased, and the bill was dismissed with costs, for want of prosecution, without notice served on the next friend or the solicitor, the next friend was *held* liable for all the costs from the commencement of the suit, and not only for such as had been incurred during the time his name had been on the record; and also for the costs of the motion to vary the order dismissing the bill with costs, by ordering that the solicitor should pay the costs. *Bligh v. Tredgett*, viii. 79.

13. *Semble*, that he has a remedy against the solicitor who appointed him. *Ib.*

NONSUIT.

1. *Judgment as in case of nonsuit—Insolvency of plaintiff.* After issue joined the plaintiff petitioned the insolvent debtors court, and was discharged as an insolvent debtor, having entered in his schedule the debt which formed the subject of the pending action; but it did not appear whether the assignees were willing to proceed with it or not. *Held*, that the defendant was not entitled to judgment as in case of a nonsuit; but that a *stet processus* might be entered by the joint consent of him and the plaintiff. *Gavin v. Allan*, viii. 575.

2. *Right of plaintiff after nonsuit to tender bill of exceptions and bring writ of error.* If, upon the trial of a cause, the judge directs a nonsuit, and the plaintiff does not appear when called, and judgment of nonsuit is therefore entered against him, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the judge improperly directed the nonsuit. The proper course is for the plaintiff to appear and require the judge to direct the jury in point of law in his favor, and upon the judge refusing to permit him to appear, and nonsuiting him against his will, or refusing to direct the jury in his favor, the plaintiff may tender a bill of exceptions, and bring a writ of error. *Corsar v. Reed*, viii. 380.

3. *In county court.* A plaintiff in a county court has a right to elect to be nonsuited at the latest moment before the judge has pronounced his judgment, or, when there is a jury, before they have delivered their verdict. *Outhwaite v. Hudson*, xi. 563.

4. *Liverpool passage court.* A rule *nisi* for a nonsuit in a cause tried before the assessor of the Liverpool passage court, drawn up on reading the writ of trial and an affidavit verifying the assessor's notes, having been granted, it was *held*, on cause shown against the rule, that without the affidavit the court had no materials on which to entertain the motion. *Winch v. Williams*, xiv. 228.

5. *Right to move for judgment as in case of nonsuit—Injunction.* Obtaining an injunction to stay the proceedings does not deprive the defendant of his right to move for judgment as in case of nonsuit. *Dobson v. Brocklebank*, viii. 543.

6. Where subsequent to the removal of the injunction, the plaintiff gave notice of trial, but did not try, the defendant was held to be entitled to move for judgment as in case of nonsuit; and, *semble*, that the time for proceeding to trial, according to the practice of the court, runs from the removal of the injunction. *Ib.*

7. See also *Edie v. Kingsford*, xxv. 320; *Stancliffe v. Clarke*, ix. 492.

NOTICE.

1. *Of appeal from bastardy order.* In cases of notice of appeal from a decision whereby a party has been adjudged the putative father of bastard children, the question is, whether, under all the circumstances, reasonable information has been conveyed by the notice. *Regina v. The Recorder of Leeds*, xi. 416.

2. *Of meetings of company—Circulation of newspaper.* Where it was provided that a company's principal place of business should be the town of S., and that fourteen days' notice of all public meetings should be given by an advertisement in a paper circulating in the district of S., and notice of a meeting was given in a newspaper which was not proved to have reached S., it was *held* that the notice was bad, and, consequently, all acts done at such meeting were void. *The Swansea Dock Co. v. Levien*, vii. 535.

3. *Of adoption of Lighting and Watching Act, publication of.* A notice of the adoption of the Lighting and Watching Act, 3 & 4 Will. IV. c. 90, for a district chapelry, was held to be sufficiently published where it was affixed on the chapel of the district, but not on two dissenting and proprietary chapels within the district, nearly two months after the meeting at which it was adopted. *Regina v. Deverell*, xxv. 160.

4. *To railway company by wrong name.* A notice was served on the clerk of the B. Railway Company, at their office, addressed "to the B. and C. Railway Co." There was no such company as the last named, but the B. Railway ran from B. to C. The company had not been misled. *Held*, a good notice. *Eastham v. The Blackburn Railway Co.* xxv. 498.

5. *Of action against magistrate.* By stat. 11 & 12 Vict. c. 44, a magistrate is entitled to notice of an action against him for acts done in the execution of his office, though maliciously and without reasonable and probable cause, and by the same statute the question of *bona fides* is not a question for the jury, but is to be decided by the judge. *Kirby v. Simpson*, xxvi. 469.

6. *Against county court judge.* The act 9 & 10 Vict. c. 95, s. 138, enacts, that in all actions for any thing done in pursuance of that act, notice in writing shall be given to the defendant one month before action brought. In an action brought against the judge of a county court established under that act, such judge is entitled to notice under the above section if he proceeded honestly, believing that his duty under the act called upon him to do so. *Booth v. Clive*, iv. 374.

7. *Against justice of the peace, form of.* Notice of action served on a justice of the peace, under stat. 11 & 12 Vict. c. 44, s. 9, stated that he had caused plaintiff to be assaulted, and taken to a prison, without any reasonable or probable cause. The declaration contained two counts—one for an assault; the other for maliciously, &c., issuing a warrant to apprehend plaintiff. *Held*, that the notice did not state the cause of action clearly and explicitly, as required by statute because the action was brought under sect. 2, whereas the notice, by omitting the word "maliciously," stated a cause of action under sect. 1. *Taylor v. Nesfield*, xxvi. 235.

8. *Constructive notice.* Constructive notice is knowledge imputed by the court on presumption, too strong to be rebutted, that the knowledge must have been communicated. *Hewitt v. Loosemore*, ix. 35.

9. A notice of the first meeting being duly given, extends to adjourned meetings. *Scadding v. Lorant*, v. 16.

NUISANCE.

I. WHAT IS A NUISANCE.

II. INJUNCTION AGAINST NUISANCE.

III. ABATEMENT OF NUISANCE.

I. What is a Nuisance.

1. *Regatta on reservoir made to supply water for canal.* Where a company had become the owner of a canal and grounds for making a reservoir, from which to supply water for the canal, the right of sporting and fishing over the reservoir being reserved to the former owners, and the company held regattas, causing large bodies of people to assemble, whereby an adjoining park was injured and the reserved rights of fishing, &c., interrupted, it was *held*, after the injured parties had obtained a verdict at law, with nominal damages, and the company persisted in holding regattas, &c., that the regatta was a nuisance, and that an injunction might be granted. *Bostock v. The North Staffordshire Railway Co.* xix. 307.

2. Whether, where land has been obtained by act of parliament for one purpose, it can be used for any other, *quære*. *Ib.*

3. *Opening streets by gas company.* It is an indictable nuisance for a gas company, without the authority of parliament, to open trenches in the public streets of a town, for the purpose of laying pipes, although reasonable despatch is used by them, in restoring the road to its former condition. *Regina v. The Sheffield Gas Consumers' Co.* xxii. 200.

4. *Works or trade tending to depreciate another's property.* *Quære*, whether the erection of works, or the carrying on of a trade which has the effect only to depreciate the property of another, amounts to a nuisance. *White v. Cohen*, xix. 146.

5. *Obstruction of public navigable river—Bridge—Question for jury.* Where commissioners were authorized to make a new cut through lands adjoining a river, for the purpose of restoring navigation, and also to build bridges, and a company, in whom the powers of the commissioners afterwards became vested by statute, built a bridge, occupying, to some extent, the bed of the new cut; on indictment against them for a nuisance to the river as a public highway, the jury found specially that the company were guilty of building the bridge, but that it did not obstruct the navigation. On motion to enter the verdict for defendants, it was *held*, that the cut was a public navigable river, the obstruction of which was an indictable offence, but that building a bridge partly in the bed of a navigable river, was not necessarily a nuisance; that the question whether in fact it be so or not in a particular instance, is for a jury; and that the verdict here, negating actual obstruction, was, in effect, an acquittal. *Regina v. Betts*, xxii. 240.

6. *Removal of snow.* Sect. 55 of the Public Health Act empowers the local board to make by-laws for the removal of dust, ashes, rubbish, filth, dung, manure, and soil. *Held*, that pure snow is not within these words, and that a by-law imposing a penalty for the non-removal thereof by the occupiers of houses is invalid. *Regina v. The Justices of Staffordshire*, xxx. 402.

7. *Private nuisance—Burning bricks by adjacent proprietor.* A house, with shrubberies and gardens adjacent, had been occupied by a tenant as a dwelling-place for thirty-two years, when the owner of adjoining land began to manufacture bricks of the clay of his own land, by burning in clamp, which was erected within 144 feet of the dwelling-house, and within fifteen feet of the stable belonging thereto. Upon a bill filed by the land owner and his tenant for an injunction, it was *held*, that such brick-making was a private nuisance. *Walter v. Selfe*, iv. 15.

II. Injunction against Nuisance.

1. *Trivial and temporary nuisance.* The court refused to interfere by injunction where the nuisance was of a trivial character, and to be continued for only a few hours. *The Attorney-General v. The Sheffield Gas Consumers' Co.* xix. 639.

2. *Inadequacy of remedy at law.* The principle upon which this court interferes by injunction, in cases both of public and private nuisance, is the inadequacy of the remedy at common law; and it is on the ground of injury to property that this jurisdiction rests. Per Sir G. J. Turner, L. J. *Ib.*

3. *Time.* Time is an ingredient which is to be considered in determining a question of injunction, although the application be on behalf of the Attorney-General. Per Sir G. J. Turner, L. J. *Ib.*

4. *Infringements of rights in respect of land.* Slight infringements of rights in respect of land, by a large company of persons, ought to be watched with a careful eye, and repressed with a strict hand by a court of equity, where it can exercise jurisdiction. Per Sir J. L. Knight Bruce, L. J. *Ib.*

5. *Motion for injunction after abandonment of works.* A motion for an injunction against executing certain works objected to as a nuisance, is useless and improper after the abandonment of the works on the part of the defendants. *Woodman v. Robinson*, xv. 146.

6. *Allegation of private nuisance.* A bill for an injunction may be filed by a person alleging a private nuisance, though the nuisance may at the same time, be public. *Soltau v. De Held*, ix. 104.

7. *Ringling of bells.* A party who has obtained a verdict for the ringing of bells, as a nuisance, need not commence a fresh action for every modified form of bell ring-

ing; in this case an injunction was granted to restrain the ringing of bells, so far as they occasioned an annoyance to the plaintiff or his family. *Ib.*

8. *Damage capable of compensation.* In case of an alleged nuisance where the damage is not of an irremediable kind, but capable of compensation, a court of chancery will not grant even a temporary injunction before the matter has been adjudicated upon in a court of law. *White v. Cohen*, xix. 146.

III. Abatement of Nuisance.

1. *By commoner.* A commoner may pull down a building wrongfully erected upon the common, and which prevents his exercising his right as fully as he otherwise might, provided he does no unnecessary damage. *Davies v. Williams*, v. 269.

2. Defendant had suffered judgment by default on an indictment for a nuisance *Held*, that the court could not in his absence give judgment that the nuisance be abated. *Regina v. Chichester*, viii. 294.

OATHS.

1. *How taken—Oath of abjuration.* The oath of abjuration required by the 6 Geo. III. c. 53, must be taken in the precise manner and form prescribed by that statute; and the words "upon the true faith of a Christian," are an essential part of the oath itself, and not merely part of the ceremony of taking it; therefore, a person of the Jewish persuasion, who is elected a member of the House of Commons, and votes as such after taking the oath in the form binding on his conscience, but intentionally omitting the words "upon the true faith of a Christian," is liable to the penalties imposed by the 1 Geo. I. s. 2, c. 13, on any person voting as a member of parliament, without having first taken the oath of abjuration. The name of the reigning sovereign is to be substituted for the words "King George," in the form prescribed by the act. *Salomons v. Miller*, xx. 353. See also *Miller v. Salomons*, x. 543.

2. *By whom administered.* Witnesses are sworn by the court, though, in fact, the oath be administered by one of its officers; and it is immaterial whether the oath be administered by the crier or clerk of the court, if it be done in open court. *Regina v. Tew*, xxix. 537.

OUTLAWRY.

1. *Effect of fraudulent conveyance on the rights of the crown.* A voluntary conveyance, though fraudulent as to creditors, nevertheless divests the property of the debtor, so that nothing passes to the crown by a subsequent outlawry. *Goldsmith v. Russell*, xxxi. 603.

2. *Plea of.* A plea of outlawry is not good unless it appears that a judgment of outlawry has been pronounced. *Winthrop v. Elderton*, vii. 294.

3. *Judgment in bankruptcy.* *Quære*, whether the Court of Bankruptcy can pronounce judgment of outlawry? *Ib.*

4. *Practice in case of.* A plaintiff having obtained a verdict, with damages, for a libel, against a newspaper proprietor, for whom the defendants had become sureties, the crown, at the instance of the plaintiff, issued a *scire facias* against the sureties for the recovery of such damages. The plaintiff having subsequently become an outlaw, the defendants pleaded that the *scire facias* had issued at the instance of and for the benefit of the plaintiff, and not of the crown. The crown having demurred and having taken no steps to bring on the demurrer for argument, but the plaintiff having obtained a rule for the appointment of a day for the argument, the court, on the application of the defendants, stayed the argument of the demurrer, on the ground that the application for the hearing of the demurrer was made not on the part of the crown, but for the benefit of the plaintiff, who was an outlaw. *Regina v. Lowe*, xx. 494.

5. *Reversal of outlawry—Special bail.* The defendant, an outlaw, appeared by attorney, and brought a writ of error to reverse the outlawry. Judgment of reversal was signed thereon. *Held*, that the defendant was bound to put in special bail on signing the judgment of reversal; and as he had not done so, the judgment must be set aside as irregular. *Commerell v. Beauclerk*, viii. 334.

6. *Affidavit to set aside proceedings.* The affidavit upon a motion to set aside proceedings to outlawry, for irregularity, must show that the party making it is duly authorized as the attorney of the defendant. *Skinner v. Carter*, xxix. 344.

PARENT AND CHILD.

I. RIGHT TO CUSTODY OF CHILD.

II. DUTY OF PARENT TO SUPPORT CHILD; INDICTMENT FOR NEGLECT.

III. MISCELLANEOUS CASES.

I. *Right to Custody of Child.*

1. *Right of father to custody—Jurisdiction of common-law courts.* The father is by law entitled to the custody of his legitimate children; and, *semble*, that a court of common law has no jurisdiction, under any circumstances, to deprive him of that right. *In re Hakewill*, xxii. 395.

2. *Father may revoke consent that child may live abroad.* The father of an infant agreed to let it live with its uncle, who was to maintain and educate it, until it was enabled to provide for itself, and the father promised not to take the child away from the uncle, and to pay a certain sum monthly for its support. The agreement was acted on for some months. *Held*, that, notwithstanding the agreement, the father was at liberty to revoke his consent to the child's living with its uncle, and that the court, on the child being brought up on *habeas corpus*, was bound to deliver it to its father. *Regina v. Smith*, xvi. 221.

3. *Stat. 2 & 3 Vict. c. 54.* The stat. 2 & 3 Vict. c. 54, has introduced, as controlling the paternal right to the exclusive custody of his infant child, two considerations, namely, of marital duty to be observed towards the wife, and of the interests of the child to be consulted. But if these two objects can be attained consistently with the father's retaining the custody of the child, his common-law paternal right will not be disturbed. *Woodward, ex parte*, xvii. 77.

4. *Misconduct of father.* The court will refuse to give possession of children to their father if he has so conducted himself as that it will not be for the benefit of the infants, or if it will affect their happiness, or if they cannot associate with him without moral contamination—or if, because they associate with him, others will shun their society. If it be established to the satisfaction of the court that the father of the children from ten to two-years of age is to be considered as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children even after he has escaped conviction. *Semble*, that under such circumstances, if the children were with their father, it would be the duty of the court to remove them. *Anonymous*, xi. 281.

II. *Duty of Parent to support Child; Indictment for Neglect.*

1. The mere moral obligation on a parent to maintain his child, affords no legal inference of a promise to pay a debt contracted by him, even for necessities. *Shelton v. Springett*, xx. 281.

2. *Past maintenance of child entitled to property.* A father cannot have past maintenance for his son, who is entitled to property, unless there are special circumstances in the case. The fact that the father has not been able to apply to the court before,

by reason of his residence out of the country, was *held* sufficient to entitle him to such past maintenance. *Carmichael v. Hughes*, vi. 71.

3. In an action on a general covenant in a deed of separation, whereby the defendant agreed to maintain all his children, it is no defence to say that the children have now become of age. *De Crespigny v. De Crespigny*, xxiv. 422.

4. *Indictment for neglecting to provide for infant children.* The prisoner was indicted for neglecting to provide her infant children with necessary or proper food or clothing, whereby they were "greatly injured and weakened." *Held*, that this averment as to the injury was material, and necessary to be proved. *Held*, also, that in order to constitute a misdemeanor at common law, an actual injury to the health of the children must be shown, and proof that they must have suffered to some extent was not sufficient. *Regina v. Phillpot*, xx. 591.

5. An indictment charged the prisoner, that, "being able and having the means," she neglected to provide sufficient meat, drink, or food for her child. There was no evidence at the trial of her actual possession of means for nourishing and maintaining the child; but it was proved that she might have applied to the relieving officer of the poor, who would have provided her with sufficient means. *Held*, that the indictment was not supported by the evidence. *Regina v. Chandler*, xxix. 551.

III. Miscellaneous Cases.

1. *Infant's estate.* The court will not give a direct benefit out of an infant's income to his father. *In re Stables*, xiii. 61.

2. An infant's legacy of small amount, under special circumstances, ordered to be paid to the father. *Walsh v. Walsh*, xv. 249.

3. Where the father makes representations as to his daughter's estate, of which he is in possession, claiming as tenant by the curtesy, but with knowledge that his title as such tenant is defective, on the faith of which the daughter marries, the father cannot afterwards set up an adverse claim to the estate. *Stone v. Godfrey*, xxvii. 318.

4. As to settlement of family estates between father and son, see *Hoghton v. Hoghton*, xi. 134.

PARISHES.

1. A mandamus cannot be supported under the act of 58 Geo. III. c. 45, to compel chapel wardens to pay off out of the rates the arrears of an amount borrowed for the purpose of enlarging and rebuilding the chapel; the vestry having provided for the expense of such enlargement under another act of parliament. *Regina v. Bilston*, ii. 255.

2. Where, by an act of parliament, the vestry men of two parishes are to be a joint vestry of the two, one parish cannot separately adopt the provisions of 1 & 2 Will. IV. c. 60, for the election of their own vestry. *Regina v. Basset*, xxiv. 193.

3. Upon an order in council, assigning an ecclesiastical district to a chapel, under the 58 Geo. III. c. 45, s. 21, and an enrolment of the boundaries, a chapelry becomes a separate district parish for all ecclesiastical purposes; and after the death of the then incumbent of the original parish, the curate of the district parish is entitled to the fees for burial, both in his parish and in respect of deceased persons removed therefrom, for interment in the cemetery. *Edgell v. Burnaby*, xxii. 577.

4. *Chapel and churchwardens, authority of.* In a district of a parish where the chapel wardens had authority in ecclesiastical matters, but all the parochial business of which was transacted by the parish churchwardens, the act 3 & 4 Will. IV. c. 90, (the Watching and Lighting Act,) was adopted at a meeting convened by the chapel wardens. A rule to show cause why a distress warrant should not issue against the overseers, who neglected to raise money for the purposes of the act, was discharged,

the court holding that the act had never been legally adopted, the chapel wardens having no authority to call such a meeting, and that the objection was open, notwithstanding the lapse of time, more than two years, since the act was adopted. *Regina v. The Overseers of Kingswinford*, xxvi. 106.

5. Circumstances under which a township is not a distinct parish, under the 58 Geo. III. c. 45. *Regina v. Bilston*, ii. 255.

6. As to the union of parishes for the maintenance of the poor, see *Regina v. Sharpley*, xxvi. 206; *Newbould v. Colman*, iii. 455.

PARTIES.

1. *Foreclosure suit—Cestuis que trust not necessary parties.* In a foreclosure suit, where all the persons having control over the property are made parties, it is not necessary, under sec. 42, rule 9, of the 15 & 16 Vict. c. 86, that the *cestuis que trust* of the mortgaged premises should also be made parties. *Sale v. Kitson*, xv. 590. See also *Goldsmith v. Stonehewer*, xv. 385; *Hannam v. Riley*, xv. 386.

2. *Proceedings in name of attorney-general.* Where parties presented a petition in the name of the attorney-general, who appeared and opposed the same, the petition was dismissed, the court holding that in proceedings commenced in the name of the attorney-general, he must be considered as the party having the conduct of the cause. *The Attorney-General v. The Wyggeston Hospital*, xxi. 362.

3. *Bill by married woman—Refusal of husband to join.* In a bill by a married woman by her next friend, for the purpose of setting aside a compromise of her rights to certain real property, her husband was made a defendant; the bill alleging that he had refused to be a co-plaintiff, the husband put in his answer, and appeared by counsel, and supported the case made by the bill. The refusal of the husband to join as co-plaintiff was not proved in the cause. *Held*, that this was not a valid objection to the suit. *Smith v. Pincombe*, x. 50.

4. The executor of a deceased defendant cannot move that the plaintiff should revive the suit against him within a limited time, or that the bill should be dismissed. *Reeves v. Baker*, iii. 262.

5. *Petition for taxation of costs by cestui que trust.* A trustee is not a proper party to a petition presented by a *cestui que trust* for the delivery and taxation of bills of costs paid by a trustee. *In re Mole*, xvii. 454.

6. *Joint contract.* The plaintiff signed a proposal, "on behalf of the members of an orchestra," to which he himself belonged. The defendant accepted the proposition, but failed to pay the amount agreed on. The plaintiff alone brought an action, stating the contract to be with him. *Held*, that the contract was joint and that he could not recover. *Lucas v. Beale*, iv. 358.

7. Two classes of trustees had committed a breach of trust. *Held*, that the *cestuis que trust* might proceed against the one class, without making the other class parties. *M'Gachen v. Dew*, xv. 97.

8. *Bill by one party on behalf of himself and others.* A mortgagee filed a bill for the appointment of a receiver, in his own name, but on behalf of himself and all other mortgagees, eight in number, who were named in a clause of the bill. Objection for want of parties was made, but the court overruled the objection, and appointed a receiver, being of opinion that there was no apparent utility in making all the mortgagees original parties, as they might be added by amendment. *Fripp v. The Chard Railway Co.* xxi. 53.

9. The trustees of a benefit building society, through a shareholder as their agent, purchased an estate out of the funds of the society, and paid the agent a certain sum for the purpose of his paying a deposit as part of the purchase-money. The agent obtained a conveyance of the estate, which he refused to convey to the trustees of the society, who filed a bill on behalf of themselves and all the other members and shareholders of the society, to compel him to convey the estate to them upon the trusts and

for the purposes of the society. The bill stated that the society consisted of upwards of 300 persons, who formed a fluctuating body, and were too numerous to be named individually as parties plaintiffs or defendants. *Held*, on demurrer for want of parties, that the suit was properly instituted, it not being necessary to bring all the members before the court to consent to the sale. *Mullock v. Jenkins*, ix. 30.

10. *Bill by some next of kin.* On a bill filed by some next of kin, on behalf of themselves and all others, the court directed some evidence to be produced to show that the others were inconveniently numerous, before the decree should be drawn up. *Leathart v. Thorne*, ii. 94.

11. Bill by four of the next of kin of an intestate, for the administration of his estate, on behalf of themselves and all others the next of kin. The bill alleged that the next of kin were very numerous, but no evidence of that fact was adduced. Upon an affidavit, under the 13 & 14 Vict. c. 35, that the next of kin were upwards of twenty in number, the court made the usual administration decree. *Smith v. Leathart*, iii. 170.

12. *Claim by some of a class of residuary legatees.* To a claim filed by some of a class of residuary legatees against the executors for an account, it appearing from the will that there were others, it was *held*, not necessary that all the residuary legatees should be parties. *Watson v. Young*, ii. 96.

13. *All the male members of a congregation necessary parties.* The trustees of a dissenting chapel, being required by the male subscribers to the congregation, under a power contained in their trust-deed, mortgaged it with a power of sale. A bill was filed to have a party claiming under the mortgage declared an assignee of the mortgage, and not a purchaser under the power of sale. *Held*, that it was not sufficient to make some of the men subscribers to the congregation parties only, but that they were all necessary parties to the suit. *Minn v. Stant*, vii. 100.

14. Power in an assignment authorizing the assignee to sue in the name of the assignor. *Held*, sufficient to justify the joining the assignor as co-plaintiff in a suit instituted upon the subject matter of the deed. *Rees v. Rees*, xxiii. 561.

15. *Persons beneficially interested in subject matter of suit.* In case of a claim for specific performance of an agreement of a railway company to purchase land from trustees, persons beneficially interested in the land are not necessary parties to the suit. *Potts v. The Thames Haven Dock, &c. Co.* vii. 262.

16. *Want of privity of contract.* If a court in Scotland orders P. and R. to deposit certain sums in court, which order P. obeys, and R. goes to England, P. cannot, by taking an assignment of the order, bring a bill in England against R. for want of privity of contract between P. and R., and the plaintiffs in the former suit are still necessary parties. *Paul v. Roy*, xi. 12.

17. *Party claiming interest in contract.* A party claiming an interest in a purchase by virtue of a contract, as having been entered into on his behalf, is a proper party to a suit by the vendor for the specific performance of the contract; otherwise, if he claim merely as a sub-purchaser, *semble*. *Chadwick v. Maden*, xii. 180.

18. Where the answer suggested that certain persons ought to be parties, and those persons were made parties by amendment, the plaintiff cannot afterwards say that they were not necessary. *Moodie v. Bannister*, xix. 81.

19. Where parties whose claims were doubtful were in Scotland, and had not been served, the court refused to proceed in their absence. *Ib.*

20. *Representation of deceased defendant.* In a foreclosure suit by a first incumbrancer, a decree was made, and afterwards a defendant, a subsequent mortgagee, (who was one of eight persons standing in a precisely similar situation, and in respect of whose mortgages there was only one right of redemption given,) died, and there being a difficulty in obtaining representation to his estate, the court ordered that the suit should proceed without any person representing his estate. *Long v. Storie*, xxiii. 351.

21. The court appointed a person under the 44th section of 15 & 16 Vict. c. 86, to

represent the estate of a deceased defendant, who was a tenant for life of tithes. *The Dean and Chapter of Ely v. Edwards*, xvii. 163.

22. *Death of party—Amendment.* A party to a special case died after it had been set down; liberty was given to amend, by making his representatives parties. *Ainsworth v. Alman*, xi. 333.

23. *Special case—Tenant in tail born after suit brought.* After a special case had been set down for hearing, and before it came on to be heard, a tenant in tail of the property to which the case related was born, who was a necessary party to the case. On motion *ex parte*, an order was made to discharge the order to set down the original case, and to set it down again amended, by adding the infant tenant in tail as a party, and that it should keep its place in the paper, fresh appearances being entered for all the defendants. *Thistlethwayte v. Garnier*, viii. 204.

24. *Supplemental bill.* A supplemental suit grafts into the original suit the new parties brought before the court by the supplemental suit, and enables the court to deal with the parties to both records, as if they were all parties to the same record. *Wilkinson v. Fowkes*, xii. 184.

25. A defendant to an original suit is not to be made a party to a supplemental suit, on the mere ground of a right to question the representative character of a defendant to the supplemental suit; for his title to sustain that character cannot be tried in this court. *Ib.*

26. The original defendants are necessary parties to a supplemental bill, where the supplemental suit is occasioned by an alteration after the original bill is filed, affecting the rights and interests of the original defendants as represented on the record; but they are not necessary parties to a supplemental bill, where there may be a decree upon the supplemental matter against the new defendants, unless the decree will affect the interests of the original defendants; nor are they necessary parties, where the supplemental bill is brought merely to introduce formal parties. *Ib.*

27. After a decree in an interpleader suit, one of the defendants, who was the official assignee in insolvency of another defendant, died, and a supplemental bill was filed by a third defendant alone, making the assignee subsequently appointed, the sole defendant. *Held*, that the supplemental suit was properly constituted, and an objection for want of parties overruled. *Lyne v. Pennell*, ii. 34.

28. *Absent parties.* In an administration suit by a single plaintiff, where an inquiry was directed in the decree as to the persons entitled to the residue, and the master made a report finding a great number of persons—nephews and nieces, and descendants of nephews and nieces, answering the descriptions in the testator's will, and consisting in part of married women and infants, and persons out of the jurisdiction, the court declared the rights of the parties, without a supplemental bill being filed to bring them before the court. *Williamson v. Parker*, xvii. 519.

29. *Bill by heir—Personal representative of ancestor having an interest in suit.* To a bill filed by the heir to set aside a purchase from his ancestor, on the ground of fraud, stating, also, that the purchase-money, or alleged consideration, was not paid,—the personal representative of the ancestor, having an interest in the question whether the contract is valid or not, is a necessary party; and if such personal representative be brought before the court by supplemental bill, the original defendant should be made a party to such supplemental bill. *Wilkinson v. Fowkes*, xii. 184.

30. If, after decree in an interpleader suit, it becomes necessary to file a supplemental bill, the original plaintiff is not a necessary party to it. *Lyne v. Pennell*, ii. 96.

31. New parties cannot be brought before the court by supplemental statement. *Commerell v. Bell*, xxiii. 119.

32. *Administration suit—Representatives of deceased executor.* The representatives of a deceased executor, not parties to an administration suit, must be brought before the court, if at all, by original, or supplemental claim. *Ewington v. Fenn*, xv. 475.

33. When parties necessary to a suit have not been named, a supplemental claim may be filed. *Gray v. Rurbridger*, xiii. 10.

34. The personal representatives of a defendant having been made parties to a suit by a bill of revivor, pleaded that their testatrix assigned her interest *pendente lite*, and that they never took any interest in the subject-matter of the suit. Plea allowed. *Nutting v. Hebden*, vii. 54.

35. *Bill by legatees against surviving partners of their testator.* A bill by legatees against the executors and surviving partners of their testator may be supported in all cases where the relation between the executors and surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners. *Travis v. Milne*, vii. 195.

36. To a claim seeking payment of a partnership debt out of the assets of a deceased partner, the surviving partner is a necessary party. *Hills v. M'Rae*, v. 288.

37. As to the necessary parties to a bill by a member against a joint stock company, alleging fraud, see *M'Bride v. Lindsay*, xi. 249.

38. *Allegation of fraud against trustee—Cestui que trust not a necessary party.* In alleging fraud against the trustee of a deed of settlement, it is not necessary to make the *cestui que trust* a party, though equally guilty with the trustee, as a court of law can only look to the legal rights of the parties to the deed. *Evans v. Edmonds*, xxiv. 227.

39. *Foreclosure suit—Subsequent judgment creditors.* Subsequent judgment creditors, whose judgments are registered under 2 Vict. c. 11, but not in the county register, are not necessary parties to a suit for the foreclosure of lands in a register county. *Johnson v. Holdsworth*, i. 143.

40. *Joinder of wife, who is heiress of mortgagee.* If a trustee and executor file a bill for the foreclosure of a mortgage, joining with himself in the action his wife, who is the heiress of the mortgagee, no objection can be taken to the misjoinder at the hearing, as she, though she has no direct interest, may be a proper person to join in any conveyance of the premises. *Pearce v. Watkins*, xiii. 370.

41. *Claim by mortgagees—Trustees—Scheduled creditors.* Upon a claim by a mortgagee against mortgagors, and against the trustees under an assignment of the equity of redemption for the benefit of the mortgagors, creditors whose names appeared in a schedule to the deed which they executed, it was held, that, although the deed gave the trustees a power of sale, with a clause making their receipts good discharges; the scheduled creditors were necessary parties to the suit. *Thomas v. Dunning*, xix. 316.

42. *Creditor's deed.* By a deed between A of the first part, B and C, creditors of A, of the second part, and the creditors of A who should execute the deed of the third part, A assigned his property to B and C, on trust to pay H a sum of money in respect of a lien on some of the property, and to divide the residue among the creditors. B never executed the deed, and his executors filed a bill to set it aside. The bill alleged that B had died directly after the date of the deed, that C was a bankrupt, that H had not any lien, and had acted improperly in the matter, and that it was the interest of the creditors who had executed the deed that it should be set aside. The only defendants were C, his assignees and H. Held, that one or more of the creditors who had executed the deed, were necessary parties to the suit. *Gore v. Harris*, i. 184.

43. *Beneficiary a necessary party in administration claim.* An administration claim was filed by an executor against his co-executors only, without making any person beneficially interested a defendant. Held, under Order 7, of April, 1850, that one at least of the persons beneficially interested must be made defendant to such a claim in the first instance. This would be necessary where the claim was to administer personal estate only, and *a fortiori* where it seeks administration of both real and personal estate. *Leslie v. Smith*, viii. 97.

44. *When next of kin must be made parties.* Bequest to trustees in trust to convey, after twenty-one years, to the testator's heir at law. If, in such case, the heir at law bring a suit for administration soon after the testator's death, the testator's next of kin are necessary parties. *Ring v. Jarman*, vi. 154.

45. *Party interested in suit against insurance company may be co-plaintiff, though not*

a party to policy. A person interested in the suit may join in an action against an insurance company, though he be not mentioned in the policy, another plaintiff and part owner having acted for himself and as agent for the other parties. *The Sunderland Marine Insurance Company v. Kearney*, vi. 312.

46. *Claim for legacy—Account of testator's estate.* Claim for a legacy, but involving an account of the general estate of the testator, will not lie against the surviving executor of the testator alone; the representatives of the deceased executor must be made parties and the proceeding must be by bill. A discretion is reserved, by the orders of April, 1850, to the court, at the hearing, to give or refuse relief, or to direct inquiries, having regard to the parties then before it. *Penny v. Penny*, iv. 55.

47. *Co-legatees.* Bequest in trust to invest a moiety for the benefit of A, and afterwards to her children, and the other moiety in the same manner to B and her children. On the death of A, a mortgage which had been made for her benefit was got in. *Held*, that A's children could maintain a suit for their moiety without making B and her children parties. *Hares v. Stringer*, xv. 145.

48. *Bill filed on behalf of plaintiff and all other mortgagees.* Where one mortgagee of a railway company files a bill on behalf of himself and all other mortgagees, and then, in a subsequent clause of the bill, names all these other mortgagees, it is no valid objection to the bill that they are not made parties. *Fripp v. The Chard Railway Co.* xxi. 53.

PARTITION.

1. *Proceedings by bill and by claim.* A suit for the partition of real estate was instituted by bill, and before the cause was brought to a hearing, a claim was filed for the partition of a portion of the same property, the plaintiff in the claim being interested in that portion only. A decree was made on the claim, the court declining to postpone the claim until the hearing of the suit. *Brace v. Foulkes*, xiii. 297.

2. One tenant in common of a manor is entitled to a decree for partition against his co-tenant. *Hanbury v. Hussey*, v. 81.

8. *Decree.* Form of a decree for partition, since the 13 & 14 Vict. c. 60, where infants are parties to the suits for the partition. *Bowra v. Wright*, iii. 190.

PARTNERSHIP.

I. WHAT CONSTITUTES A PARTNERSHIP.

II. RIGHTS AND LIABILITIES OF PARTNERS.

III. DISSOLUTION OF PARTNERSHIP.

IV. SURVIVING PARTNERS.

V. APPOINTMENT OF RECEIVER IN PARTNERSHIP CASES.

VI. MISCELLANEOUS CASES.

I. *What constitutes a Partnership.*

1. *Salary equal to a certain percentage of profits.* A contract to pay a manager, by way of salary, such a sum of money as shall be equal to a certain percentage on the net profits of an undertaking, does not make him a partner. Provisions in such a contract, that in given events the manager may purchase the business upon certain terms, and that, as a remuneration for his services, he shall, at the expiration of a certain period, provided he shall have performed all his covenants, receive such a sum of money as shall be equal to a certain percentage on the capital of the business, do not create a partnership, and are not inconsistent with a contract of hiring and service. *Stocker v. Brockelbank*, v. 67.

2. *Associations—Trade protection society.* A trade protection society, for supplying members with lists of bankrupts and other persons, consisted of members paying an annual sum, payable in advance, and was managed by a committee of members. By

one of the rules, the committee had the power of appointing and dismissing the printer, who was to be a member of the society, and had the care of defraying the expenses, and applying and disposing of the funds of the society. *Held*, that the printer could recover the price of goods furnished by him for the society, from a committee man who had ordered them, as the rules created no partnership, and the printer was not bound to look to the funds of the society for payment. *Caldicott v. Griffiths*, xxii. 527.

3. *Assignment for benefit of creditors—Authority of assignee to carry on debtor's business.* A deed of assignment in the usual form to trustees, for the benefit of creditors, which empowers the trustees to employ the debtor or other person in winding up his affairs, and in collecting and getting in his estate, and in carrying on his trade, if thought expedient, is a valid deed, and does not constitute a partnership between the creditors. *Coate v. Williams*, ix. 481.

4. The defendant and others purchased a mine, paying cash for part, to pay for the rest in six months, or surrender, at their option. It was divided into shares, some of which defendant took and paid for. A company was formed on the cost-book principle, and A, B, and C, the largest shareholders, agreed to find working capital for six months, and defendant was on the managing committee with them. The action was for machinery. *Held*, that the defendant was a partner in the mine during that time, and that the resolution that A, B, and C should find the requisite capital for six months, did not exempt him from liability to the plaintiffs for the goods supplied. *Peel v. Thomas*, xxix. 276.

5. See, also, *Bear v. Bromley*, xi. 414.

II. Rights and Liabilities of Partners.

1. *Liability of one partner for acts of the other—Authority of partner.* In 1832, A employed B and C, partners as attorneys, to lay out 500*l.* on mortgage, which was invested on a mortgage from D. D subsequently sold the property subject to the mortgage, and the purchaser shortly afterwards paid the 500*l.* to C, who, however, did not inform either A or B, his partner, of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838; but both before and after the dissolution, and after the death of A, in 1840, interest was paid as upon a mortgage of 500*l.*, to A and his representatives, up to 1848, by C. In 1846, the 300*l.* was paid to C, and the mortgage was given up by him, but no reconveyance was ever executed. Neither A nor his representatives had any knowledge of these facts till 1848. *Held*, that B, having no knowledge thereof, was not liable for these acts of C, as they were not within the scope of his partnership authority, which ceased with the first investment. *Sims v. Brutton*, i. 446.

2. *Restricted liability.* The agents appointed to make contracts for a partnership have authority to bind all the partners in the manner usual and customary in the same trade or business, and even to delegate to others the authority so to bind them, if it be usual so to do, notwithstanding an express agreement between the partners not so to deal; and the liability of the partners to a person contracting with them is not restricted by such agreement, unless he had notice thereof, and contracted with reference thereto. *Hallett v. Dowdall*, ix. 347.

3. *Right of creditor to enforce claim against one.* A creditor who has obtained judgment against a company may not prove his debt against the assets of a deceased partner, unless he can show that he has tried to enforce the debt against the whole partnership and has not succeeded. *Heward v. Wheatley*, xv. 271.

4. *Breach of trust.* A partner is not liable for his partner's breach of trust not connected with any breach of duty as such partner. *Coomer v. Bromley*, xii. 307.

5. *Stipulations inter se.* Whatever stipulations partners may make *inter se*, they cannot absolve themselves from the general liabilities arising out of the partnership, as between themselves and third persons. *In re The Sea, Fire and Life Assurance Co.* xxiii. 422.

6. *Attorneys' partnership—Scrivener.* The business of a scrivener is not within the ordinary scope of the business of an attorney, and one member of a partnership firm of attorneys cannot, therefore, render his copartner liable simply by receiving money indefinitely for the purpose of being laid out on mortgage security which might afterwards be obtained. *Harman v. Johnson*, xviii. 400.

7. *Between solicitors—Continuation of.* Where two solicitors have engaged in partnership for no definite period, the partnership must be supposed to continue until the affairs are wound up, and, consequently, one partner cannot exclude the other from the office till that time. *Roberts v. Eberhardt*, xxiii. 245.

8. *Authority after dissolution.* The authority of a partner continues after a dissolution for all purposes of winding up, and, if it be unduly exercised, the remedy is by applying to the court for the appointment of a receiver. A partner in a firm of sharebrokers has power, after the dissolution of the firm, to give a power of sale to dispose of shares contracted to be purchased by the firm, in order to obtain funds to complete the purchase. *Butchart v. Dresser*, xxxi. 121.

9. *Discharge of retiring partner, proof of—Security.* A contract to discharge a retiring partner from a debt due from the firm, may be proved either by an express agreement, or by facts and conduct from which it may be fairly inferred. Taking a new security is not of itself sufficient to discharge the retiring partner, but there must also be an agreement, either express or to be fairly inferred, to discharge the old firm. *Harris v. Farwell*, xv. 70.

10. *One partner may become a creditor of the firm.* By mercantile custom, one partner may, by advances for the purpose of business, become a creditor on the firm for the amount, and has a right to be credited, with interest, if there be no express contract to the contrary. Per Lord Justice Knight Bruce. Lord Justice Turner, doubting. *In re The German Mining Co.* xix. 591.

11. *One partner paying a note fraudulently signed by another.* If one of two partners is compelled to pay a note to which the name of the firm is fraudulently signed by the other partner, he is entitled to recover against that other partner as for money paid to his use. *Cross v. Cheshire*, vi. 517.

12. *Demand of repayment on the ground of fraud.* One shareholder, or partner, cannot demand repayment of his money on the ground of general fraud on all the shareholders or partners, except the directors, without alleging some specific fraud on him. If there has been no such specific fraud, then all the other shareholders, or partners, must be made parties. *M'Bride v. Lindsay*, xi. 249.

13. *Sale by an absent joint owner through a broker.* A solvent joint owner may authorize the sale of the partnership goods, and the circumstance that the broker who sells the goods was in the first instance employed by the bankrupt, and had no knowledge of any other person being interested in the goods, is immaterial, nor is the broker estopped from setting up the joint ownership by having sent to the assignees an account in which the goods were stated to have been sold for the bankrupt alone. *Morgan v. Marquis*, xxiv. 894.

14. *Executor of partner.* The executor of a partner succeeded as partner, and for some months there was no separation of the partnership assets, and closing of the business. The property was small, and the testator died in debt to the concern. Held, that the executor was not accountable to the testator's estate for the profits since he had been a partner, not having become a partner as executor. *Simpson v. Chapman*, xxvii. 522.

III. Dissolution of Partnership.

1. *Because of insanity of one partner.* A decree, asked by both parties, was made, declaring a dissolution of a partnership where one of the partners was hopelessly insane, though the deed made no provision for lunacy. *Leaf v. Coles*, xii. 117.

2. *For omission to communicate instructions—Request.* By articles of partnership

between three solicitors, A, B, and C, it was agreed that, in case either of them should do or omit certain acts, then the other partner, or partners, might give notice of dissolution; and that each partner was to employ himself in the partnership business and to communicate to the others all instructions in anywise relating to the business. C was to be a sub-partner only and attend to certain specified duties, receiving their emoluments as his share of the profits. A absconded, and B gave notice of dissolution to C, and served it at A's place of residence. *Held*, that it was not a sufficient cause of dissolution to show that C had neglected other duties than those specified as his; that neglect to communicate instructions was a cause of dissolution only after request made for such communication; and that B had no right to dissolve as against A without joining C, but that the notice given operated as a general dissolution. *Smith v. Mules*, x. 103.

3. A partnership cannot be dissolved by any partner simply for his own benefit. *Blisset v. Daniel*, xxiii. 105.

4. *Cost-book system—Retiring partner.* Nonpayment of calls in a company managed on the cost-book system does not work forfeiture of shares, nor does it dissolve the partnership. A retiring partner, who has refused to pay his calls, is entitled to an account and his legal interest cannot be affected by the acts of his partners. *Hart v. Clarke*, xxvii. 561.

IV. *Surviving Partners.*

1. *Right of, to wind up partnership concerns.* Upon the death of a partner, the right to wind up the partnership concerns vests in the surviving partners, and courts will not interfere with this right except upon good cause shown. *Collins v. Young*, xxviii. 14.

2. *Jus accrescendi.* The rule *jus accrescendi inter mercatores locum non habet*, applies to partnership chattels. The rule extends, also, to manufacturers, and to trade fixtures. Surviving partners have no *jus disponendi* in the partnership property, so as to enable them to mortgage the share of the deceased partner together with their own, as a security for a debt principally due from the surviving partners, and in part only from the deceased, and in order to enable them to continue their trade. *Buckley v. Barber*, i. 506.

3. As to when a surviving partner should be made a party, see *Hills v. M'Rae*, v. 233; *Travis v. Milne*, vii. 195.

V. *Appointment of Receiver in Partnership Cases.*

1. *Exclusion.* Exclusion is a sufficient ground for appointing a receiver in partnership cases; but partners may, by contract, provide for an exclusion on the happening of certain events. *Blakeney v. Dufaur*, xv. 76.

2. *Motion for receiver—Practice.* Upon a motion for a receiver of a partnership, the court will not determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights. *Ib.*

3. Where a suit is not to dissolve, but to continue a partnership, a receiver is not granted, unless, if this be not done, the partnership is likely to be destroyed by defendant's acts. *Hall v. Hall*, iii. 191.

4. *Bankruptcy of one partner.* When one of two partners has become bankrupt in respect of his separate estate, and an official assignee and creditors' assignees have been appointed, and the partnership has been dissolved by the bankruptcy, the continuing partner is entitled to have a receiver of the partnership debts appointed in chancery, notwithstanding the 152d section of the stat. 12 & 13 Vict. c. 106. *Freeland v. Stansfield*, xiii. 336.

5. *Appointment of retired partner.* A retired partner, who had advanced all the capital, and was liable to the partnership debts, appointed receiver of the partnership assets on his own application. *Hoffman v. Duncan*, xxiii. 99.

PARTNERSHIP.

Death of partner. A, B, and C jointly undertook to execute some railway contracts. There was no deed of partnership, but A had a letter of attorney from B and authorizing him to receive moneys and grant discharges. When the works had been completed, but before the period of the obligation of the railway contractors to maintain the works in repair had expired, C died. At that time, a large sum for extra work was due to the joint adventurers, which was the subject of a reference to the railway company's engineer. One year after C's death, the reference still pending, C's executor presented a petition to the court, alleging undue delay, and praying for the appointment of a receiver. *Held*, the circumstances did not warrant the interference of the court, and the petition dismissed, with costs. *Collins v. Young*, xxviii. 14.

7. *Want of interference in managing partnership property.* Where one of two tenants in common of a mine refuses to bear his share of the expenses, and avoids his duties in assisting to manage the mine, a receiver cannot be appointed at the suit of the other partner, there having been no interference in the management. *Roberts v. Eberhardt*, xxiii. 245.

VI. Miscellaneous Cases.

1. *Construction of articles of partnership.* A tradesman bequeathed his residuary estate, including his stock in trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds, and to invest the same and pay the annual income to Sarah his wife; and after her decease, to Mary, his wife's sister; and after the decease of the survivor of Sarah and Mary, he gave his residuary estate to another person absolutely. After the date of the will, Mary married, and her husband and the testator entered into partnership, under articles which contained a proviso, that if the testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who, under this provision, claimed his interest in the partnership. *Held*, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled, under the partnership articles, to such share. *Page v. Coz*, xvii. 572.

2. *Trust.* A trust may well be created in the absence of any expression importing confidence; and the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and therefore the articles of partnership created a trust in favor of the wife, to arise on the death of the testator leaving a widow surviving, which would attach on the property as it should then exist. *Ib.*

3. *Inconsistent clauses in partnership deed.* Where the first saving clause of a partnership deed limits the liability of retiring partners to a personal liability growing out of any forfeiture, misconduct, &c., other following clauses must be construed in a manner to make them consistent with the first, if such is the evident intention of the deed. *Ex parte Croxton*, xi. 227.

4. *Expulsion of partner under deed of partnership.* Where it is agreed in articles of partnership, that when any member shall wish to retire, shall die, be expelled, & the share of such retiring, &c., partner shall be paid him according to the next preceding annual valuation, and that any member may be expelled by a two thirds vote it is not necessary that a cause be assigned in a notice of expulsion; but if the expulsion takes place for no good cause, but solely for the gratification of some single men

and therefore *malâ fide*, then a mere conventional valuation of property is not sufficient, but it must be founded on fact, if practicable; if not practicable, then the member may be reinstated. *Blisset v. Daniel*, xxiii. 105.

5. *Annual stock-takings*. The usual annual stock-takings of a firm do not necessarily represent the true value of the partners' shares. Where the object is merely to ascertain the profit and loss of the year, the correctness of the valuation is much less important than where the object is to ascertain the exact value of a partner's share. *Travis v. Milne*, vii. 195.

6. Where partnerships consist of a great number of individuals, it is the duty of the court to hold such persons, as strictly as may be, to the terms of the deed of partnership. *Ex parte Laves*, x. 162.

7. *Partnership books*. *Semble*, that by the ordinary rules of the court of chancery, partnership books are admissible in evidence for and against all the partners and their estates. *Lodge v. Prichard*, xxvii. 474.

8. To a claim seeking payment of a partnership debt out of the assets of a deceased partner, the surviving partner is a necessary party. *Hills v. M'Rae*, v. 233.

PARTY WALLS.

See EASEMENT.

PATENTS.

- I. FOR WHAT PATENT MAY BE GRANTED, &C.
- II. SPECIFICATION AND DISCLAIMER.
- III. INFRINGEMENT.
- IV. INJUNCTION.
- V. ORDERS FOR INSPECTION.
- VI. ACCOUNT OF SALES, &C., ORDERED.
- VII. PLEADINGS AND EVIDENCE.
- VIII. MISCELLANEOUS CASES.

I. *For what Patent may be granted, &c.*

1. *Discovery of principle—Application of*. A obtained a patent for an improvement in packing hydraulic and other machines, by means of a lining of soft metal, and thereby of rendering certain parts of such machines air and fluid tight. B afterwards discovered that soft metal had the property of diminishing friction, and of preventing the evolution of heat when applied to the surfaces in contact of machines in rapid motion and subject to pressures, and he embodied the application of that discovery to machines in a patent. *Held*, that the application of the soft metal by B differed essentially from that of A, and that B's patent was new. *Newton v. Vaucher*, xi. 589.

2. *Improvements in known process*. A claim for improvements in the mode of doing any thing by a known process, is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the improvements claimed, and their application. *The Electric Telegraph Co. v. Brett*, iv. 347.

3. On a trial for infringement of a patent for improvements in electric signals, &c., the jury found that "the sending of signals to intermediate stations" was a new invention of the patentees, and had been adopted by the defendants. There was a distinct claim in the specification for this improvement, and the method of carrying it into

effect was pointed out. *Held*, that this was the proper subject of a patent; and that the idea and method being obvious and simple, did not make any difference; and that the plaintiffs were entitled to a verdict, although by the defendants' method signals were sent from, as well as to, intermediate stations. *Ib.*

4. *Novelty*. In an action for infringement of a patent for improvements in the means and apparatus for working under water, in order to produce excavations, and building foundations of light-houses, piers, jetties, and other structures under water, the specification described a cylinder or caisson of iron, divided into compartments and chambers, which was to be sunk to the bottom of the water, in the place where the foundation was to be made. The specification concluded by saying that the inventor claimed the mode of constructing the interior of a caisson in such a manner that the work-people might be supplied with compressed air, and be able to raise the materials excavated, and to make and construct foundations of buildings as above described. It was pleaded that the invention was not any manner of new manufacture, and the defendants proved that a patent had been obtained for a caisson similar in its construction, but which was to be applied to facilitate mining, &c., by keeping out water met with in such operations, by the compressed air in the cylinder. *Held*, that the inventor claimed the construction of the caisson itself, and that, as this was not new, the judge was right in telling the jury that the invention was not a new manufacture. *Bush v. Fox*, xxvi. 464.

5. A patent was taken out for causing sheets of metal to be passed through molten zinc in such a way as to secure their complete immersion. This was effected by the sheets passing between rollers in contact with metal kept molten in a suitable pot. Another mode was, by causing the sheets to be passed under a bar placed below the surface of molten metal, in combination with certain guides. *Quære*, whether a bar alone, when so placed for the purpose of insuring complete immersion by passing sheets of metal under it, is the proper subject of a patent. *Semble*, per Parke, B., that if the patent is good for the bar alone, the use of the bar by the defendants, though for a purpose different from that of the plaintiffs, is an infringement. *Morewood v. Tupper*, xxx. 555.

6. *Prior public use*. In an action for the infringement of a patent for the manufacture of steel, by the use of carburet of manganese, in any process whereby iron is converted into cast steel, it appeared from the evidence of witnesses for the defendant, that for eight or ten years before the grant of the patent, three firms had manufactured steel in the manner described in the patent, and had used and sold the steel so manufactured in the way of their trade and without concealment. *Held*, that there was such a public use as invalidated the patent. *Heath v. Smith*, xxv. 165.

7. *Quære*, whether a patent for improvements in a manufacture would be valid if one person had previously perfected the article and sold it to the public, though he kept the process secret? *Ib.*

8. As to designs, see COPYRIGHT OF DESIGNS.

II. Specification and Disclaimer.

1. *Ambiguity—Nature of invention*. The specification of a patent for improved arrangements for raising ships' anchors, claimed as the invention of the patentee, a cable-holder, which is described thus: "The scoloped shell in which the iron chain cable appears in the drawing, is upon a new plan, to hold, without slipping, a chain cable of any size, as shown by the opening form of the scollops at the top and bottom of figure 2." It also claimed as the invention of the patentee, "the new form of a scoloped shell, (as shown in figure 2,) in conjunction with the arrangements hereinbefore described." A drawing attached to the specification showed that the inner sides of the cable-holder and the scollops were not to be parallel, but should converge towards the centre of the cable-holder. In an action for an infringement of the patent,

it was proved that the specification and drawing would enable a competent workman to make a cable-holder which would hold chains of different sizes. *Held*, that the specification did not sufficiently describe the nature of the invention; that it was at least ambiguous whether it was an invention of a cable-holder to hold one cable of whatever size, or to hold cables of different sizes, and was therefore bad. *Hastings v. Brown*, xvi. 272.

2. *Specification must distinguish what is new from what is old.* A obtained a patent for "an improved turning-table for railway purposes," and in his specification gave a description of the machinery, of which no part was, in fact, new, except certain suspending rods. The combination, however, was both new and useful. In the specification, the patentee claimed as his invention the "improved turning-table hereinbefore described, such my invention being to the best of my knowledge and belief entirely new." *Held*, that the specification was insufficient for not showing what was new and what old. *Holmes v. The London, &c. Railway Co.* xvi. 409.

3. In an action for the infringement of a patent, the plaintiff included in his description of the machinery, a wheel with hollow spokes, describing said wheel as part of the machinery. The use of a hollow wheel for raising water by virtue of centrifugal force, was not a new invention; but the plaintiff's improvement consisted in a new combination of the hollow wheel, with suction pipes placed on each side of it, so as to admit the water on both sides of the wheel, and thereby preserve its equilibrium. *Held*, that the specification was bad, as it described the wheel as part of the invention, and did not clearly show that it was old, and not claimed by the plaintiff, and that it lies on the patentee to show that he has clearly pointed out in his specification what is new and what is old; what he claims and what he does not claim as part of his invention, and that it should be made clear on the face of the specification that he does not claim as new, that which is old. *Telley v. Easton*, xxii. 321.

4. *Description of process.* In a patent for an improved process in the manufacture of gelatine, the specification stated a part of the process to be to cut the hides or skins into thin slices or shavings, by any suitable instrument, and soak them in water repeatedly. The specification stated that the inventor generally used a carpenter's plane to cut the skins into slices, but it did not state whether the skins should be wet or dry. *Held*, that the process was valid, and that the specification was sufficient. *Wallington v. Dale*, xvi. 584.

5. *New combination—Infringement.* In the specification of a patent for "improvements in looms for weaving," the plaintiff declared that his improvements applied to that class of machinery called power looms, and consisted "in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." After describing the manner in which that was done in ordinary looms, the specification proceeded thus: "The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or sley striking against the 'frog,' (which is fixed to the framing.) In my improved arrangement the loom is stopped in the following manner: I make use of the 'swell' and the 'stop-rod finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever which bears against the 'swell,' but instead of its striking a stop or 'frog' fixed to the framing of the loom, it strikes against a stop, or notch, upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre, and throw a clutch box (which connects the main driving pulley to the driving shaft) out of gear, and allows the main driving pulley to revolve loosely upon the driving shaft, at the same time that a projection on the lever strikes against the 'spring handle,' and shifts the strap; simultaneously with these two movements, the lower end of the vertical beam causes a break to be brought in contact with the

fly wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock." After the date of the plaintiff's patent, the defendant obtained a patent for "improvements in, and applicable to looms for weaving," and amongst them, he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus the "clutch box" was not used, but instead of it, the "stop-rod finger" acted on a loose piece, or sliding frog; but instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever, and, by reason of the pin travelling on an inclined plane, the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms, by means of the action of the "clutch-box" in combination with the action of the break, was new and useful; also, that the plaintiff's arrangement of machinery for bringing the break into connection with the fly-wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially that of the plaintiffs. *Held*, upon these findings, first, that the specification was good; secondly, that the defendant had infringed the patent. *Sellers v. Dickinson*, vi. 544.

6. *Effect of disclaimer upon title of patent.* Where the title of a patent specifies several things, some of which are not new and useful, and are subsequently disclaimed, *semble*, that the disclaimer applies to the title as well as to the specification, and limits it to the things not disclaimed. *Regina v. Mill*, i. 346.

7. A disclaimer is valid notwithstanding the grantee of the patent has parted with all his interest in the invention at the time of entering it. *Wallington v. Dale*, xvi. 584.

III. Infringement.

1. *Combination of things new and old—Imitation by use of an equivalent.* Where a patent is granted for a combination of several things, some of which are old and some new, the question for the jury is whether, taking the specification altogether, that which is claimed as a whole is new; and the imitation by a chemical or mechanical equivalent of a part of the combination, which is both material and new, is an infringement. *Newton v. The Grand Junction Railway Co.* vi. 557.

2. *New combination—Infringement by use of part.* There may be a patent for a combination of old and new mechanism; and such patent will be infringed by using so much of the combination as is material; and it will not be less an infringement because the result is attained by the substitution of a mechanical equivalent. *Sellers v. Dickinson*, vi. 544.

3. *Infringement of one claim out of several.* A declaration for the infringement of a patent "for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits," alleged that the defendants had used the said invention. The specification made nine several claims in respect of different improvements. The jury having found an infringement in respect of one such improvement, that was held to be a sufficient finding of the alleged infringement. *The Electric Telegraph Co. v. Brett*, iv. 347.

4. *Adoption of part of patent.* The title of the patent, and every part of the specification in which directions were given for putting the apparatus in use, mentioned "metallic circuits" as the means by which the electric current was conveyed, but no claim was made in respect of such circuits. It was subsequently discovered that the earth might be used to complete the circuit to an extent of almost one half of the circuit, and that metal might be dispensed with to that extent, and the defendants had always used this new discovery. *Held*, nevertheless, that the defendants having adopted a part of the plaintiff's invention, the patent had been infringed. *Id.*

5. The plaintiff's system of electric signals was worked by six wires, but no specific

claim was made by him to any particular number of wires or any particular system of making the signals. The defendants used only one wire, and made the signals in a different manner. *Held*, that a finding of the jury, "that, as a whole, the system of the defendants is not the same as that of the plaintiff," did not entitle the defendants to a verdict, the plaintiff's claim not being to any particular system, but to the particular improvements pointed out in his specification. *Ib.*

6. *Use of chemical equivalents.* The plaintiff took out a patent, and claimed "the use of carburet of manganese in any process whereby iron is converted into cast steel;" and in the description of his process he said that he proposed to make his improved steel by introducing into a crucible broken steel or malleable iron and carbonaceous matter, with from one to three per cent. of their weight of carburet of manganese, and melting them together. The defendant put oxide of manganese and carbonaceous matter into the crucible with the iron, and produced the same result. At the trial, it was proved that during this process the oxide of manganese and the carbonaceous matter combined, and formed a carburet of manganese, and then, in the same process, but at a higher temperature, this carburet acted upon the iron and produced the same result, as that effected by the plaintiff's process. *Held*, in error, (*dissentientibus* Alderson, B., and Coleridge, J.) first, that there was evidence for the jury of the infringement of the plaintiff's patent; secondly, that the discovery claimed by the patent was the use of the carburet of manganese, and that the plaintiff was not limited to the mode of working mentioned in his specification; and although the defendant's process might constitute a different manner of manufacturing carburet of manganese, yet if he used it in the conversion of iron into steel, he infringed the patent. *Heath v. Unwin*, xiv. 202. Afterwards reversed by House of Lords, see *Unwin v. Heath*, xxxii. 45.

7. The specification, after describing the manner in which the wheel was formed, so that nave, spokes, and rim would consist of one solid piece of wrought iron, stated the invention to consist in the circumstance of the nave, &c., being composed of wrought iron "welded into one solid mass, in manner hereinbefore described." Defendant imitated the way of forming the nave, but not the spokes and rim. *Held*, that the imitation of the mode of forming the nave was an infringement of part of the patent, for which an action was maintainable; and that the words of the claim did not restrict the patent to the invention of a wheel made in every respect "in manner hereinbefore described." *Smith v. The London and Northwestern Railway Co.* xx. 94.

8. *Infringement of process.* The specification of a patent claimed the invention of a mode of manufacturing candles with two wicks, describing at length how the wicks were to be placed to make the ends thereof turn outwards in burning. A candle was produced, made by the defendant, of which the wicks turned outwards in burning; but no evidence was offered of the mode in which it was made. *Held*, that there was no evidence of infringement, the patent being for the mode of manufacturing such a candle, and not for the candle itself. *Palmer v. Wagstaffe*, xxv. 535.

9. *Novelty of invention—Question for jury.* In the ordinary process of dyeing with madder, there remained a refuse called spent madder, which was worthless, but which was known to retain coloring matter. A process was discovered for extracting the coloring matter from fresh madder, and the extract was called garancine. The same process was applied to spent madder, and garancine of the same quality as from fresh madder was obtained, and a patent was taken out for obtaining garancine from spent madder. In an action for an infringement of the last patent, it was *held* to be a fact for the jury, and not of law for the court, whether the plaintiff's last invention was a new manufacture of garancine. *Steiner v. Heald*, vi. 536.

IV. Injunction.

1. *Waiver of breach in the condition of a license—Acquiescence.* Plaintiffs licensed defendant to use a patent for the annual rent of 2,000*l.*, reserving the power of deter-

mining the license in default of payment. The defendant failed to pay the entire rent; but the plaintiffs allowed him for several years to use the patent, and received payments on the footing of a reduced rent. *Held*, that, by so doing, the plaintiffs had elected not to treat the previous breach as a forfeiture of the license, and that consequently they were not entitled to an injunction restraining the defendant from using the patent. *Warwick v. Hooper*, iii. 233.

2. *Restraint of foreigners using patent in England.* The exclusive right under an English patent will be enforced against foreigners while in England, in the same way and to the same extent as it would against British subjects. Therefore, in a case in which the foreign owners of a ship caused to be made in their own country, and attached to their vessel, a steam screw propeller, the manufacture and user of which was unrestricted by law there, but restricted in England by a patent, and afterwards sent the vessel with a cargo for the purposes of trade to England, the use of the steam propeller was restrained by injunction while the vessel should be within the waters covered by the English patent. *Caldwell v. Van Vlissingen*, ix. 51.

3. *Proof of title in a new patent.* Where a patent is new, the court considers the proof of the title in the patentee to be wanting, inasmuch as the public have had no opportunity of contesting the validity thereof, and, therefore, refuses to interfere by injunction until the title has been established at law; but, in a case where there has been long enjoyment (including user) under a patent, the public have had an opportunity of contesting the patent, and the fact of their not having done so successfully, is at least *prima facie* evidence that the title of the patentee is good; and the court therefore interferes, in such a case, before the right is established at law. *Ib.*

4. *Injunction—Presumption as to title after several verdicts in favor of patentee.* Where a patent had been in force for twelve years, and had been the subject of four suits against different persons, all of which terminated favorably to the patentee, and in two of which verdicts had been given in favor of the validity of the patent, it was *held*, that, in a fifth case, the patentee was entitled to an injunction, pending the trial of the legal right, although a fresh fact was brought forward, tending to impeach the novelty of the invention. A patentee does not acquiesce in the infringement of his patent, by omitting to proceed by *scire facias* to set aside a subsequent patent extending to part of his invention, unless such subsequent patent is put in practice. An allegation as to the defendant's inability to be answerable in damages, was *held*, not irrelevant, upon a motion for an injunction, against the infringement of a patent. *Newall v. Wilson*, xix. 156.

5. *Practice in granting injunctions.* Under the 82d section of the Common-law Procedure Act, the court of common pleas will grant only a rule *nisi* in the first instance for an injunction against a defendant in an action for infringing a patent; but, on cause being shown, it will give such directions as would be given by a court of equity. *Gittins v. Symes*, xxviii. 380.

V. Orders for Inspection.

1. *When an inspection may be granted.* Under the 42d section of the stat. 15 & 16 Vict. c. 83, which empowers a court of common law to order "an injunction, inspection, or account," in an action for the infringement of a patent, an inspection of machinery may be granted. But such inspection will not be granted as of course, and without the party applying for it showing at least that it is materially and really wanted for the purpose of the cause. The application may be made before declaration. *Amies v. Kelsey*, xiv. 169.

2. *Sufficiency of affidavits.* In an action for the infringement of a patent, the court will not grant an order, under the 15 & 16 Vict. c. 83, s. 42, for an inspection of a machine upon an affidavit "that the machine used by the defendants is the same for which the plaintiff has obtained a patent." The affidavit ought to state that there is

such a machine, and that the plaintiff has reason to believe it is an infringement. *Shaw v. The Bank of England*, xiv. 460.

3. *Second inspection.* The plaintiff, having brought an action against the defendants for an alleged infringement of a patent for the use of certain machinery, was, in company of two scientific witnesses, allowed an inspection of the machinery complained of as an infringement. That action was afterwards discontinued, and a fresh action brought after the passing of the 15 & 16 Vict. c. 83, and the plaintiff applied, under sect. 42, for a second inspection. The court refused to make the order, on the ground that there had already been an inspection. *Shaw v. The Bank of England*, xx. 436.

VI. *Account of Sales, &c., ordered.*

1. *When an account of sales will be ordered.* Under the Patent Law Amendment Act, 15 & 16 Vict. c. 83, where an action has been brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not be granted before final judgment. Neither does the act give power to order an inspection of the defendant's books containing entries relating to such sales. But, upon reasonable evidence of the existence of a valid patent, and of its infringement by the defendant, and of the defendant's making a profit thereby, he will be ordered to keep an account of all sales to be made of the article alleged to be an infringement, and of the profits thereon, until the further order of the court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment should be in favor of the defendant, to pay the expense of keeping such account. *Vidi v. Smith*, xxvi. 113.

2. A bill charged the defendant with infringing the plaintiff's patent, and asked for an account, seeking to make him answerable for the profits received in consequence of the infringement. *Held*, that the defendant must answer the interrogatories, though he disputes the title of the plaintiff, and insists that the discovery will be an act of oppression upon him, and that there was little probability that the court, at the hearing, would direct an account upon the facts if disclosed. *Swinborne v. Nelson*, xv. 572.

3. *Of what an account will be ordered.* The court will compel one convicted of infringing a patent to account with the patentee for all the articles sold, to pay him their price, and further the value of all remaining in the infringer's hands. *Quære*, if in such a case an order will be granted to the patentee to inspect the infringer's books. *Holland v. Fox*, xxv. 69.

4. *Jurisdiction to order an account at law.* The stat. 15 & 16 Vict. c. 83, s. 42, vests in any court of common law in which an action for the infringement of a patent is pending, the powers before exercised exclusively by courts of equity, and enables them to grant, either by interlocutory order, an account of all patent articles sold during the suit, or, after verdict for the plaintiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action and after notice that an account would be required. But the court has no power, where damages nominal or substantial have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the suit, the damages assessed by the jury being considered as the compensation for the loss of such profits. *Holland v. Fox*, xxvi. 133.

VII. *Pleadings and Evidence.*

1. *Several pleas.* In an action for the infringement of a patent, the court (since the Common-law Procedure Act) allowed the defendant to plead,—first, not guilty;

secondly, that the patentee was not the inventor; thirdly, *non concessu*; fourthly, that the invention was not a manufacture; fifthly, that the invention was not new; and sixthly, that no sufficient specification was enrolled. *Platt v. Else*, xx. 304.

2. *Particulars of infringement.* In an action for infringement of a patent, it is sufficient for the plaintiff to furnish such particulars of the infringement as show distinctly what are the acts of infringement he complains of, that is to say, the article, the making or selling of which he alleges is an infringement upon his patent, and the times and places of its making or sale; and it is not necessary to specify in what respects, or as to what parts or processes of the invention it is an infringement. *Talbot v. Laroche*, xxvi. 286.

3. *Sufficiency of plea—Invention not new.* To a specification describing an apparatus, it was pleaded that the said specification "did not particularly describe the nature of the said invention, and in what manner the same was to be and might be performed, *modo et forma*." Held, that the question whether the apparatus was or was not new, did not arise under this plea. *Wallington v. Dale*, xvi. 584.

4. *Particulars of objection.* Particulars of objections delivered under the 15 & 16 Vict. c. 83, s. 41, by a defendant in an action for an infringement of a patent, must state the place at or in which the invention is alleged to have been used or published prior to the date of the letters-patent, and no evidence of such prior user or publication will be admitted, if the particulars of objection are defective on this point. *Palmer v. Cooper*, xxiv. 468.

5. *Statement of place where an invention is used.* The defendant in an action for the infringement of a patent for the manufacture of candles, after alleging that the invention was not new, stated that it had been used by the plaintiff and certain other persons who were named, "and by candle-makers generally in London and the vicinity thereof." Held, that this was a sufficient compliance with the statute 15 and 16 Vict. c. 83, s. 41, which requires a statement of the place or places at or in which the invention is alleged to have been used. *Palmer v. Wagstaffe*, xx. 527.

6. *Disclaimer—How to be pleaded.* A disclaimer by a party, though it be enrolled subsequently to issue joined, is evidence for that party and may be read as a part of the original specification; and it is not necessary to plead such disclaimer *purs darrein continuance*. *Semble*, in actions or suits, not being proceedings by *sci. fa.*, and which were not pending at the time of the enrolment of a disclaimer under the 5 & 6 Will. IV. c. 83, s. 1, the disclaimer is to be deemed and taken to be a part of the patent or specification from the time of the granting of the letters-patent, and not from the time of its enrolment only. *Regina v. Mill*, i. 346.

7. *Particulars of objections upon a sci. fa. to repeal patent.* Upon a *sci. fa.* to repeal a patent, the particulars of objection are not part of the record, so as to show that those specific objections are in issue; and therefore it cannot be taken that issues were joined upon objections to parts of a patent which were disclaimed after the particulars were filed, and that those issues were to be tried. *Id.*

8. *Evidence of the nature of an invention.* Declaration for infringement of a patent for "certain improvements," &c. Pleas. Not guilty; that the plaintiffs were not the first inventors; and that the invention was not new. At the trial, the plaintiffs put in the specification, which, after describing the invention, claimed as "the improvements," three things, each of which, taken by itself, was old. Held, that on these issues the patentee might give evidence that the real invention he claimed was a combination of these three things, and that the specification was not conclusive evidence on this point. *Semble*, that the specification was bad. *Bateman v. Gray*, xx. 520.

VIII. Miscellaneous Cases.

1. *Caveat.* Where a caveat was lodged before the great seal was affixed to a patent,

the lord chancellor declined to enter into the merits of the opposition, but referred the matter back to the attorney-general. *In re Fawcett's Patent*, xix. 189.

2. *Practice—Injunction.* The plaintiffs, patentees of a chemical invention, filed their bill against the defendants to restrain them from pirating the invention. The bill contained statements setting out the letters-patent, and the opinions of scientific men that the invention was original and important, and also statements for the purpose of obtaining a discovery as to the process used by the defendants. The defendants pleaded that the plaintiffs were not the first inventors, and supported their plea by an answer, but they did not answer the interrogatories relating to the letters-patent, and the opinions of the scientific men, nor those which sought a discovery of the defendants' process. *Held*, that the defendants were not bound to answer either class of interrogatories, inasmuch as the former class were based upon statements which, if true, would not be evidence to invalidate the plea, and the latter class were immaterial to the issue raised by the plea. *Young v. White*, xxiii. 517.

3. *Agreement between rival patentees—Estoppel.* In case of a dispute between parties, holding different letters-patent, one for purifying, the other for manufacturing gas, as to certain rights given each thereby, it was agreed between the parties, to avoid disputes, that each should use the patents on certain terms. The declaration alleged a breach of the agreement; the plea denied the validity of the plaintiff's patent. *Held*, that the parties were bound by the agreement, and that the defendants were estopped from denying the validity of the plaintiff's patent. *Hills v. Laming*, xxiv. 452.

4. *Costs in action for infringement.* Where the plaintiff, in an action for the infringement of a patent, is nonsuited, the defendant is not entitled, on taxation, to any costs in respect of particulars of objections delivered with the pleas in pursuance of sect. 41 of the Patent Law Amendment Act, 1852, (15 & 16 Vict. c. 83,) unless such particulars are certified by the judge to have been proved under sect. 43. *Honiball v. Bloomer*, xxviii. 453.

5. On a motion for an injunction to restrain the violation of a patent, the plaintiffs were directed to establish their rights at law. After they had issued their writ, they pleaded to the bill in equity that the plaintiffs were not the first inventors. The court gave the plaintiffs leave to apply to have the order for trial amended, so that the action at law might be confined to the same issue as that raised by the plea in equity. *Young v. White*, xxiii. 517.

6. Where there are two assignees of a patent, and one of them dies, the action for an infringement in his lifetime descends to the survivor, who is entitled to recover the whole damages. *Smith v. The London and Northwestern Railway Co.* xx. 94.

PAUPERS.

I. SETTLEMENT AND REMOVABILITY.

II. ORDER OF REMOVAL AND FOR MAINTENANCE.

III. LIABILITY FOR MAINTENANCE AND EXPENSES OF ORDER OF REMOVAL.

IV. OF APPEALS FROM ORDERS.

V. POOR LAW BOARD, GUARDIANS, &C.

VI. MISCELLANEOUS CASES.

I. *Settlement and Removability.*

1. *Settlement of legitimate children follows that of the father.* By the law, both of England and Scotland, the settlement of legitimate children follows and is determined by the settlement of the father, and this doctrine is not laid down by positive statute but is the result of the construction put by courts of justice on the poor-laws. *Adamson v. Barbour*, xxviii. 38.

2. *Of bastard.* By sect. 71 of stat. 4 & 5 Will. IV. c. 76, which enacts that every

child born a bastard after the passing of the act, shall have and follow the settlement of the mother until it shall attain the age of sixteen years, or shall acquire a settlement in its own right, such child has the settlement of its mother only until the age of sixteen, and after that age is removable to the place of its birth. *Regina v. The Churchwardens, &c., of St. Andrew*, xvi. 100.

3. *By tenancy—Husband and wife.* The settlement relied upon in support of an order for the removal of the widow of A was the birth settlement of A in the appellant township. One of the grounds of appeal stated "that the pauper, being possessed of a cottage, situate in the respondent township, for a certain term of years or as tenant thereof from year to year under a yearly or other renting, intermarried with the said A; and that the said A thereby became possessed of the said cottage, or of an estate or interest therein, in right of his wife, and that he resided and slept for forty days in the respondent township, and thereby gained a settlement." On the hearing of the appeal, the birth of A in the appellant township was proved; but it also appeared, that when the pauper married she had been and was then living as the tenant of a cottage in the respondent township, and that she and her husband lived there after the marriage for upwards of a year. The pauper was called as a witness on behalf of the respondent township, but she was not examined by either party as to the terms upon which she had held the cottage. *Held*, that there was some evidence to warrant the sessions in finding a settlement, by reason of a tenancy for a term of years, or from year to year, as alleged in the ground of appeal. *Quære*. Whether, if the tenancy of the wife had been merely a tenancy at will, it would have been available for the purpose of conferring a settlement by marriage. *Regina v. Halifax*, xxix. 137.

4. *By payment of rent and public taxes.* William A. occupied a separate and distinct dwelling-house and farm in the parish of B., which were let to him and his father, Thomas A., as joint tenants, the rent and value of the land itself being sufficient to confer a settlement on both. The father resided on another farm, at a distance, but he *bond fide* paid the rent of the farm occupied by his son. In the rate-books of B., "Mr. A." appeared as the name of the occupier of the house and farm in respect of two rates, and in a third rate the name of "Thomas A." appeared. The overseers had demanded and received payment of these rates from the father. *Held*, that the sessions were justified in finding, first, that there was sufficient occupation and payment of rent, as well as a sufficient assessment to and payment of rates, to confer on William A. a settlement in B., under the 1 Will. IV. c. 18, and 4 & 5 Will. IV. c. 76; and, secondly, that he had sufficiently been charged with, and paid his share of the public taxes, to gain a settlement in B. under the 3 & 4 Will. & M. c. 11. *Regina v. Huthwaite*, xiv. 111.

5. *Payment of pauper's rate by friend.* Where a pauper's rate was payed by a friend in his behalf, it was *held*, that it was not a payment by the pauper, if there was no precedent authority or subsequent recognition by the pauper, and therefore no evidence of his settlement. *Regina v. Bengeworth*, xxv. 163.

6. *Annual value of property less than 30l.—Payment of less than 30l.* W. R. occupied land, on which he built a dwelling-house, but did not expend 30l. thereon; the land being part of a property the other part of which was let to J. R. Afterwards his landlord granted to him a lease of the premises, in consideration of the rent and of the covenants, and "in consideration of having erected a dwelling-house, to be for the joint benefit of the other part demised to J. R." The annual value of the property occupied by W. R. was not 10l. *Held*, that by virtue of the stat. 9 Geo. I. c. 7, s. 5, there was no settlement proved; for there was no necessary inference, nor was there any statement, that the consideration for the grant was other than a pecuniary purchase of it; and it was found that the money paid was less than 30l. *Wendron v. Stithians*, xxix. 158.

7. *Clerk of district church appointed by curate.* A pauper, appointed to the office

of clerk of a district church, by the curate, and continuing to act in said office for eight years, with the knowledge of the vicar of the parish, and without any attempt having been made to remove him, acquires a settlement in the township in which the church is situate, under the stat. 3 W. & M. c. 11, s. 6. *Regina v. Ossett*, iv. 307.

8. *What interrupts settlement.* The father of a pauper had gained a settlement in B., on April 16, 1837. He had also owned an estate in C. for some years before and down to 1838. On April 27, 1837, when the son was emancipated, the father had slept for more than forty days upon his estate in C., including several days' residence between the 6th and 27th of April, 1837. *Held*, that the residence in C. had the effect of superseding the settlement gained in B., and of establishing a subsequent settlement in C., to which the pauper might properly be removed. *Regina v. Knaresborough*, iii. 360.

9. *Interruption by execution of order of removal.* Where a valid order of removal has been *bonâ fide* executed by taking the pauper to the parish where he is settled, and there delivering him to the overseers, such a removal operates as an interruption of residence within the 9 & 10 Vict. c. 66, however short be the period during which the pauper was actually absent from the removing parish. *Regina v. Caldecote*, iv. 293.

10. *Removal by parish officer with illegal intent, no interruption.* Under stat. 9 & 10 Vict. c. 66, if a parish officer assist to convey a pauper out of the parish with illegal intent, and she afterwards return, her absence does not cause an interruption in the residence; but the court will not infer such intent, if the sessions do not find it. *Semble*, the irremovability of a widow from the parish in which she lived with her husband for a year after his death, is destroyed by an interruption during the year. *Regina v. St. Marylebone*, iii. 385.

11. *Absence of pauper under contract.* Temporary absence out of a parish, where a pauper resides, for the purpose of fulfilling a contract, but with the intention of afterwards returning, is not a breach of residence. *Regina v. The Guardians of the Poor of Brighthelmstone*, xxviii. 287.

12. But though the absence of a pauper be under a contract, yet if he had no intention of returning, unless events over which he has no control should occur, this is a break of residence. *Regina v. Stapleton*, xviii. 300.

13. *Imprisonment of pauper.* A pauper had resided in the respondent parish for upwards of five years next before the application for a warrant for his removal, excluding a period during which he was an inmate of the workhouse in the said parish, and excluding, also, two periods of three weeks and two weeks, during which he was imprisoned in a house of correction, situate out of the respondent parish, under committals for misbehavior in the workhouse. *Held*, that these periods were to be excluded from the computation for all purposes, and that the pauper was consequently irremovable by reason of residence for five years in the respondent parish, within the meaning of 9 & 10 Vict. c. 66, s. 1. *Regina v. St. Andrew*, ix. 314; see, also, *Regina v. The Overseers of Hartfield*, ix. 309.

14. The irremovability intended in statute 11 & 12 Vict. c. 111, is that acquired by virtue of stat. 9 & 10 Vict. c. 66, s. 1. *Regina v. East Stonehouse*, xxv. 225.

15. Relief given to a parent on account of his children, is relief received by the children within the proviso of the 9 & 10 Vict. c. 66, s. 1, and such children are therefore removable. *Regina v. Shavington-cum-Gresty*, iv. 298.

16. *Loss of settlement by removal.* A obtained a settlement by estate in B, by his marriage with the pauper. Before the birth of any of their children, they removed to a distance of more than ten miles from B, whereby A lost his settlement there. A, whose previous settlement was unknown, deserted his family, the children being unemancipated, while they were residing in C. Upon appeal against an order obtained by C to remove the wife and children to B, it was *held*, that the settlement of

A in B, being lost under stat. 4 & 5 Will. IV. c. 76, s. 68, the wife and children could not be removed there. *Regina v. Llansaintffraid Glan Conway*, xxii. 247.

17. *Absence of husband—Intention to return.* A married woman had resided in the parish of L. for ten years. Two years before the order of removal, her husband left her and went to America. She had received letters from him, and was in daily expectation of receiving from him money to defray the expenses of herself and children to America. *Held*, that she was removable, the presumption being that the husband did not intend to return. *Regina v. Llanelly*, iv. 315.

18. *Desertion of husband.* A married woman whose husband was a Scotchman, and had acquired no settlement in England, had, during the absence of her husband, (who had sailed on a voyage to Calcutta without leaving sufficient means of support for his family,) become chargeable to the parish in which she was residing. The wife had acquired a maiden settlement in England. *Held*, that this was such an absence on the part of the husband as amounted to a desertion of his wife, and that she might, therefore, be removed to the place of her maiden settlement. *Regina v. St. Marylebone*, ii. 252.

19. An Irishman who had gained no settlement in England, had resided with his family in the respondent parish for more than five years up to November, 1849, when he deserted them, and went to America. His wife and children continued to reside in the respondent parish until December, 1849, when they became chargeable and were removed by an order to the appellant parish, where the wife had a maiden settlement. *Held*, first, that the wife and children were removable from the respondent parish; and secondly, that they were properly removed to the wife's maiden settlement. *Regina v. The Overseers of Much Hoole*, vii. 399.

20. *Daughter of Irish parents who had gained no settlement in England.* A pauper, who had gained no settlement in her own right, and who was the daughter of Irish parents, neither of whom had ever gained any settlement in England, was *held* properly removable to the place of her birth settlement; the circumstances being such that her father was not removable with his family to Ireland, under 8 & 9 Vict. c. 117, s. 2. *Regina v. St. Giles*, vii. 385.

21. *Unemancipated child.* An unemancipated child cannot acquire irremovability, under stat. 9 & 10 Vict. c. 66, ss. 1, 3, by residence after the age of sixteen, in a parish from which its father is removable; though the father had been irremovable, and lost his irremovability after the child attained the age of sixteen. *Regina v. St. Ann*, xviii. 260.

22. *Wife of a marine.* A pauper married a marine in 1846; in 1848, he left the service and lived with her in S.; in 1850, he entered the navy, and served till November, 1853; then lived with his wife till January, 1854; went to sea in a merchant vessel and died at sea, July, 1854. In October, she was removed from S., where she had continued to live. *Held*, that she had not resided five years in S. so as to be irremovable under s. 1 of 9 & 10 Vict. c. 66; but that she was removable only after twelve months from her husband's death, as he was a resident of S., under s. 2, by intending to return thither. *Regina v. East Stonehouse*, xxx. 369.

II. Order of Removal and for Maintenance.

1. *Order of removal—Estoppel of.* A prior order of removal, quashed on appeal upon the question of settlement, is conclusive evidence between the same parties that the pauper was not then settled in the parish to which he was ordered to be removed, whether the subsequent inquiry be for the adjudication of the settlement and maintenance of a lunatic under the 8 & 9 Vict. c. 126, s. 58, or an ordinary case of removal of the pauper. *Heston v. St. Bride*, xviii. 265.

2. In 1849, two young children were removed to parish H., being adjudged to be settled there in right of their father's settlement there. In 1854, an order was made

that their mother, a pauper, was legally settled in H., and ordering that parish to pay money, &c. The parish appealed, denying the father's settlement therein. *Held*, that parish H. was estopped from disputing the order on this ground by the order of 1849, unappealed against, the settlement of the husband having been decided thereby, and the two orders being made between the same two parishes. *Regina v. Hartington, &c.* xxx. 250.

3. *Meaning of "sickness" within 9 & 10 Vict. c. 66, s. 4.* Incurable blindness is sickness, within the meaning of the 9 & 10 Vict. c. 66, s. 4. *Regina v. Bucknell*, xxviii. 176.

4. Where, therefore, upon an appeal against an order of removal, which stated that the pauper had not "become chargeable in respect of relief made necessary by sickness or accident," it was proved that incurable blindness was the original and continuing cause of the pauper's chargeability, and the order of removal omitted to state that the justices making the same were satisfied that the sickness would produce permanent disability, as required by 9 & 10 Vict. c. 66, s. 4, it was *held*, that the order was defective and bad. One ground of removal served with the said order on the appellants, stated that the pauper had gained a settlement in the respondent parish "by one of the means stated in his examination, and that his settlement by one of such means or otherwise had been acknowledged by relief given," &c. The pauper's examination stated a settlement by birth and by hiring and service, and also by relief given whilst resident out of the respondent parish, to which last point the appellants answered that, if any relief had been given to the pauper, it was given in error, and under a mistaken belief as to the place of settlement of the said pauper, and that the said pauper had never acquired a settlement, and was not settled in the appellant parish. *Held*, that evidence of the birth settlement, objected to by the appellants, though it might not properly be admissible under the above ground of removal, was admissible to disprove the allegation in the ground of appeal that the relief had been given by mistake. *Quære*, whether, under the above answer of the appellants, evidence was admissible of a settlement of the pauper's father by hiring and service in a third parish at the time of the pauper's birth, in order to show that the relief had been given in error as to the pauper's birth settlement. *Ib.*

5. *Asylum part of workhouses.* A pauper was conveyed to a licensed lunatic asylum in parish A, and afterwards adjudged by justices to be settled in parish B; and the latter parish was ordered, under stat. 8 & 9 Vict. c. 126, s. 62, to repay to the overseers of A sums paid by them to the keepers of such asylum for maintenance. *Held*, no objection to such order, that the asylum is part of the workhouse of M., and that the keepers are the physician and master of the workhouse, salaried as such by the parish, having no beneficial interest in the asylum, and accountable to the parish for whatever they receive or expend as such keepers. *St. Pancras v. St. Marylebone*, xxii. 379.

6. *Statement that pauper was chargeable.* The order of maintenance recited a prior order for the removal of the lunatic to the asylum, and an order adjudging his settlement to be in the appellant parish, and stated that the pauper, from the time of being sent to the asylum to the time of making the order of maintenance, had been maintained at the expense of the appellant parish. *Held*, that it sufficiently showed that the pauper was chargeable. *Regina v. Minster*, ii. 172.

III. Liability for Maintenance and Expenses of Order of Removal.

1. *Notice of chargeability.* Where an order of maintenance of a pauper lunatic is made, under the 8 & 9 Vict. c. 126, s. 62, upon the parish in which he is adjudged to be settled, no notice of chargeability is required to be sent by the parish obtaining the order. *Regina v. Minster*, ii. 172.

2. *Maintenance under a suspended order of removal.* The costs of maintenance of a

pauper, while remaining in a parish under a suspended order of removal, may be recovered against the parish to which he is adjudged to belong, by an order of two justices, under sect. 84 of stat. 4 & 5 Will. IV. c. 76. *In re The Overseers of Chedgrave*, i. 279.

3. In April, 1843, an order was made for removal of a pauper from parish B. to parish C., and was suspended the same day; and C. was served with notice of the order of removal within ten days. On 26th August, 1846, stat. 9 & 10 Vict. c. 66, came into operation. In September, 1847, execution of the order was directed by another order of justices; and, at the same time, they ordered payment, by C. to B., of the expenses of maintenance from April, 1843, to September, 1847; and the pauper was removed to C. He had resided in B. five years next before the execution of the order. Afterwards C. appealed against both orders. The sessions confirmed both. On cases reserved, the order of removal was confirmed on the ground that the appeal was too late; but an order for payment was quashed, on the ground that the case was not within stat. 35 Geo. III. c. 101, s. 2, the pauper not being dead, nor, in consequence of stat. 9 & 10 Vict. c. 66, s. 1, legally removed. *Held*, nevertheless, (on motion under stat. 11 & 12 Vict. c. 44, s. 5,) that, after the decision of this court, B. was entitled to an order on C. for the same expenses of maintenance, the settlement having now been finally adjudged to be in C., so as to bring the case within stat. 4 & 5 Will. IV. c. 76, s. 84. *Regina v. Wodehouse*, ix. 425.

4. An order of removal was made and suspended in 1841. In October, 1852, the pauper being dead, the suspension was taken off, and an order for the costs of maintenance during the whole period of the suspension, (exceeding 20*l.*.) was made, against which there was no appeal. In February, 1853, an application was made for a distress warrant, which was resisted on the ground that it had been recently discovered that the pauper had resided for five years in the removing parish, and that the costs of maintenance, subsequent to the passing of the 11 & 12 Vict. c. 110, were chargeable to the common fund of the union, and not to the parish of settlement. The justice, on this ground, refused to issue the warrant. *Held*, that he was bound to do so, as the objection should have been taken by appeal, when the amount of costs might have been reduced by the sessions. *Ex parte Williams*, xviii. 315.

5. *Liability of union.* If an extra-parochial place be first made liable to support its own poor and afterwards it be comprised in a union, those paupers who have always resided there, unless they be irremovable by the 9 & 10 Vict. c. 66, must be supported by the township and not by the union. *Regina v. The Overseers of East Dean*, xxiv. 140, and *Regina v. Bennett*, xxiv. 143.

6. The 12 & 13 Vict. c. 103, s. 5, which enacts that the costs of maintenance of a lunatic pauper, who if not a lunatic would have been irremovable under the 9 & 10 Vict. c. 66, shall be borne by the common fund of the union, and not by the parish of settlement, is confined to cases where the lunatic is removed to the asylum under an order of justices, and does not apply when the removal to the asylum was under the order of an officiating clergyman and a relieving officer, according to the 8 & 9 Vict. c. 126, s. 48, in which case the order for maintenance must be made on the parish where the lunatic is adjudged to be settled. *Regina v. St. Leonard*, xvi. 383.

7. Sect. 5 of stat. 12 & 13 Vict. c. 103, by which the costs and expenses of removal and maintenance of a lunatic pauper, who if not a lunatic would have been exempt from removal, shall be borne by the union comprising the parish wherein the pauper was resident at the time of removal, applies to unions under Gilbert's Act, 22 Geo. III. c. 83. *Regina v. Priest Hutton*, iv. 319.

8. The 12 & 13 Vict. c. 103, s. 5, must be read to include the expenses of maintenance, as well as those of obtaining the order of removal to the asylum, of a lunatic pauper, who, if not a lunatic, would have been exempt from removal by reason of the 9 & 10 Vict. c. 66; and both expenses are to be borne by the union com-

prising the removing parish. *The Overseers of Snailh v. The Overseers of Wigton*, ii. 248.

9. *Pauper born in Ireland and having no settlement in England.* The 12 & 13 Vict. c. 103, s. 5, extends to the maintenance of a pauper lunatic, born in Ireland, who has acquired no settlement in England, but has become irremovable by reason of five years residence in a parish within a union in England; and in such a case the burthen of maintaining the pauper in an asylum is cast upon the common fund of the union. *Regina v. Arnold*, xiv. 102.

IV. Of Appeals from Orders.

1. *Appeal against order for costs.* No appeal lies under sect. 80 of stat. 8 & 9 Vict. c. 126, against an order of two justices upon the treasurer of a county for the payment of the costs of the maintenance of a lunatic pauper, who has been adjudged chargeable to the county under sect. 63. *Regina v. Wilson*, vi. 209.

2. *From order of maintenance—Quarter sessions.* An appeal against an order for the maintenance of a lunatic pauper must, under the 8 & 9 Vict. c. 126, s. 62, be made to the quarter sessions having jurisdiction in the place from which the lunatic was removed to an asylum. *Regina v. The Justices of Lancashire*, xi. 372.

3. *Jurisdiction of quarter sessions—Notice.* Two justices in and for a county removed a pauper from a township in the borough of A in that county to a parish. The overseers of the parish, within twenty-one days after notice of the order, gave notice of appeal to the next quarter sessions for the county. They appealed to the borough sessions of A, but did not, within twenty-one days, give any further notice of appeal; and their appeal was dismissed for want of notice of appeal to the borough sessions. *Held*, 1. That no appeal lay to the county sessions, though the order appealed against was made by justices for the county, who had, within the borough, concurrent jurisdiction with the borough justices. 2. That the notice given was a sufficient notice of appeal, within stat. 11 & 12 Vict. c. 31, s. 9, the erroneous statement that the appeal would be made to the county sessions being merely surplusage. *Regina v. The Recorder of Liverpool*, ix. 335.

4. *Notice of abandonment.* After a notice of abandonment of an order appealed against, under 11 & 12 Vict. c. 31, s. 8, has been served, the quarter sessions have no jurisdiction to enter upon an appeal. *Regina v. St. Michael's, Pembroke*, viii. 311.

5. *Notice of chargeability.* Where an order of removal has been duly served, but no notice of chargeability or grounds of removal have been sent to the appellant parish, the want of service of these latter documents does not deprive the quarter sessions of jurisdiction to hear an appeal against the order of removal; but the omission to serve them may be made the matter of a ground of appeal. *Regina v. The Recorder of Shrewsbury*, xvi. 348.

6. An appeal does not lie against an order of removal, until service of a notice of chargeability and statement of grounds of removal, and the non-service of such notice and statement is no ground of appeal against the order. *Regina v. The Recorder of Shrewsbury*, xvi. 394.

7. *Appeal from order of removal, notice of.* Notices of appeal from an order of removal must be supposed to be given at the time when, according to the regular and usual course of post, it ought to reach the respondents. *Regina v. Slawstone*, xi. 351.

8. *Time of notice of appeal against order for maintenance.* In the case of an appeal against an order for the maintenance of a lunatic, notice of appeal must be given within twenty-one days after service of the notice of chargeability or of the particulars of settlement, and if no such notice or particulars have been served, then within twenty-one days after service of the order of maintenance. *Regina v. The Justices of Derbyshire*, xii. 161.

V. *Poor-Law Board, Guardians, &c.*

1. *Tenure of office of chaplain*—*New regulations of poor-law board.* A person appointed as chaplain of a workhouse for one year, whose term of office had not expired when new regulations for the workhouse were prescribed by the poor-law board, was held not to be entitled to hold his office after the expiration of the year, under the 68th article, which provided that all persons then holding office should continue to discharge its duties, in the same manner as persons appointed under the new regulations, and the 83d article, which provided that all officers appointed under the new regulations should hold their offices till death, insanity, resignation, or removal. *Regina v. The Governors, &c. of St. James*, x. 354.

2. *Power of auditor appointed by.* The directors of the poor of a parish being authorized by act to appoint officers, and the auditor appointed by the board disallowing a bill of costs paid by the directors to their clerk, upon application to a justice to enforce payment by the directors, it was held, that the auditor had power, under sect. 47 of stat. 4 & 5 Will. IV. c. 76, and sect. 32 of stat. 7 & 8 Vict. c. 101, to order the disallowance; and that his order must stand until reversed on appeal, under sect. 35 or sect. 36 of stat. 7 & 8 Vict. c. 101. *Regina v. Tyrwhitt*, xx. 54.

3. Stat. 4 & 5 Will. IV. c. 76, gives the poor-law board exclusive power with regard to those officers whom they direct the parish officers, or board of guardians, to appoint. *Regina v. The Poor-law Commissioners*, vi. 189, 205.

4. Under the 5 & 6 Will. IV. c. 69, the poor-law guardians may pay the expenses for the investigation of title in case of the reinvestment of any money which comes into their hands in the performance of their duties. *In the matter of Lady Byron's Settlement*, xxxi. 599.

5. By 5 & 6 Vict. c. 57, if a question arises as to the right to act as an elective guardian, the poor-law board may issue such order therein as they may deem requisite. Held, that the court of queen's bench had jurisdiction to review the order where the board had made a mistake in point of law; but that they would not grant a *certiorari* unless there was a reasonable ground for impeaching the order. *Regina v. The Poor-law Commissioners*, xxix. 160.

6. *Nomination papers.* By the general order of the poor-law board the nomination papers of guardians shall be sent to the clerk of the guardians after the 14th and on or before the 26th March; and by art. 6, when the day for the performance of any act relating to the election of guardian shall be a Sunday, "such act shall be performed on the day following." Held, that the delivery of a nomination paper to the clerk on the 26th March, being Sunday, might be treated as a delivery on the Monday following, and was good. *Ib.*

VI. *Miscellaneous Cases.*

1. *Form of certificate—Liability of keeper of asylum—Jurisdiction of justices.* The certificate upon which a pauper lunatic was removed to an asylum under the 8 & 9 Vict. c. 126, s. 48, purported to be, and was in fact, given by a surgeon, but it did not follow the form in schedule E., No. 1, to that act, in stating that he was a member of the college of surgeons, &c., or in giving his place of abode. Held, that although the keeper of the asylum might be guilty of a misdemeanor, under sect. 51, for receiving the lunatic without a certificate in the prescribed form, yet the confinement did not thereby become unlawful, and the lunatic being *de facto* confined in the asylum, the jurisdiction of justices to adjudge the settlement under sect. 88, and to make an order for costs under sect. 62, attached. *Regina v. Minister*, ii. 172.

2. *Union of parishes for the maintenance of the poor.* In the district of M. St. M. and M. St. T. there had always been one rate for maintaining the poor and repairing the roads, one set of overseers and surveyors of the highways, and one constable; but

there was evidence that there had formerly been two churches and two rectories, and that for some ecclesiastical purposes the district had been treated as two parishes. *Held*, that as the evidence showed that the district was a reputed parish at the time of the passing of stat. 43 Eliz. c. 2, it was to be treated as one parish, as respects the maintenance of the poor. *Regina v. Sharpley*, xxvi. 206.

3. As to the validity of an order of poor-law commissioners directing a union of parishes and townships for the administration of the poor laws, and of the acts of guardians under it, see *Newbould v. Coltman*, iii. 455.

4. *Promise by pauper to pay attorney's costs.* A promise by a pauper, while the pauper's order is in force, to pay his attorney his costs at some future time is a *nudum factum*. *Holmes v. Penney*, xxiv. 540.

PAWNBROKER.

A pawnbroker who fills up the ticket which he gives to the person pawning, according to the information received from him either at the time of the article being pawned, or on previous occasions, complies with the provisions of the 39 & 40 Geo. III. c. 99, s. 6, unless he knows such information to be false. *Attenborough v. London*, xx. 479.

PAYMENT.

1. *Payment after action brought—Set-off.* Where the plaintiff at the trial proved a debt of 11*l.* 18*s.* 1*d.*, and the defendant established a defence under one plea as to 18*s.*, under a set-off as to 7*l.* 8*s.*, and also a payment of 4*l.* after the commencement of the suit, thus answering the whole of the plaintiff's demand, it was *held*, that the payment having been made after the commencement of the suit, the plaintiff was entitled to a verdict, with nominal damages, on the plea of set-off. *Spradbery v. Gilham*, iv. 464.

2. *Of a smaller sum on account of a larger sum—Statute of Limitations.* A payment of a smaller sum on account of a larger takes the case out of the Statute of Limitations as to all sums not barred at the time of payment; but it does not revive a debt then barred, if it can be attributed to any sum against which the statute has not run. *Nash v. Hodgson*, xxxi. 555.

3. *Of debt and costs—Stay of proceedings.* The defendant had given bills of exchange, and deposited with the plaintiffs as collateral security some nine warrants, with authority to the plaintiffs to sell the nine. The plaintiff served on the defendant a writ of summons indorsed for a certain sum, being the amount of the bills with interest and costs. Subsequently, the plaintiffs sold the nine and then delivered to the defendant a declaration in which a smaller sum was claimed, the amount received for the nine having been deducted. The defendant, contending that the sale was fraudulent, applied for a stay of proceedings on payment of the amount indorsed on the writ, but it was *held* that the plaintiff was not bound to accept more than the amount demanded in the declaration, and that the defendant would not be prejudiced by the payment of such smaller sum. *Arnold v. Goodered*, viii. 332.

4. *Prepayment.* On a settlement of accounts between the plaintiff and the defendant, the latter overpaid the plaintiff 1*l.* 11*s.* 5*d.* which they then agreed should go in discharge of the plaintiff's ensuing account. The plaintiff having afterwards done work for the defendant, sued him in debt on the common counts for the amount. *Held*, that the defendant had a good defence as to 1*l.* 11*s.* 5*d.*, under the general issue. *Smith v. Winter*, x. 506.

5. *Payment to creditor by mistake.* If a man has two creditors and intending to pay one, he by mistake pays the other, he cannot recover the money back. Per Pollock, C. B. *Platt v. Bromage*, xxviii. 521.

6. *Breach of contract to perform award—Substituted agreement.* Declaration that

by an award, on submission to arbitration under seal, the defendant was ordered to pay the plaintiff a certain sum by instalments and alleging a breach of the order. Plea that after a breach of the award by non-payment of the first instalment, it was agreed between the parties that the plaintiff should accept in full satisfaction of the award, breach, &c., a certain other sum specified, payable in instalments on days specified in the agreement. One of the instalments was not paid until after the time specified, when the plaintiff refused to receive it except on account of the sum due under the award, assigning as his reason, not that the payment was made on the wrong day, but that the defendant would not sign a letter which the plaintiff had no right to require. The last instalment was duly paid on the day specified. The jury found that the plea was proved. *Held*, that the non-payment of the first instalment due under the award was a breach of the whole contract to perform the award, and that the plea was, therefore, a good answer to the action by way of accord and satisfaction, the agreement being for payment of a smaller sum at an earlier day; and that the payment of the third instalment, having been accepted by the plaintiff as payment at the time agreed upon, was a performance of the agreement. *Smith v. Trowsdale*, xxii. 360.

7. *Acceptance of credits by common agent.* A sent an order for coffee to B, stating that "for the costs of said order, he had opened a credit with C in favor of B." B sent the coffee, and drew at sixty days' sight on C, who was and had for some time been the common agent of both A and B. On receipt of the bill, C marked it as accepted, and afterwards accepted it formally and entered the amount in his books to the credit of B with interest, as from the date of receipt, and at the same time debited A with the same amount, as from the same date. C stopped payment before the bill became due, and it was protested for non-payment. At no time were C's assets sufficient to cover his liabilities for A on the bill and other accounts, and B was a creditor of C when he stopped payment. B sued A for the price of the coffee. *Held*, that the circumstances did not import that B had accepted the credit as an immediate payment, and had taken the risk of C's insolvency, for that C had no right to enter it as a present payment without B's consent; and that, therefore, B was entitled to recover from A the price of the coffee. *Maxwell v. Deare*, xxvi. 56.

8. *Payment by bill of exchange.* To an action of debt, the defendant pleaded, that after the accruing of the debt, and before suit, the plaintiff drew a bill on one A B, who accepted the bill, and delivered it to the plaintiff for and on account of the said debt, and that the plaintiff received it from A B, on such account; that the plaintiff, before suit, indorsed the bill to C D, who was still the holder and entitled to sue A B thereon. *Held*, a payment of the debt. *Belshaw v. Bush*, xiv. 269.

9. *Joint and several payment—Promissory note.* An agreement between the payee and one of several makers of a joint and several promissory note, that the payee shall take another note in satisfaction of the first, with payment of the note taken by the payee on such understanding, amounts to payment by the other makers of the joint and several note. *Thorne v. Smith*, ii. 301.

10. *Payment by master of ship by bill—Broker.* A broker having received money for the shippage of goods on account of the owners of the ship, offered to pay it to the captain, who was also managing owner, by a check. This the captain declined, preferring that the broker should open a credit for him at a bank in N. B. in favor of A, which the broker did. The bank accordingly paid A 250*l.*, for which A gave a bill drawn by him in favor of the bank upon the broker, who accepted and paid it when due; *Held*, that this was a good payment of 250*l.* by the broker, and binding the co-owners. *Anderson v. Hillies*, x. 495.

11. *Voluntary payment.* Where money is paid under an illegal demand, *colore officii*, the payment is not voluntary. *Steele v. Williams*, xx. 319.

12. *Payment of wager deposits by administratrix.* Deposits on bets were made with the testator. His widow, who was administratrix, paid the deposits as well on those bets which had been decided before the testator's death as those which had not. *Held*,

that the payments of the bets decided in the testator's lifetime were voluntary, and could not be charged against the general estate; but as to those not decided in his lifetime the case was otherwise, the moneys having been deposited on an illegal contract which she had a right to determine, and had determined by payment of the deposits, and that, therefore, she could charge the estate in respect of such payments. *Manning v. Purcell*, xxxi. 452.

13. *Payment to a clerk on forged check.* A, in Scotland, being indebted in 460*l.* to B, in England, paid 460*l.* into a Scotch bank, in return for a letter of credit on an English bank in this form: "Please honor the drafts of B to the extent of 460*l.*, which charge to the bank." A inclosed this letter of credit in a letter to B, which arrived at B's office in B's absence. The only clerk in the office, but who had no authority to manage B's money transactions, opened the letter, took the letter of credit to the English bank, forged a check in B's name for the amount, received payment, and absconded. On B's return he drew on the English bank for the 460*l.*; but his draft was dishonored, and the bank refused payment to him. B then, along with A, sued the Scotch bank in Scotland for repayment of the 460*l.* Held, that there was no claim against the English bank, but that the Scotch bank was liable, unless it could show, either that the English bank actually paid B's draft when called on to do so, or that the English bank did something which, as between the English bank and B, the English bank was entitled to treat as equivalent to payment. *Orr v. The Union Bank of Scotland*, xxix. 1.

14. *Appropriation of payments.* As to the appropriation of payments by a creditor, where the debtor makes a payment generally, see observations by Knight Bruce, L. J. *Nash v. Hodgson*, xxxi. 555.

15. As to the sufficiency of an allegation of payment in an action between a principal and factor, see *Morgan v. Couchman*, xxiv. 321.

16. *Evidence of payment—Set-off.* A, being indebted to B in 25*l.* on an over-due bill, gave B 9*l.* and a fresh bill for the balance of the 25*l.* and interest on renewal, and asked B to take the money and the new bill in lieu of the old one. B refused to do so, and returned the fresh bill to A, but kept the 9*l.*, though A demanded it back. Held, per Pollock, C. B., and Platt, B., that this was evidence to support a plea of payment of 9*l.*; per Parke, B., and Martin, B., that it proved a set-off only, and not a payment, for that payment *post diem* requires the assent of both parties, and this payment was clogged with a condition which B refused to comply with. *Thomas v. Cross*, xii. 570.

17. For other cases as to evidence under a plea of payment, see *Jones v. Gretton*, xx. 472; *Elsom v. Denny*, xxv. 423.

PAYMENT INTO AND OUT OF COURT.

1. *Payment into county court in detinue.* *Semble*, that money may be paid into court in detinue in the county court, under the 9 & 10 Vict. c. 95, s. 82. *Taylor v. Addyman*, xvi. 454.

2. The 44th section of 15 & 16 Vict. c. 86, does not apply to paying money out of court. *Rawlins v. M'Mahon*, xix. 121.

3. *Investment of money paid into court.* A railway company took some settled land, and paid the purchase-money into court. An order was made with reference to the investment of the money in other land to the same uses. *Metherell, ex parte*, vii. 139.

4. Money paid into court by a railway company for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered after his death not to be reinvested in, or considered as land, but to be paid to his executors. *Flamank, ex parte*, iii. 243.

5. Where freehold and copyhold hereditaments are taken by a railway company,

the money paid into court cannot be reinvested in leasehold property. *Ex parte Macaulay*, xxvii. 341.

6. Money paid into court by the Liverpool Dock Trustees, in respect of leaseholds for years, taken by them under the powers of their act of parliament, ordered to be reinvested in the purchase of copyholds of inheritance. *In re Coyle's Estate*, iii. 224.

7. On petition for reinvestment of purchase-money paid into court, and arising from settled lands bought under legislative powers, the court, in the first instance, only approves of the propriety of the proposed investment, and reserves the directions as to the completion of the purchase until the certificate of a conveyancing counsel is obtained approving of the title. *In re Martin's Estate*, xvii. 54.

8. *Right of tenant for life to the dividends on money invested.* Where the real estate of a testator was subject to a lease, the lessees paying only a small rent in consideration that they would expend 600*l.* on the estate in a given number of years, and the testator bequeathed the said estate subject to said lease to A for life with remainder to B, and the interest of A and B was bought up by a railway company, and the money invested, it was *held*, that the tenant for life was entitled to all of the dividends of the purchase-money. *In re Steward's Estate*, xxi. 305.

9. *Money deposited in lieu of bail, and paid into court.* A party arrested on mesne process in an action of debt, deposited with the sheriff the amount claimed, with 10*l.* for costs, in lieu of bail, and the sheriff paid the amount into court. The defendant afterwards perfected bail, but not in due time. *Held*, that the defendant was entitled to have the money paid out to him, the plaintiff having no right to elect whether he would take the security of the bail or of the money. *Brook v. Brook*, xvi. 177.

10. *Bail.* Where a defendant is arrested under 1 & 2 Vict. c. 110, and released on depositing with the sheriff the amount indorsed upon the writ with 10*l.* for costs, which sums are afterwards paid into court, the plaintiff is entitled to have the money paid out of court to him (subject to taxation) if the defendant neglects to pay an additional 10*l.* into court pursuant to 7 & 8 Geo. IV. c. 71, s. 2. *Nyssen v. Ruysenaers*, i. 439.

11. *Money paid into court by third party in lieu of bail—Absence of defendant.* Where money has been paid into court by a third party in lieu of bail, the court will, upon bail being put in and perfected, pay it out to him, if the attorney who gave instructions for the application swears that he is the attorney of the defendant and acts for him, though the defendant himself be abroad. *Alcenius v. Nygren*, xxv. 222.

12. Application that payment out of court of a sum of 39*l.* might be made on a York probate refused. [The practice has since been modified. *Vide* the cases in the note.] *Cope v. Cope*, xi. 340.

13. *Effect of payment into court in cases of tort.* Payment into court in tort has the same effect as payment into court in actions of *indebitatus assumpsit*, namely, that of admitting a cause of action, with damages, amounting to the sum paid into court. *Story v. Finnis*, iii. 548.

14. *Where declaration in tort is unspecific.* Where a declaration in tort is general and unspecific, the payment of money into court admits a cause of action, but not the cause of action sued for. If the declaration is specific, so that nothing can be due to the plaintiff from the defendant, unless the defendant admits the particular claim made by the declaration, payment of money into court admits the cause of action sued for, and so stated in the declaration. The declaration stated a contract by the defendants to carry the plaintiff from N. to E., and a negligent breach of duty in the performance of that contract, and damage to the plaintiff. Plea, payment of 25*l.* into court. Replication, damages ultra. *Held*, that the payment into court admitted the contract and the breach of duty; and that as the damages were single, and dependent solely on the breach of duty admitted, the plaintiff was not bound to prove negligence, in order to entitle him to recover more than 25*l.* (See note to

case.) *Perren v. The Monmouthshire Railway Co.* xx. 258. See also *Schreger v. Carden*, x. 513.

15. *Payment out of court under power of attorney.* Where money is asked to be paid out of court to an attorney, under a power of attorney from the party entitled to the money, his signature is not sufficiently attested by the certificate of a notary public under hand and seal, and the official seal of the mayor of the foreign city where he resides, but the same must be proved by affidavit. *Salvidge v. Tutton*, xix. 560.

16. *Payment out of court to solicitor of party.* The rule of the court is, not to order payment of money to the solicitor of the party where it exceeds 10l.; and this rule will not be deviated from, except in very special circumstances. *Middleton v. Younger*, xxi. 65.

17. *Payment to solicitor of infant.* The whole of a small legacy and its accumulations, were paid out of court to the solicitor of an infant who had no other property, upon his undertaking to apply it in discharging a sum claimed for past maintenance, and for a prospective outfit, and, after deducting the costs, to pay any remaining balance to the infant at majority. *In re Welch*, xxiii. 334.

18. *Application in formâ pauperis.* Party entitled to a life interest in a fund paid into court under the Trustee Indemnity Act is allowed to apply for the payment of the dividends to him in *formâ pauperis*. *In re Money*, i. 188.

19. *Who may petition for payment—What is payment out of court—Costs.* Where an estate is directed to be sold, and the proceeds to be distributed, the persons entitled to receive the proceeds may petition for the payment out of money paid into court, under the Lands Clauses Consolidation Act, as purchase-money for part of the estate. A transfer from one account in court to another, is payment out of court, within the meaning of the act. Where one of several persons entitled petitions under the act, and serves the other persons, it is not of course that the company should pay the costs of such respondents. *Melling v. Bird*, xvii. 130.

20. *Shares—Requisites of petition.* Where a sum of money, distributable in shares, has been paid into court, on any application for payment out of some of the shares, the petitioner should ask that the other shares may be carried to separate accounts. *In re Hawke's Trust*, xxiii. 70.

21. *Payment only on petition.* The court will not make an order for payment of money out of court, except upon petition, however small the sum may be. *The Blind School v. Goren*, ix. 101.

22. *Service of petition.* Lands had been settled on A for life, with remainders over. A railway company took part of the lands and the money was paid into court. An eligible property being found for the reinvestment of part of the money, the tenant for life petitioned for the payment of so much out of court for that purpose. *Held*, that the petition need not be served on the parties entitled in remainder, but the order could be made on the petition of the tenant for life alone. *Ex parte Staples*, ix. 186.

23. *Service of petition on committee of lunatic's estate.* Although the committee of a lunatic's estate has duly passed his accounts and paid the amount certified to be due into court, and had his security discharged under the new orders in lunacy, yet a petition for payment out of court of the lunatic's estate to his executors, must be served upon the committee. *In re Wylde*, xxiii. 103.

24. *Amendment of petition.* A petition, praying the payment out of court, under the Trustee Relief Act, of a small sum to the petitioners, in certain shares, to which they were held not entitled on the true construction of a will, was allowed to be amended by the addition of a prayer for a declaration of the rights of all parties, and payment accordingly; and, subject to such amendment, an order was made containing such a declaration, and for payment in conformity therewith. Costs of all parties out of the fund. *In re Walker's Trusts*, xvii. 61.

25. *Payment for expenses of inclosure.* Under an inclosure act, some lands were

allotted to a rector, who had a power of selling to pay the expenses. Under a railway act, compensation was made in respect of other lands of the rectory and paid into court. The court sanctioned the application of the money in court to the payment of the expenses of the inclosure. *Lockwood, ex parte*, vii. 280.

26. Lands having been taken for the purposes of a railway company, and the money paid into court, and other lands being approved of, to be purchased therewith, and to be settled to the like uses as the former lands, it was *held*, that only one application to the court would be necessary for carrying this purpose into effect; and that the draft conveyance, approved by the conveyancing counsel, being engrossed, with a blank for the date, and other particulars of the order, the court would make one order directing the blank to be filled up, and the contract to be completed. *In re Caddick's Estate*, xvii. 82.

27. *Restoration of funds taken out of court by mistake.* If the plaintiff takes out of court the money which has been paid in by the defendant, under the mistaken idea that he may still proceed to recover the remainder, the judge may relieve him and allow him to restore the money (and amend) on indemnifying the defendant. *Emery v. Webster*, xxiv. 415.

28. *Order to pay into court and produce documents.* In a claim the defendant was ordered to pay into court a sum of money admitted by him, upon affidavit, to be due, and also to produce a document admitted to be in his possession. *Jefferies v. Biggs*, vii. 152.

29. *Tenant for life of a fund in court transported and not heard from.* A tenant for life of a fund in court was transported in 1838, and had not since been heard of. Upon an application made in 1852 by the remainder-men for payment, the court would only direct payment of the dividends to them, and required an undertaking to replace the amount out of the capital, if the tenant for life should be still alive. *In re Mileham's Trust*, xxi. 550.

30. Several persons were entitled successively to life estates in real property limited in strict settlement: they became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon a bill filed on behalf of H. L., the then first tenant in tail in existence, who was an infant, the assignees were ordered to bring the money into court. H. L. attained twenty-one, and being still entitled to the first estate of inheritance, he presented a petition for payment to him of the fund and the accumulations; which were ordered to be transferred to him. *Lushington v. Boldero*, viii. 265.

31. Part of the principal in court, to which infants were entitled, was advanced towards enabling the infants to emigrate with their guardian. *In re Clarke*, xvii. 599.

32. An order may be made for payment of money into court, although some of the persons interested in the money are not before the court. *Wilton v. Hill*, xxi. 602.

33. *Trustees' Relief Act—Adverse claims to money paid into court.* Money was paid into court by the trustees of a marriage settlement, under 10 & 11 Vict. c. 96. *Held*, that it could not be paid out upon the petition of a party claiming by a title adverse to the settlement; but that a bill must be filed to determine the rights of the claimants. *In re Fozard's Trust*, xxxi. 343.

34. *Payment upon production of probate copy of will.* The dividends of a small sum of stock, arising from the purchase-money of real estate taken by a railway company, were ordered to be paid to a party claiming under a will, upon production of the probate copy, with an affidavit that it had been examined and was correct. *In re Lowndes's Trust*, vi. 60.

35. *Payment out of court to tenant for life of purchase-money of leaseholds since determined.* Leaseholds for years determinable on lives were bequeathed in trust for one for life, and then over, with a direction to the trustees, to renew once, for the purpose of inserting a new life in the place of the testator, who was one of the *cestuis*

que vie. The testator died. The land was taken by a railway company, who paid into court a sum of money for the purchase of the leasehold interest. The trustees neglected to renew. The leaseholds expired. Upon petition, the money was ordered to be paid to the tenant for life, without prejudice to any question as to the renewal. *In re Beaufoy's Trust*, xv. 15.

36. *Money paid into court where the only question raised is as to the amount of the original debt*. Where, under rule of Trinity term, 1 Vict., the only question to be raised by the pleadings is the amount of the original debt, the defendant can oblige the plaintiff to accept in discharge whatever sum he pays into court or proceed for more at the risk of the costs of the suit; but when the original debt exceeds the sum the defendant chooses to pay as a balance, and he is thus obliged to plead an affirmative plea or pleas to reduce the debt to such balance, the plaintiff may accept it in discharge of the cause of action on which it is paid and receive all costs thereon. *Rumbelow v. Whalley*, iv. 231.

37. Order made that certain sums which had been ordered to be paid into court, but had not been paid in, might, after they were paid in, be paid out to the party entitled to them. *Milne v. Gilbert*, iii. 185.

38. After a decree in a cause, a motion that the defendants might pay into court money which, by their answer, they admitted to be in their hands, was refused, with costs. *Wright v. Lukes*, i. 94.

39. A legacy of 10*l.* to an infant for mourning may be directed, by a decree on further directions, to be paid to the father, he undertaking to apply it for the benefit of the infant. *Ker v. Ruxton*, xi. 220.

40. *Payment to husband of ward of court*. Petition of husband and wife for the payment out of court to him of a small sum in court for the benefit of the wife, a ward of the court, who had married without its consent. Petition granted. *In re Cooke*, v. 230.

41. *Money advanced out of a settled fund in court to the husband*. *Phillips v. Phillips*, xxiii. 99.

42. *Settlement on wife*. Although the fund in court belonging to a married woman is less than 200*l.*, she is entitled to have the whole of it settled upon her, the husband being insolvent. *In re Cutler's Trust*, vi. 97.

43. As to payment out of court to defray the funeral expenses of a deceased lunatic, see *In re Townsend*, xiii. 157.

44. As to plea of payment into court, see PLEADING.

45. See also *Davenport v. Davenport*, xiii. 455; *Orton v. Bainbridge*, xxi. 444; *Gilbert v. Michael*, xxx. 515. See PARENT AND CHILD.

PEERAGE.

Irish earldom—English viscounty—Evidence. An Irish earldom was created, and a holder of that earldom was afterwards created a viscount of the United Kingdom; the patent granting the viscounty described the grantee by the name and title of the Irish earldom. On the death of one holder of these titles, his eldest son received a writ of summons to attend the House of Peers as an English viscount. He did so, and took his seat as a viscount. He subsequently petitioned to have his claim to vote for representative peers of Ireland allowed, and it was allowed. After his death, his son received a writ of summons as an English viscount, and took his seat in that character. He then petitioned to be admitted to vote for representative peers of Ireland in virtue of the Irish earldom. The petition came before the committee for privileges. The patents creating the Irish earldom and the English viscounty, the writ of summons to the previous viscount, and the entry on the journals showing that the preceding peer had taken his seat, and likewise the resolution of the committee for privileges admitting his claim to vote for representative peers, were all proved. *Held*, that this was not sufficient to establish the title of the present claimant; that the evidence must

be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it. Such evidence not being producible at the moment, the consideration of the claim was adjourned. *The Earl of Donoughmore's Claim*, xxii. 17.

PENALTY.

1. *Penalty imposed for benefit of Market Co., how recovered.* A company was authorized by a local act to borrow money, take lands, &c., and construct a market; stallages and tolls were granted to it; and any one selling any article liable to stallage, out of the market, was to forfeit and pay to the company any sum not exceeding 40s. *Held*, that the penalty was imposed solely for the protection and benefit of the market company, and that it could not be recovered except upon an information laid by the authority of the company. *Regina v. Hicks*, xxx. 228.

2. *Municipal corporation act—Clerk to borough justices.* The 102d section of the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, provides that it shall not be lawful for the clerk to the justices of a borough to act in the prosecution of any offender committed for trial, by the justices to whom he is clerk, "and any person being an alderman or councillor, or clerk of the peace of any borough, who shall act as clerk to such justices, or shall otherwise offend in the premises," shall forfeit 100*l.* *Held*, that the penalty of 100*l.* did not attach to a clerk to the borough justices, (not being an alderman, councillor, or clerk of the peace of the borough,) who acted in the prosecution of offenders committed for trial by the borough justices. *Coe v. Lawrance*, xvi. 252.

3. *Watermen's act.* The 37th section of the Watermen's Act, 7 & 8 Geo. IV. c. 75, imposes a penalty on any person, (other than a freeman of the Watermen's Company, or an apprentice to a freeman or widow of a freeman,) who shall work or navigate, "any wherry, lighter, or other craft," from or to any place or places, or ship, or vessel, within the limits of the act. *Held*, that this does not extend to a person who works a steam-tug for the purpose of towing vessels on the river. *Reed v. Ingham*, xxvi. 164.

PERJURY.

1. *Oath administered by arbitrator appointed by county court.* An arbitrator, appointed by a county court, under the stat. 9 & 10 Vict. c. 95, has no authority to administer an oath, and consequently false swearing by a party sworn before him in the course of a reference is not perjury. *Regina v. Hallett*, iv. 570.

2. *By master extraordinary in chancery.* A master extraordinary in chancery has no authority to administer oaths in matters before the court of admiralty; therefore, a conviction for perjury in an affidavit used in the court of admiralty, but sworn before a master extraordinary in chancery, cannot be supported. *Regina v. Stone*, xxii. 593.

3. *Judicial proceeding—Malicious Trespass Act.* Prisoners were charged with perjury at an examination of one summoned for trespass, in consequence of an information not under oath. *Held*, that the examination was a judicial proceeding; that the justice had jurisdiction, though the information was not under oath, by the 24th sect. of the Malicious Trespass Act; that section 30 is additional to and does not control sect. 24; and that an oath is required only in proceedings under the former. Conviction affirmed. *Regina v. Millard*, xx. 595.

4. *False swearing by attorney to induce court to receive a document.* The attorney of the plaintiff, on trial of an ejectment, swore falsely, to induce the judge to receive a document, irrelevant to the title, but relevant to prove the time of the death of the plaintiff's lessor. The judge thereon offered to receive it in evidence, but the counsel withdrew it, and the date was otherwise proved. In fact, the evidence, if true, would not have rendered the document legally admissible. *Held*, nevertheless, that

the attorney had sworn falsely in a judicial proceeding upon a material point, and was guilty of perjury. *Regina v. Philpotts*, viii. 580.

5. *Evidence.* Two witnesses are not essentially necessary to contradict the oath on which the perjury is assigned, but there must be something more than the oath of one, to show that one party is more to be believed than the other. *Regina v. Boulter*, ix. 537.

6. *Of the indictment—Descriptio personæ.* In an indictment for perjury it was alleged to be a material question whether or not the prisoner ever got "one Milo Williams" to write "a letter" for her; and in the averments, negating the truth of what was sworn, the indictment alleged, that, "in truth and in fact, the said M. A. B. did get the said Milo Williams to write a letter for her," and that when on her cross-examination at the trial, upon which the alleged perjury was committed, she was asked whether she had ever got "a Mr. Milo Williams (who was then pointed out to her in court) to write a letter for her, &c." it was held, that the averments in the indictment were sufficient without any allegation connecting the "one Milo Williams" named in the allegations of materiality and the averments negating the truth of what was sworn, with "Mr. Milo Williams" subsequently named. *Regina v. Dennett*, iv. 560.

7. *County court.* As to the sufficiency of an indictment for perjury alleged to have been committed in the county court, see *Lavey v. Regina*, vii. 401.

PERSONAL PROPERTY.

When to be deemed real estate and e converso, see EQUITABLE CONVERSION OF PROPERTY.

PHARMACEUTICAL SOCIETY.

Who entitled to membership. Under the 15 & 16 Vict. c. 56, persons who were in business on their own account as chemists and druggists, either before the 18th of February, 1843, or the 30th of June, 1852, and have obtained a certificate of this fact, and of being qualified for admission as members of the pharmaceutical society, which certificate has been approved by the council of the society, are entitled to have their names placed upon the register of pharmaceutical chemists directed to be kept by that act, although they have never been examined under that act. *Regina v. The Registrar of the Pharmaceutical Society*, xxx. 212.

PIRACY.

1. The words "pirates or persons engaged in acts of piracy" in one statute, and the words persons "alleged to be pirates, afloat or ashore," in a statute repealing the former one, were held to be synonymous. Insurgent subjects of an independent country committing "acts of piracy," are pirates within 13 & 14 Vict. c. 26, s. 2. *The Magellan pirates*, xxv. 595.

2. *Evidence upon which courts of admiralty proceed.* The evidence upon which courts of admiralty are to proceed, under the 13 & 14 Vict. c. 26, s. 2, is different from and of a more strictly legal character than that required under the repealed act, 6 Geo. IV. c. 49, s. 1. *The Virago*, xx. 644.

PLEADING.

I. AS TO THE DECLARATION.

II. OF THE PLEA IN GENERAL.

III. AUTREFOIS ACQUIT AND PUIS DARREIN CONTINUANCE.

IV. TRAVERSE.

- V. PLEA OF PAYMENT INTO COURT.
- VI. EQUITABLE PLEAS UNDER COMMON-LAW PROCEDURE ACT, 1854.
- VII. OF ARBITRATION AND AWARD.
- VIII. PARTICULARS OF DEMAND.
- IX. REPLICATION.
- X. IN ADMIRALTY AND ECCLESIASTICAL COURTS.
- XI. OF AMENDMENT; SUBSTITUTION; VARIANCE.
- XII. PRACTICE.
- XIII. GENERAL PRINCIPLES.
- XIV. MISCELLANEOUS CASES.
- XV. PLEADINGS IN EQUITY.

I. *As to the Declaration.*

1. *When to declare specially and when generally.* A special contract was entered into by B. to do the whole of certain work for G., for a stated sum. Before the completion of the work B. died, and an arrangement was then come to between G. and C., under which C., on his own account, completed the portion of the work left unfinished at B.'s death. C., who afterwards became administrator of the effects of B., sued G. on the common indebitatus counts for the proportion of the work done by B., alleging that G. was indebted to B. in his lifetime, and was liable to pay B. on request. *Held*, that although the special contract was to be considered as rescinded by the arrangement between C. and G., still, that the above form of declaration was not supported. *Crosthwaite v. Gardner*, xii. 474.

2. *Initials.* Declaration on *sci. fa.*, upon a recognizance to keep the peace, described the justices before whom the recognizance was taken as "Lee B. Townshend, Esq., and I. H. Harper, Esq." On demurrer, it was *held*, no objection; and by Lord Campbell, C. J., that "B." and "I. H." might be the Christian names, and not merely initial letters of them. *Regina v. Dale*, v. 360.

3. *Aider by pleading over—Count for freight.* A declaration alleged that the plaintiff sued the defendant "for freight for the conveyance by the plaintiff for the defendant, at his request, of goods in ships, &c.:" without saying for money due and payable for freight." *Held*, sufficient after pleading over, although it would have been bad on demurrer. *Wilkinson v. Sharland*, xxviii. 592.

4. *Action for non-delivery of goods—Averment of willingness to pay.* In a declaration for the non-delivery of goods purchased, an averment of performance by the plaintiff of all conditions precedent, and that all things have been done and happened to entitle the plaintiff to have the goods delivered, is sufficient, without an averment of his readiness and willingness to pay. *Bentley v. Dawes*, xxv. 540.

5. *Action for breach of charter-party—Exceptions in charter-party need not be negatived.* In an action by the freighters against the ship-owner for breach of a charter-party, the declaration stated that it was agreed the vessel should sail to S., there load coals and proceed to L., and deliver the cargo, a certain amount being payable per ton (the act of God, the queen's enemies, &c., excepted.) That the contract should be in force for six voyages, and that they should not be made later than the last day of February, 1853. The plaintiffs averred performance of all things necessary on their part, but that the defendant did not permit the vessel to make the fourth voyage. Plea, that the last day of February expired before the breach. *Held*, on demurrer, first, that the plea was bad; secondly, that the declaration was good, it not being necessary for the plaintiffs to negative the fact of the defendant being within any of the exceptions in the charter-party, it being the duty of the defendant, if he relied upon such exception, to plead it. *Wheeler v. Davidge*, xxv.

6. A declaration setting forth a charter-party, wherein the defendant was described as the owner of the vessel, and the plaintiff as the freighter for six voyages, with allegations of the loading and delivering of two cargoes according to charter, and with breach assigned, for that the defendant had refused to make the residue of the six voyages, &c., &c., was *held* bad on demurrer, on the ground that there was no contract set forth on which the breach was assigned. *Richards v. Beavis*, xxviii. 157.

7. *Action in case against sheriff—Charge of breach of duty.* Declaration in case against the sheriff alleged, that although defendant could have levied, of goods of the execution debtor within his bailiwick, the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods the moneys, or any part thereof; and that defendant, further disregarding his duty, falsely returned, &c. *Held*, that the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage. *Mullett v. Challis*, ii. 260.

8. *Account stated—Common-law Procedure Act.* A declaration stating that the plaintiff sues the defendant for money found to be due from the defendant to the plaintiff upon accounts stated between them, is a sufficient compliance with the form given in the schedule to the Common-law Procedure Act. *Fagg v. Mudd*, xxv. 224.

9. *Equivocal allegation construed to support action after verdict.* A declaration containing allegations which may be understood in two senses, in one of which it will sustain the action, while in the other it will not, must after verdict be construed in the sense which will sustain the action. *Emmens v. Elderton*, xxvi. 1.

10. *Reasonable time—Transfer of shares.* A declaration alleged that N., who appeared by "the register of shareholders," to be the holder of 300 shares, transferred them to the plaintiff, and that the plaintiff delivered the deed of transfer to the defendants for the purpose of entering a memorial of it in "the register of transfers," and required the defendants to make such entry. Breach, that the defendants did not make such entry, whereby the plaintiff was deprived of his right to appear in the books of the company as a shareholder, and by reason of N. still appearing to be the holder of the said shares, and failing to pay calls made on him after the delivery of the transfer to the defendants, the defendants forfeited the said shares, and confirmed the forfeiture, and sold the shares. The second count alleged that the plaintiff was the lawful holder of and entitled to 300 shares, and that the defendants wrongfully, and in pretended exercise of the powers of the Companies Clauses Consolidation Act, declared the said shares forfeited, and confirmed the said forfeiture and sold the said shares, alleging special damage. *Held*, that the declaration showed a good cause of action, and that it was not necessary to the first count to allege that a reasonable time had elapsed before the commencement of the suit. *Catchpole v. The Ambergate, &c. Railway Co.* xvi. 163.

11. *In case by actor against master of theatre—Allegation of duty.* In a declaration in case by an actor against the master of the theatre, alleging that it was the master's duty to keep properly covered and guarded a certain hole in the stage of great depth, that no actor might suffer injury thereby, and to keep the floor well lighted to the same end, and that the hole was not kept properly guarded, &c., whereby the plaintiff suffered grievous injury, it was *held*, first, that the facts stated did not raise the duty the breach of which was alleged; secondly, that the express allegation of duty was immaterial, and could not help; and, therefore, that the declaration was bad in arrest of judgment. *Seymour v. Maddox*, v. 265.

12. *Trespass—Description of locus in quo.* In trespass to land, the *locus in quo* ought to be designated by abutments, or other description, as it stood at the time of the trespass, and not at the time of the declaration. *Humfrey v. The London and North-western Railway Co.* xx. 384; s. c. xii. 554.

13. *Description of locus in quo.* A declaration in trespass *quare clausum fregit* stated, that the defendant broke and entered "certain lands of the plaintiff covered with water, being the bed and channel of the river T., and under the same, in the several parishes of L. and L., in the county of G." *Held*, on special demurrer, that the declaration sufficiently described the *locus in quo* by name. *The Duke of Beaufort v. Vivian*, xii. 564.

14. *Burgess list—Action for penalty against churchwarden.* In an action for a penalty against a churchwarden for neglecting to sign the burgess list, though the declaration contained no averment that there were any persons in the parish entitled to be put on the burgess list, the court, after verdict for the plaintiff, held the declaration good. *Clarke v. Gant*, xvi. 518.

15. *Allegation of consideration—Phrase "agreed with plaintiffs," &c.* A count in a declaration reciting the defendants' promises to do certain things, and containing no recitals of any agreement or promise on the part of the plaintiffs, excepting so far as this was to be inferred from the use of the words "the defendants agreed with the plaintiffs," was held bad, on general demurrer, as not stating any consideration for the defendants' agreement. *Payne v. The New South Wales Coal, &c. Co.* xxviii. 579.

16. In *assumpsit*, the declaration stated that Sir J. C. agreed with the plaintiff as follows: The said Sir J. C. agrees to let, and the said J. F. agrees to take all that messuage, &c., for two years. Then followed an agreement by the plaintiff to pay the rent and taxes, and to farm in a husband-like manner; and in consideration thereof Sir J. C. agreed to grant the plaintiff a lease at the end of the two years, at a rent to be then fixed according to a valuation, the agreement concluding thus: "To which both parties agree. Witness their hands. Sir J. C." The breach was, the non-appointment of a valuer by Sir J. C. *Held*, that the declaration was bad on general demurrer, on the ground of its not alleging that there was any agreement on the part of the plaintiff, or any consideration for the agreement on the part of Sir J. C. *Fremlin v. Hamilton*, xviii. 539.

17. *Sheriff—Extortion—Misrecital of statute—Allegation of no levy.* In a declaration against the sheriff for treble damages for extortion, the statute was recited, under a *videlicet*, as of the twenty-ninth year of Elizabeth, instead of the twenty-eighth. The declaration stated that a *fi. fa.* was delivered to the sheriff, indorsed to levy debt and costs, and that the sheriff wrongfully took 8*l.* more for the execution than he was entitled to, although he did not levy any sum of money by virtue of the execution. *Held*, that the declaration was good; that the misrecital of the statute was immaterial, and that it was not necessary to negative the acts by which a levy might have been made. *Holmes v. Sparks*, xi. 542.

18. *Allegation of performance—Pleading over.* If, in a declaration by the vendor against the purchaser of an estate for non-payment of the purchase-money, there is an allegation of performance on the part of the plaintiff, and the defendant pleads over, the declaration is sufficient, though it may have been bad on special demurrer. *Manby v. Cremonini*, xi. 573.

19. *Action for breach of covenant not to carry on business.* In a declaration for breach of a covenant, wherein the defendant had agreed not to carry on a certain business in any place where the plaintiff should be engaged in the same business, no allegation that the defendant had notice that the plaintiff was thus engaged is necessary. *Tallis v. Tallis*, xi. 455.

20. *Action against tenant—Breach of covenant.* Declaration in *assumpsit*, upon an agreement between landlord and tenant, containing, among others, a stipulation that defendant should not sell hay or straw grown on the farm during the tenancy, without the written license of plaintiff, alleged a breach of that stipulation. *Held*, by Lord Campbell, C. J., and Patteson, J., not necessary to allege that the breach occurred during the continuance of the tenancy. Erle, J., dissenting. *Massey v. Goodall*, vi. 326.

21. *Count for interest—Forbearance.* A count for interest upon and for the forbearance of sums laid out for the defendant, and at his request, and forborne at the defendant's request, is good, though it does not state that the money was paid to the defendant's use, or forborne to the defendant. *Smith v. Hartley*, v. 383.

22. *Railway—Action for calls—Allegation that defendant is the holder of shares.* In an action by a railway company for calls, a declaration framed on sect. 26 of the stat. 8 & 9 Vict. c. 16, alleged that the defendant "is the holder of ten shares, and is indebted to the company in 100*l.*, in respect of a call of 10*l.* upon each of the said shares." *Held*, good, on special demurrer, although it was objected that the declaration did not allege that the defendant was the holder of such shares at the time the calls were made. *Wilson v. The Birkenhead, Lancashire, &c. Railway Co.* v. 524.

23. *Agreement.* The plaintiff agreed that he would serve the defendant as a manufacturer and assistant for the term of seven years, at a salary of 100*l.* per annum, &c.; the defendant agreed if he should, from any cause, give up his business, or not require the plaintiff's services, then, that he would use his best endeavors to procure for the plaintiff employment in some similar business, and for which he would receive a salary of not less than 100*l.* per annum, or, in case he should be unable to do so, the defendant would pay the yearly salary of 100*l.* during the residue of the term of seven years. Averment of performance on the part of the plaintiff. Breach, that the defendant did not continue the plaintiff in his employ until the expiration of the seven years, but refused to do so, and wrongfully discharged the plaintiff therefrom, without reasonable or probable cause. And, further, that although the defendant had not continued the plaintiff in his employ, but had discharged him as aforesaid, yet the defendant did not use his best or any endeavors to procure, nor did he procure the plaintiff employment in some similar business, for which he should receive a salary of 100*l.* a year, but had wholly failed to find the plaintiff such employment. Plea, that at the time when the plaintiff was discharged, the defendant was, and thence hitherto had been wholly unable to procure for the plaintiff any such employment as in the agreement mentioned. *Held*, upon demurrer, that the agreement did not leave it open to the defendant merely to pay the plaintiff after his discharge 100*l.* a year without first using any endeavors to obtain a situation for the plaintiff. *Held*, also, that it was not necessary to aver a request by the plaintiff that the defendant would use his best endeavors. That the allegation of performance was sufficient, without any averment of readiness and willingness. And that the mode in which the breach was alleged rendered it unnecessary to aver that a reasonable time had elapsed. *Rust v. Nottidge*, xvi. 170.

24. *Insurance.* In an action against an insurance company for the amount of the insurance, it is not necessary to aver in the declaration that the capital stock and funds were sufficient according to the deed of settlement of said company. *The Sunderland Marine Insurance Co. v. Kearney*, vi. 312.

25. *Videlicet, effect of—Variance.* The declaration stated a promise to hire horses from the plaintiff, and employ them for a certain space of time, to wit, for the space of one year, and to pay for the use thereof certain hire and reward, to wit, 50*l.* a year for each of the horses, payable quarterly. *Held*, that the allegations after the *videlicets* were immaterial; that although the hiring was for a week, and from week to week, at the hire of 50*l.* a year for each horse payable weekly, there was no fatal variance; that the words "hire and reward" include time as well as amount, and therefore the words "payable quarterly" were covered by the *videlicet*. *Harris v. Phillips*, iv. 344.

26. *Allegation of time.* When a contract is alleged in pleading to have been for a "certain" time or amount, it is sufficient to prove that some specific time or amount was agreed upon, and it is not necessary to prove the precise time or amount laid under a *videlicet*. *Ib.*

27. *Particularity—Sheriff—Treble damages.* A declaration against the sheriff for treble damages, under 29 Eliz. c. 4, stated that five writs of *fi. fa.* against the plaintiff

were delivered to the sheriff, setting out the amount of the indorsements, and it was then averred that the sheriff afterwards, under the said several writs respectively, seized the plaintiff's goods to the value of the said writs. It then alleged that the sheriff took for executing the said writs a large sum, to wit, 52*l.* 12*s.* 3*d.*, the same being more than he was entitled to by 35*l.* 18*s.* 6*d.*, contrary to the form of the statute, whereby an action accrued to the plaintiff for 107*l.* 15*s.* 6*d.*, treble the amount of the damages. To this there was a special demurrer, for not setting out with particularity the amounts taken, and in respect of what fees the excess arose, and that it was not averred that the extortion took place within one year before the commencement of the suit. *Semble*, that the declaration did not sufficiently show whether there was one or more seizures, but that this objection was not sufficiently taken by the demurrer, and that in other respects the declaration was good. *Berton v. Lawrence*, i. 453.

28. *Letters-patent—Declaration—Substantial traversable allegation.* The declaration alleged that the plaintiff, the first inventor, had applied for letters-patent, and that the solicitor-general had permitted the title of the invention to be amended, &c. That the defendant maliciously opposed the granting of the patent, &c., whereby the solicitor-general refused to allow the plaintiff's application for letters-patent, &c. *Held*, that the declaration was bad; that the allegation of the refusal, in the statement of special damage, could not be called in aid to supply a substantial traversable allegation of the refusal; and that the special damage alleged did not appear to be the necessary or natural result of the facts stated in the declaration. *Haddon v. Lott*, xxix. 215.

29. *Patent—License to manufacture pipes—Covenant.* The declaration stated that by deed A, the patentee of machinery for making pipes, granted B and his assigns the exclusive license to manufacture iron pipes, yielding a royalty of so much for every ton of pipes made or sold by B or his assigns, "to be paid" within twenty-one days of the end of each quarter, B covenanting for himself and assigns to an account in writing, within seven days of the end of each quarter, of the amount manufactured, and to pay within twenty-one days the sum which should appear due on the face of the account; that B transferred his interest in the license to the plaintiff, who transferred it to the defendants, who covenanted with the plaintiff to perform the covenants made by B to A in the first deed; that the defendants made quantities of iron tubes in pursuance of the license, whereby royalties became due to the plaintiff. Breaches, that the defendants did not pay the royalties, and did not render an account. *Held*, that the declaration need not directly aver that any iron pipes were made by B, or his assigns; and that the covenant to render an account, was only auxiliary to, and did not control, the preceding covenant to be implied from the words "to be paid." *Bower v. Hodges*, xxii. 521.

30. *Declaration by husband and wife—Account stated.* Declaration by husband and wife, "for money found to be due from the defendant to the plaintiffs since their intermarriage, on accounts stated between them since the intermarriage of the plaintiffs." *Held*, upon demurrer, that the count on the account stated was bad for not averring that the account was stated in respect of money due in right of the wife, or otherwise showing her interest in the money. *Johnson v. Lucas*, xvi. 290.

31. *Collision.* For a case as to the declaration in an action for damages caused by a collision, brought under the stat. 14 & 15 Vict. c. 79, see *The General Steam Navigation Co. v. Morrison*, xx. 267.

32. *Declaration for negligently working mines without leaving proper support to walls of adjacent building.* *Jeffries v. Williams*, i. 433.

33. *Inducement—Negligent driving of servant.* In an action against a master for a personal injury caused by the negligent driving of his servant, the declaration alleged, by way of inducement, "that the defendant was possessed of a cart and horse which was being driven by his servant" without stating "at the time of the grievance" complained of. *Held*, an immaterial allegation, and not traversable. *Mitchell v. Craswell*, xvi. 448.

II. Of the Plea in general.

1. *Plea in bar.* Whether an abated suit can be pleaded in bar to another suit by the personal representatives of the plaintiff in the first suit, *quære. Long v. Storie*, x. 182.

2. If in an action for libel a material part of a plea of justification fails, the plea fails altogether. *Biddulph v. Chamberlayne*, vi. 347.

3. *Outlawry.* A plea of outlawry is bad unless it appears that a judgment of outlawry has been pronounced. *Winthrop v. Elderton*, vii. 294.

4. *Action on promissory note*—Plea that it was given as collateral security for a third person. It is a good plea to an action by the payee against the maker of a promissory note, that the defendant made the note at the request of the plaintiff, as a collateral security for a debt due from a third person to the plaintiff, and that the defendant was not liable to pay the debt, or to give the note as security, and that there was no other consideration. *Crofts v. Beale*, v. 408.

5. *Plea in avoidance of circuity of action.* A plea in avoidance of circuity of action must show that the sum which the defendant is entitled to recover from the plaintiff is in law the same as that for which the plaintiff sues. It is not enough to show that a jury would probably give the defendant the same sum as damages. *Charles v. Alton*, xxvi. 319.

6. A plea that the cause of action accrued in the furthering of a company without any legal authority, is bad without special averments showing illegality. *Hunt v. Hunter*, xxix. 195.

7. *Plea amounting to general issue*—*Statute of frauds.* A plea that the promise sued upon was a promise to answer for the debt of another person, and that there was no agreement or memorandum or note thereof in writing and signed by the defendant, is bad, as amounting to the general issue. *Reed v. Lamb*, iii. 570.

8. *In assumpsit.* In an action on the *indebitatus* counts, the defendant pleaded that the debt was due for certain hops bargained and sold; that the plaintiff produced a sample at the bargain and sale, and promised to deliver the hops equal in quality and description to the sample, and that the hops were not equal in quality and description; wherefore the defendant refused to accept them, and broke his promise. On special demurrer, the plea was held bad, as amounting to the general issue. *Dawson v. Collis*, iv. 338.

9. *In trover*—*Effect of plea of not guilty.* The plea of not guilty in trover puts in issue not merely the conversion in fact, but the wrongful conversion. To trover for furniture by the assignees of a bankrupt, the defendant justified the seizure under a judgment and execution against the goods of the bankrupt before his bankruptcy. Held, on demurrer, that the plea was bad, as amounting to not guilty. *Young v. Cooper*, iii. 540.

10. In *trover*, the plea of not guilty admits the property of the plaintiff. Therefore, evidence that the chattels had been given to the plaintiff by the defendants upon a certain condition, which had not been performed, and that the defendants retook them, is not admissible under that plea. *Jones v. Davies*, vi. 566.

11. *Duplicity in pleas.* To a declaration on a promissory note, the defendant pleaded that the said note was given to the plaintiff to induce him to abandon a certain threat; and also that it was given for and on account of a certain debt due the plaintiff, from which debt the defendant was discharged by effect of a certain statute. Held, on demurrer, that the plea was bad for duplicity. *Heseltine v. Sieley*, xii. 421.

12. *Ambiguity in plea*—*Escape.* By a deed, after reciting the appointment of W. T. as bailiff to the plaintiffs, the sheriff of Middlesex, the defendants, W. T. and his sureties, covenanted to save harmless the plaintiffs from any action brought against them touching or concerning any matter "wherein the said bailiff shall act, or assume to act as bailiff," or "for, or by reason of, any extortion or escape happening by the

act or default of the said bailiff." The declaration, after stating an escape, averred that it happened "by the default of the defendant, W. T., and not otherwise, he, the defendant W. T., then being the bailiff of the plaintiffs as such sheriff." The defendants cravedoyer, and after setting out the deed, pleaded that the default "was not the default of him, the said W. T., as such bailiff of the plaintiffs. *Held*, that the plea was bad for ambiguity; but, *semble*, that the declaration would have been bad on special demurrer, for not showing how the escape was the default of W. T. *Cubitt v. Thompson*, i. 456.

13. *Generality in plea—Gaming.* To a declaration for differences on the sale of railway shares, the defendant pleaded generally that the contract was by gaming, (under 8 & 9 Vict. c. 109, s. 18.) On demurrer, the pleas were held bad for vicious generality. *Grizewood v. Blane*, viii. 415.

14. *Argumentative plea—In debt.* A plea to a declaration in debt, after setting out a deed, which it alleged to be a deed of arrangement under 12 & 13 Vict. c. 106, between the defendant and his creditors, stated, that the creditors by whom and on whose behalf the same was sealed, were "more than six sevenths, to wit, nine tenths" in number and value of the creditors of the defendant, &c. *Held*, (on special demurrer for argumentativeness, and for attempting to raise an immaterial issue, &c.,) that the plea sufficiently stated the deed to have been signed "by or on behalf of six sevenths of the creditors" within the meaning of sect. 225. *Stewart v. Collins*, ii. 322.

15. *In action against common carriers.* The declaration stated that the defendants received from the plaintiff, as common carriers, a certain package, to be safely carried and delivered for him at a place mentioned, and did not safely carry the package, but that through their negligence it was lost; the defendants pleaded that, at the time they received the package, they gave the plaintiff notice that they would not be responsible for packages of a particular description, under which this particular package fell, unless their contents were declared; and that the contents of this package were not declared; and that the defendants did not consent to be responsible contrary to the terms of such notice. Verification. *Held*, that the plea amounted to an argumentative denial of the bailment as alleged in the declaration, and was therefore bad. *Crouch v. The London and Northwestern Railway Co.* xiv. 498.

16. *Issuable plea—Action on attorney's bill.* To an action on an attorney's bill, the defendant pleaded that, after the accruing of the causes of action, he obtained his final order for protection as an insolvent debtor, and that the debts in question were omitted from his schedule by and with the full knowledge and consent, and by and through the contrivance and procurement, of the plaintiff. *Held*, an issuable plea. *Wilkin v. Manning*, xxv. 512.

17. To a count on a bill of exchange, accepted by the defendant, and indorsed to the plaintiffs, the defendant, being under terms of pleading issuably, pleaded that he accepted and delivered the bill in part payment of the purchase-money of a ship, which he was induced to buy of the plaintiffs by their false and fraudulent representations as to her value, which they then knew to be false, &c. *Held*, that the plea was not issuable, and that the plaintiffs were entitled to sign judgment, but that the defendant might amend. *Sully v. Frean*, xxix. 404.

18. *Action on bill of exchange.* In an action on a bill of exchange by the indorsee against the acceptor, a plea, stating that there were certain unsettled accounts betwixt the drawer and the defendant, the acceptor, and that it had been agreed betwixt the defendant and the drawer before the bill became due, that such accounts should be investigated, and in case the balance should be found to be in defendant's favor, that defendant should not be liable on the bill, and then averring that such investigation was had and balance found to be in defendant's favor, and that the bill was indorsed to the plaintiff after it was due, was held to be an issuable plea. *Dunmore v. Tarleton*, xvi. 391.

19. *Trespass—Justification under fi. fa.—Admission of warrant in pleadings.* In trespass for breaking and entering the plaintiff's house and taking his goods, defendant pleaded a justification under a *fi. fa.* and warrant of execution against the goods of one G. H., which warrant was delivered to the defendant, a bailiff, to be executed, and that, under the authority of the same, the defendant entered, &c. The plaintiff replied *de injuria*, admitting the writ, the making of the warrant, and the delivery thereof to the bailiff. *Held*, that the existence of a warrant was admitted by the replication, and that the defendant was not bound to prove it. *Hewitt v. Macquire*, vii. 571.

20. *Trespass for pulling down wall—Paved public place—Special injury to defendant.* To a declaration in trespass, the defendant pleaded that the close in question was a paved public place, within the meaning of the Metropolitan Paving Act, (57 Geo. III. c. 29,) and that the plaintiff had unlawfully, and contrary to the provisions of the said act, erected thereon the said wall; and because the said wall, at the said time when, &c., remained incumbering the said public pavement, and because the plaintiff, upon the request of the defendant, refused to remove the same, the defendant entered upon the said close and pulled down the said wall. *Held*, (after verdict for the defendant,) that the plea was bad, as it did not show any necessity for the defendant's using the portion of the pavement obstructed by the wall, or that it interfered with the exercise of his right of passage. *Bateman v. Bluck*, xiv. 69.

21. *Quare clausum.* The defendant to an action of trespass *quare clausum fregit*, may still plead together the pleas of not possessed and *liberum tenementum*. *Sloccombe v. Lyal*, ii. 376.

22. *Plea of right of way to declaration quare clausum fregit.* The plea to a declaration in trespass *quare clausum fregit* alleged a right of way thus derived; that A up to the time of his death was seised of a certain close, &c.; that he had no other way to said close except over the close on which the trespass was alleged to have taken place; that on his death the former close escheated to the lords of C and D; the defendant justified as the servant of D. *Held*, a bad plea, inasmuch as there was no allegation that D had no other right of way than that in question. *Proctor v. Hodgson*, xxix. 453.

23. *Plea of right of way—Description of closes through which it passes.* In answer to a declaration in trespass *quare clausum fregit* in pleading a right of way, it is not necessary to describe with great particularity the closes as to which the right of way is claimed, and it is enough to give the names of the two at the *termini* and to describe the others as adjoining, if they are so. *Holt v. Daw*, v. 307.

24. *Trespass for an assault and battery—Plea of justification—Material averment—Matter of description—Distinct trespasses.* Trespass, for that the defendant "assaulted the plaintiff, and beat and ill treated him, and then knocked down and prostrated him on the deck of a certain vessel." Plea, "as to the assaulting, beating, and ill treating" the plaintiff, a justification by the defendant as captain of a vessel on board of which the plaintiff and others were passengers, and alleging that the plaintiff made an affray on board the said vessel, and was then fighting with another person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," and was striving to beat the said person; wherefore the defendant, as such captain, to preserve peace, and prevent the beating of such person, gently laid his hands upon the plaintiff, which was the trespass complained of. *Held*, first, that the plea would have been good, without the statement that the person with whom the plaintiff was fighting was a passenger on board the vessel, whose name was unknown to the defendant. Secondly, that such statement did not necessarily contain matter of description, and, consequently, that a failure of proof of that part of the plea was not material. Thirdly, that the knocking down and prostrating of the plaintiff was alleged as a distinct trespass, and was not covered by the justification in the plea. *Noden v. Johnson*, ii. 201.

25. A party who insists upon remaining on the land of another against his will, and therefore *primâ facie* against right, ought to show, in a plea of justification in an action of trespass, all the circumstances which make such possession lawful, and abridge the general rights of property. *Hayling v. Okey*, xviii. 532.

26. *Imprisonment by commander of ship—Suspicion of larceny—Plea must state grounds of suspicion.* To an action of trespass against the commander of a ship of war on the high seas for imprisoning the plaintiff and putting him in irons, a plea alleging sufficient grounds of suspicion that the plaintiff had committed larceny is a sufficient answer. These grounds of suspicion must be specifically stated. *Broughton v. Jackson*, xi. 386.

27. *Breaking close to seize goods for rent—Stat. 11 Geo. II. c. 19, s. 1.* Trespass, for breaking and entering a close of the plaintiff, and carrying away divers goods and chattels of the plaintiff: the defendant pleaded, under the 11 Geo. II. c. 19, s. 1, that at the time when the trespasses were committed, one O. was tenant to the defendant, and that half a year's rent was then due, and that, within thirty days before the said time, O. fraudulently and clandestinely conveyed from the premises the goods and chattels in the declaration mentioned, being the proper goods and chattels of the said O., in order to prevent the defendant from distraining them; and that the defendant, whilst the rent remained due, and within thirty days after the said goods and chattels had so been conveyed and locked up, entered the said close, in order to seize, and did seize them as a distress for the said arrears of rent; and that, because the defendant could not, without breaking open and entering the said close seize the said goods, the defendant was obliged and did in order to seize the said goods, first calling to his assistance the constable of the place where the said close and goods were, according to the form of the statute, and with his aid and assistance, in the daytime, break open and enter the said close, in order to seize the said goods and chattels for the said arrears of rent, according to the statute, and that the defendant in so doing did no unnecessary damage, &c. *Held*, a good *primâ facie* defence. *Williams v. Roberts*, xiv. 482.

28. *Justification—New assignment, plea to—Surplusage.* Trespass for an assault. The defendants justified in defence of the possession of the dwelling-house of one W. New assignment, that the trespass was committed out of the dwelling-house, and upon a certain bridge and for another and different purpose. Plea to the new assignment, that the trespasses newly assigned were committed in defence of the said possession, by removing the plaintiff, and that the defendants "did then take the plaintiff by the nearest and most direct way to a certain public highway near to the said dwelling-house, &c., as they lawfully might for the cause aforesaid." Upon demurrer, it was *held* that the plea was good, as it intended to confess trespasses committed on the bridge, and to justify them as committed in defence of the possession; that with these the removal to the highway had no necessary connection, and might be treated as surplusage. *Hayling v. Okey*, xviii. 532.

29. *Plea of user, how supported.* A plea of user for any number of years is supported only by proof of user coming down to the year in which the action was brought. *Quære*, whether such a plea is good which alleges the user of right to have been for twenty or forty years, as the case may be, preceding the commencement of the suit, without saying "next" preceding. *Lowe v. Carpenter*, vi. 450.

30. *Divisibility of issue—User.* A plea alleging twenty years user of water for certain purposes, and among others to supply a certain cistern and the existence of no such cistern being proved, but other parts of the plea being sustained by evidence, it was *held*, that the issue was divisible, and that the defendant was entitled to a verdict except as to such cistern. *The Proprietors of Rochdale Canal v. Radcliffe*, xii. 409.

31. *Trespass—Thirty years' user of common—One year's interruption.* In an action of trespass the defendants pleaded their rights of common, acquired by a thirty years user, to a large space of land, including the *locus in quo*, but, as to the *locus in quo*, it

was proved that there had been a year's interruption of the right of common. *Held*, that there was no justification of the trespass. *Davies v. Williams*, v. 269.

32. *Prescription*. A plea claiming an immemorial right of common by prescription in the occupiers for the time being of a messuage, is bad in substance, and cannot be supported even after verdict. *Ib.*

33. Where a prescriptive right is relied on, the word "prescription" should be used in the pleadings. *Knapp v. The Parishioners of St. Mary*, v. 562.

34. *Contract to pay freight*. Declaration upon a contract to pay the highest freight which the plaintiff should be able to prove had been paid on the same voyage; (not less than 90s. per ton;) averment that all things had been done to entitle plaintiff to freight according to the charter-party; and also a special averment that the plaintiff was able to prove, as the fact was, that the highest freight paid was 7l. per ton, of all of which the defendant then had notice; breach, non-payment of the freight of 7l. per ton. The defendant pleaded, first, a traverse of the special averment; second, that the plaintiff did not prove the fact. *Held*, on demurrer, that the second plea was bad; that on the first plea the plaintiff must prove that the fact was as alleged, and that the defendant knew it; and that the defendant's knowledge was sufficient proof. *Gether v. Capper*, xxvi. 275.

III. *Autrefois Acquit and Puis Darrein Continuance*.

1. Prisoners were indicted for the murder of A, *inter alia*, by a series of assaults. They were acquitted of the felony, and upon the evidence they could not have been lawfully convicted of assault under stat. 7 Will. IV. and 1 Vict. c. 85, s. 11, since the only assaults proved were not, as was proved, "part of the very act or transaction prosecuted as a felony." The prisoners, having been subsequently indicted for those assaults, pleaded *autrefois acquit*, and the judge having directed the jury upon the trial of this plea, to the effect that if they were satisfied there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown, it was *held*, by eight judges, that such direction was not strictly right, inasmuch as the issue raised by the plea was, whether the prisoners had been before tried for the same offence; and held by six of these judges that the conviction was bad by reason of the misdirection; but it was held that the misdirection was not sufficient to invalidate the verdict by two of these judges; by whom, together with six others, the conviction was affirmed. To sustain a plea of *autrefois acquit*, it is not sufficient merely to put in the record of the first indictment and acquittal. Some evidence must be given to show that the offences charged in the former and present indictment are the same. *Regina v. Bird*, ii. 439, 448.

2. There can be no plea of *autrefois acquit*, where there is no judgment in the former trial on the record. Per Jervis, C. J. *Regina v. Reid*, i. 595.

3. *In action on recognizance of bail—Puis darrein continuance*. In an action on a recognizance of bail, the defendant pleaded two pleas of *nul tiel* record and a plea of payment. The plaintiff having obtained judgment on the pleas of *nul tiel* record, the issue on the plea of payment came on for trial, when the defendant offered a plea *puis darrein continuance*. *Held*, that such a plea was receivable, notwithstanding the judgment against the defendant on the other issues. *Wagner v. Imbrie*, iii. 584.

4. *Alien enemy*. A plea (*puis darrein continuance*) that the plaintiff was an alien born in the empire of Russia, and an enemy of the queen, born of alien father and mother, and not a subject of the queen by naturalization, denization, or otherwise, and that he was residing in this kingdom without the license, safe-conduct, or permission of the queen, is good, although it does not in terms negative that the plaintiff had obtained a Secre-

tary of State's certificate under the 7 & 8 Vict. c. 66, s. 6, nor state that war exists between England and Russia. *Alcenius v. Nygren*, xxviii. 219.

IV. *Traverse.*

1. *Too large.* To a declaration on a covenant to repair, alleging that the defendant, during the term, to wit, on, &c., and thence hitherto, permitted the premises to be out of repair, the defendants pleaded that, during the said term, the defendant did not permit the said premises to be out of repair. *Held*, that the plea was too large a traverse, as it put the whole time in issue. *Aldis v. Mason*, vi. 391.

2. *Conclusion of traverse.* If pleas which are traverses of facts necessarily implied in the declaration conclude with a verification, instead of "to the country," they are bad. *Manby v. Cremonini*, xi. 573.

3. *Argumentative traverse.* In an action for the infringement of a patent, a plea which amounts to an argumentative traverse of the specification of the patent, and which pleads evidence, is bad. *Hancock v. Noyes*, xxiv. 510.

4. *False imprisonment—What traverse puts in issue* In trespass for false imprisonment, the defendant justified under an order made by the judge of the sheriff's court of London. The plea did not allege that the plaintiff had been summoned to show cause against the order of commitment being made, but it stated that the judge duly and according to the form of the statute made the order of commitment. The replication averred that the judge did not order the plaintiff to be committed to prison in the manner and form as alleged in the plea. *Held*, that this traverse only put in issue the fact of the order of commitment being made, and not its validity. *Buchanan v. Kinning*, vii. 455.

5. *Patent—Assignment—Disclaimer.* In an action by the assignee of a patent for its infringement, the declaration alleged that after the assignment, the grantee of the patent, pursuant to the statute 5 & 6 Will. IV. c. 83, entered with the clerk of the patents a disclaimer of part of the title of the invention. Plea,—that before the making of the disclaimer, the grantee assigned the patent to the plaintiff, and at the time of making the disclaimer was not a person who could lawfully enter such disclaimer; without this, that, pursuant to the statute, he entered the disclaimer, *modo et formâ*. *Held*, that, under this traverse, the only issue raised was whether in point of fact a disclaimer was entered by the grantee. *Wallington v. Dale*, xi. 567.

6. *Landlord and tenant—Traverse raising immaterial issue.* The plaintiff declared on an agreement by which he let to the defendant two rooms in a house, and the defendant promised, besides the rent, to pay the proportion of the rates to be assessed. The declaration averred that rates were assessed, that the plaintiff paid them, and that the proper and reasonable proportion to be paid by the defendant was a certain proportion, to wit, one third part, amounting, to wit, to 50*l.*, of which the defendant had notice and was requested to pay, &c. A plea to this declaration, denying the request to pay, was *held* bad on demurrer, as raising an immaterial issue. Also, a special traverse, stating that the proper and reasonable proportion was a certain proportion amounting to 12*l.* 10*s.* and no more; *absque hoc* that the proper and reasonable proportion was a certain proportion, to wit, 50*l.*, was *held* bad on demurrer, for attempting to put in issue the immaterial allegation, that 50*l.* was the precise amount of the reasonable proportion. *Hooper v. Woolmer*, i. 399.

7. *Detinue for deed—Materiality of traverse—Inducement to special traverse.* In detinue for a deed, by which property was assigned to C. and S., on trusts for securing an annuity to the plaintiff, the defendant pleaded that C. and S. took possession of, and had a right to the deed; that before the plaintiff had possession of the deed, S. obtained possession of it, and C. died; and that afterwards S. delivered the deed

to the defendant to keep, and that the defendant detained the deed from the plaintiff on behalf of S., and by his authority. The plaintiff replied, that, before the defendant was possessed of the deed, and after the death of C., one G., and not S., was possessed of the deed, and that G. delivered it to the defendant by the authority of the plaintiff, and that the defendant hath always held and still holds the same under such authority; without this, that S. delivered the deed to the defendant. *Held*, on special demurrer, that the replication was good, the traverse that S. delivered the deed to the defendant being a material traverse. *Foster v. Crabb*, xiv. 215.

8. *Held*, also, that the inducement to the special traverse was not bad for saying that the defendant "still holds" the deed by the plaintiff's authority. *Id.*

9. *Excuse for profert.* A traverse of excuse for *profert* may be pleaded with other pleas in bar. *Porch v. Cresswell*, xiv. 385.

10. *What a plea traverses.* *Mandamus* to the lord and steward of the manor of C., to admit E. H. P. to certain copyhold estates which were alleged in the writ to have descended to the said E. H. P., as the heiress at law of S. T., deceased, who was her maternal uncle and the person last seised. The return alleged that the said copyhold estates did not descend to the said E. H. P., as the heiress of S. T., and that the said E. H. P. was a stranger in blood to the said S. T., and not entitled to the said estates, whereof the said S. T. died so seised. Pleas, first, that the said estates did descend to the said E. H. P. as the heiress at law of the said S. T.; secondly, that the said E. H. P. was not a stranger in blood to the said S. T. as alleged; thirdly, that E. H. P. was, on the death of S. T., entitled to the said estates, whereof S. T. died so seised. *Held*, upon demurrer to the second plea, that it was to be considered as a distinct and single plea, and that it traversed an immaterial allegation in the return, and was therefore bad. And per ERLE, J., that one plea traversing the whole of the allegation in the return would have been good. *Regina v. Dendy*, xviii. 337.

11. Per CROMPTON, J. that the rule of pleading, which admitted of the whole of an allegation being put in issue, though too much had been alleged, did not apply. *Id.*

V. Plea of Payment into Court.

1. *New rules.* In trover for cattle, the defendant pleaded that the conversion complained of was a sale of the cattle by him after he had seized and impounded the same as surveyor of the highways, &c.; and that the plaintiff ought not further to maintain his action because the defendant now brings into court the sum of 10*l.* ready to be paid to the plaintiff, and that the plaintiff has not sustained damages to a greater amount, &c. *Held*, that this plea was bad, as not warranted by the new rules. *Key v. Thimbleby*, iv. 521.

2. *Administration bond, action on—Payment into court.* In an action on an administration bond, breaches were assigned in the declaration, and the defendant, by way of plea, set out the condition, and paid money into court as to certain breaches, and as to the residue averred performance or excuse for non-performance. *Held*, that the plaintiff was entitled to strike out the whole plea, and proceed to assess damages. *The Bishop of London v. M'Niel*, xxiv. 511.

3. Plea, in the general form given by the Common-law Procedure Act, of payment into court of 2*l.*, and that the same was enough to satisfy the claim of the plaintiff. Replication, that the defendant did what was complained of under circumstances which did not enable him to pay money into court in the action, and that there was not any statute under or by virtue of which the defendant was authorized or entitled so to do. *Held*, upon demurrer, that although the action was one in which the defendant could only be entitled to pay money into court under the special provisions of a statute, still, that the plea in the above general form was good, and the replication, therefore, bad. *Thompson v. Sheppard*, xxviii. 200.

4. In case for distraining for more rent than was due, alleging a sale of the goods,

defendants for plea paid money into court. *Held*, that the plea admitted both the distress and the sale, and that a joint damage beyond the sum paid into court need not be shown; for that both defendants were liable, though the evidence connected only one with the grievance. *Leyland v. Tancred*, iii. 479.

VI. *Equitable Pleas under Common-law Procedure Act, 1854.*

1. *What constitutes an equitable defence.* In reply to an action on the covenants of a lease, the defendants pleaded certain agreements for the delivery up and acceptance of the premises and cancellation of the lease averring all things properly done on his part and that it was the fault of the plaintiff that the surrender was not completed, but the agreement was not in writing. *Held*, that such plea did not constitute an equitable defence, within the 17 & 18 Vict. c. 125, ss. 83, 86, as a court of equity would not either compel performance of the agreement between the parties, or restrain the plaintiffs from executing their judgment, without at the same time compelling the defendant to execute a surrender in writing, pursuant to the statute of frauds; and this court had no power to compel the defendant to execute such surrender. *The Mines Royal Society v. Magnay*, xxviii. 447.

2. *Power of court.* The power of the court to act, under the above sections, is confined to cases where they are empowered to grant an injunction absolute and without terms. *Id.*

3. It is not necessary, in order to give the court power to grant a defendant leave to plead an equitable defence along with other pleas, that the defendant should be entitled to unconditional relief in equity. *Chilton v. Carrington*, xxx. 439.

4. *Action on bill of exchange.* To an action on a bill of exchange, the court allowed the defendant to plead by way of an equitable defence, (leaving its validity to be questioned on demurrer,) that the defendant was chairman of a company completely registered under the Joint Stock Registration Act; that the bill was drawn for the company's purposes, and accepted by the defendant, as chairman of the company; that, in order to bind the company, it ought to have been accepted by another director also, and countersigned by the secretary; that by mistake or accident this was omitted to be done; that it never was intended that the defendant should be bound personally, and that all parties, including the plaintiff, had treated it as a bill of the company. *Burgoyne v. Cottrell*, xxviii. 232.

5. *In action of trover.* In an action of trover an equitable plea, to the effect that the property alleged to have been converted was conveyed to the defendant and paid for by him under a contract of sale, but that the brokers who made the bought and sold notes had by mistake omitted to include it in the bill of sale, was allowed to be pleaded on affidavit of its truth, subject to the right of the plaintiff to reply and demur thereto. *Steele v. Haddock*, xxviii. 540.

VII. *Of Arbitration and Award.*

1. *When plaintiff not at liberty to show that award has been set aside.* To an action for goods sold, the defendant pleaded that an action having been brought in the county court for the same cause, the matter was afterwards submitted to arbitration, and that an award was made of a certain sum, which the plaintiff refused to receive, and discharged the defendant from paying into court. Replication, *nul tiel award*. *Held*, first, that under these pleadings the plaintiff was not at liberty to show that the award had been set aside. Secondly, that the plea was not bad, on motion for judgment *non obstante veredicto*, in omitting to state that the reference was ordered by the judge under the 77th section of the County Court Act, the obligatory part consisting of the mutual consent to arbitration. *Roper v. Levy*, vii. 570.

2. *Plea that arbitrators did not make their award modo et formâ.* The plea, that

"the arbitrators did not make their award concerning the matters in difference referred to them *modo et formâ*," puts in issue only the fact of the award having been made of and concerning the matters in difference, and not its validity. *Adcock v. Wood*, vi. 570.

3. *Action on award—Demurrer.* Action on an award; plea, setting out the award and concluding with a demurrer to the declaration. *Held*, that by section 56, of the 15 & 16 Vict. c. 76, the award was part of the plea and not of the declaration, so as to enable the defendant to demur; and judgment was given for the plaintiff. *Semble*, that the defendant ought to have pleaded the award simply or with a prayer of judgment, so as to enable the plaintiff either to traverse and raise any question of fact, as to its being the award declared on, or to demur and raise any question of law, as to its construction. *Sim v. Edmonds*, xxvi. 379.

4. The declaration, that an arbitrator found in favor of the plaintiff to the whole amount demanded, and that a given portion of the same had been paid to the plaintiff by the defendant, and that they then "requested" the defendant to pay the balance to the plaintiff, is good, if no objection be made on special demurrer that the balance was not pointed out. *Quære*, whether the declaration would have been good on special demurrer. *Smith v. Hartley*, v. 383.

5. Where a difference has existed between parties, and they have submitted the whole matter to arbitration and the defendant has refused to fulfil the award, it is not necessary to set out the matters in difference in the declaration; it is sufficient that it should appear that differences have existed and that the arbitrator has awarded *de præmissis*; and it is for the defendant to show that the arbitrator has not acted within the scope of his authority. *Ib.*

6. *Breach of award.* An arbitrator directed that the defendants pay 270*l.* to the plaintiffs, and that two thirds of the costs be paid by the defendants and the other one third by the plaintiffs. In the declaration two breaches were assigned; 1st, non-payment of the 270*l.*, 2d, non-payment of two thirds of the costs, such two thirds amounting to 500*l.* *Held*, that the first allegation of breach was good, and the second bad. *Kirk v. Unwin*, vi. 477.

VIII. Particulars of Demand.

1. *Sufficiency of—Statement of ground of action.* The particulars of a summons were: "To sinking a shaft at" &c.; "Cr. Cash on account, £," making the balance the sum claimed. *Held*, that the summons and particulars showed a sufficient ground of action, without stating that the shaft was sunk for defendant. *Wedlake v. Sargent*, viii. 404.

2. *Defendant not misled.* Where the plaintiff's particulars of demand state the action to be brought for one year's salary, or damages for the dismissal of the plaintiff before the expiration of such year, it is sufficient to let in a claim upon a *quantum meruit* for work done during a portion of such year, if it does not appear that the defendants were misled by the particulars. *Harris v. Montgomery*, v. 441.

3. Where the plaintiff had been compelled to pay to the indorsees a promissory note which he had given to the defendant, as liquidated damages in case he should break his agreement to purchase all his beer of the defendant; and in his summons and particulars stated, that the plaint was brought "for money paid by the plaintiff for and on account of the defendant to A. B. & C. upon a judgment obtained by them in this (the county) court as indorsees of a promissory note of the plaintiff and one W. made payable to the defendant or his order, but for which promissory note the plaintiff or W. never received from the defendant any value or consideration," it was *held*, that the summons and particulars sufficiently described the ground of the action, as the defendant could not be misled by them, and that evidence as to the quality of the beer was admissible under them. *Stancliffe v. Clarke*, ix. 492.

4. *Action for fees—Uncertainty of amount of.* "This action is brought to recover the amount of fees, profits, and emoluments received by the defendant, as deputy prothonotary of the palace court, on, from, and after the 20th November, 1848, to the commencement of this suit; the plaintiff, who is the prothonotary of the said court, having, on the last-mentioned day, revoked all or any authority of the defendant to act as such; also the amount prior to the said 20th day of November, up to and including the 6th day of October, 1848. The plaintiff does not know the exact amount of such fees, profits, and emoluments, but the same is in the knowledge of the defendant." *Held*, Coleridge, J., *dubitante*, a sufficient particular to entitle plaintiff to recover both the fees due to the prothonotary, as such, before the revocation, and all the fees received since then. *Campbell v. Hewitt*, xii. 375.

5. *Judgment non obstante—Judicial notice of particulars.* The declaration in an action of debt claimed 44l. 8s. The particulars, after giving credit, stated the balance due from the defendant to be 12l. 4s. The defendant pleaded payment of 15l. in satisfaction, and obtained a verdict. *Held*, that the plaintiff was not entitled to judgment *non obstante veredicto*, although the court will not judicially notice the particulars of demand, as they are not a part of the record, yet, after verdict, it will take notice that there may be such particulars as will make a plea valid. *Turner v. Collins*, iii. 363.

6. Objection to particulars of demand cannot be taken after the defendant has pleaded in the county court. *Wedlake v. Sargent*, viii. 404.

IX. Replication.

1. *Action on foreign judgment—Replication bad as not showing foreign law.* Action on a judgment of a foreign tribunal: plea, that defendant had never been served with process or appeared, nor was a resident of the country nor had property there; replication, that the judgment was on a bill of exchange drawn in B. according to the laws of that country, and payable there; that by those laws the place of payment is to be taken as the domicil of the acceptor; that summons was left at the place of payment there; and that "by the law of B. and practice of said court" such leaving is a good summoning; and, therefore, the judgment was valid. *Held*, that the replication was bad, as it did not sufficiently show what was the law of the foreign country at the time of the acceptance. *Pollock, C. B., dubitante. Mees v. Thellusson*, xx. 465.

2. *Statute of Limitations—Plea of set-off and never indebted.* Debt. Plea, set-off alleging that the amount due from the plaintiff to the defendant equalled the plaintiff's claim. Replication, as to the plea, so far as it related to 49l. 16s. 10d., parcel, &c., the Statute of Limitations, concluding with a verification, and as to the residue that the plaintiff was not nor is indebted *modo et forma*. *Held*, on special demurrer, that the replication was bad. The proper replication would be, that part of the set-off was barred by the Statute of Limitations, and that the plaintiff was not indebted to the defendant in any sum which (with the part so barred) equalled the amount of his demand. *Mead v. Bashford*, iv. 408.

3. *Action for injury to land—Replication de injuriâ.* In an action for injury to land, the defendants pleaded that they entered on the plaintiff's land under sect. 85 of the Lands Clauses Consolidation Act, before the expiration of the prescribed period for exercising their compulsory powers, and being so lawfully in possession that they, after the prescribed period, continued in possession, and in the due and lawful exercise of the powers of the said act committed the grievances complained of. The plaintiff replied (admitting the statute) *de injuria absque residuo causæ*. *Held*, that the replication was bad, as the plea claimed an interest in land, and the replication traversed an authority in law by the denial of acting under the statute. *Worsley*

The South Devon Railway Co. iv. 223.

4. *In trespass—Estoppel.* In trespass for mesne profits the defendant pleaded first, not possessed, and secondly title in himself; the plaintiff replied by way of estoppel as to trespasses since October 26, 1853, setting out a writ in ejectment of that date in which he was claimant, directed to the defendant as tenant in possession, and averred judgment thereon by default and an entry by virtue of the judgment; and on demurrer it was held a good replication to both pleas. *Wilkinson v. Kirby*, xxvi. 371.

5. The estoppel in such case is from the date of the writ, and the plaintiff's title is presumed to continue unless the rejoinder shows it to have determined. *Ib.*

6. It is not necessary to aver notice to the defendant of the proceedings in ejectment, or the issuing and execution of a writ of possession. The replication contained a sufficient averment of the plaintiff's entry. *Ib.*

7. To a plea of *nul tiel record* the plaintiff replied *tiel record*, but omitted to give a day to bring in the record; the court refused to give judgment on motion therefor. *Aylward v. Garrett*, i. 402.

8. *Composition with creditors—Fraudulent preference.* The defendants, being indebted to the plaintiff and other persons, proposed a composition to his creditors, which was agreed to at a meeting where the plaintiff was not present. The plaintiff refused to concur unless he should receive a much larger percentage than had been agreed to by the other creditors. The defendants finally consented and gave notes for the amount agreed upon, assuring the plaintiff that he was the only preferred creditor; whereas, the defendants had preferred several persons besides the plaintiff. The plaintiff now brought an action for the goods sold; the defendants pleaded a release, to which the plaintiff replied that the release was obtained by the fraud of the defendants. *Held*, Wightman, J., *dissentiente*, that the replication was not proved, inasmuch as the plaintiff had participated in the fraudulent preference of himself to the other creditors. *Mallalieu v. Hodgson*, v. 279.

9. *Libel imputing murder—Replication by way of estoppel.* *Semble*, that if in an action for a libel imputing to the plaintiff the crime of murder with aggravating circumstances, the defendant pleads that the plaintiff did commit murder, a replication to such plea, by way of estoppel, that the plaintiff was tried and acquitted, is not good. *Helsham v. Blackwood*, v. 409.

10. *Multifariousness—Trespass—Distress.* To an action of trespass for breaking and entering the plaintiff's house and seizing his goods, the defendant pleaded that one Thomas held a house as tenant to one Payne; that the rent was in arrear; that the said goods, being the goods of Thomas, were fraudulently and clandestinely conveyed by him from his house to prevent a distress, and were, with the plaintiff's consent, placed in the plaintiff's house; whereupon the defendant, as bailiff of Payne, and by his command, seized the goods as a distress. Replication, that the said goods were not the goods of Thomas, nor were they fraudulently and clandestinely conveyed away by Thomas to prevent a distress. *Semble*, that the replication was not open to the objection of multifariousness, but that it was a good answer to the plea. *Thomas v. Watkins*, xiv. 489.

11. *Replication de injuriâ—Ancient lights—Trespass.* To an action of trespass for entering a close and pulling down a stable, the defendant pleaded that he was possessed of a dwelling-house adjoining the plaintiff's close, and was entitled to have the light and air enter through a certain ancient window therein; that the stable wrongfully and unlawfully obstructed the light and air, and darkened the window, wherefore he entered the plaintiff's close and pulled down the stable to remove the obstruction. The plaintiff replied *de injuriâ*. *Held*, on special demurrer, that the replication was good, as the plea consisted merely of excuse; that it neither claimed any interest in the plaintiff's land, nor set up such a right by virtue of an authority from the plaintiff, within the true meaning of the rule which precludes the adoption of this general form of replication. *Thompson v. Eastwood*, xvi. 598.

X. *In Admiralty and Ecclesiastical Courts.*

1. In an allegation responsive to summary petition, in a cause of wages, it is not necessary to plead the entries in the log, of the several acts of disobedience and mutinous conduct, relied upon to work a forfeiture of the wages. *The John Knox*, xx. 631.

2. An allegation, propounding a will and codicil alleged to have been made by virtue of certain powers under a deed of settlement, did not plead the deed of settlement. *Held*, that the deed should be pleaded as an exhibit. *Este v. Este*, i. 629.

3. If administration of the estate of a married woman is granted to her next of kin rather than to her husband, and the husband sets up his interest in act, on petition, such act should be answered by the next of kin. *Brenchley v. Lynn*, ix. 583.

4. *Prerogative court—Immateriality.* An article, pleading a declaration of an attesting witness that the testatrix was insane in March, 1850, and had been so for years, the will being executed in May of the same year, was rejected as immaterial. *Yglesias v. Dyke*, i. 626.

XI. *Of Amendment; Substitution; Variance.*

1. *Action for money had and received with count in trover—Plea of joint conversion and judgment against one.* Declaration for money had and received, with a count in trover. Plea, that the debt became due from the defendant jointly with B, who had also jointly converted the plaintiff's goods, and that judgment had been recovered by the plaintiff against B for the same causes of action. At the trial, the count in trover was given up, and it was proved that the defendant, assisted by B, had wrongfully sold, as auctioneer, the goods in question, and that the plaintiff had recovered judgment against B, without satisfaction, for the conversion, but that the proceeds of the sale (for which this action was brought) were received by the defendant alone. The plea was then amended by striking out the allegation of the joint receipt, and substituting, that the action was for the proceeds of the sale of the goods for the conversion of which the plaintiff had recovered judgment against B. *Held*, that the amendment was right, and should be made without costs, as the plea, both before and after amendment, raised substantially the same defence, namely, the recovery against B. *Buckland v. Johnson*, xxvi. 328.

2. *Insolvency—Withdrawal of new plea and substitution of former ones.* The plaintiff becoming insolvent after issue joined, the defendant, by leave of a judge, given under the stat. 15 & 16 Vict. c. 76, s. 142, (the plaintiff's assignees not giving security for costs,) pleaded a plea of the plaintiff's insolvency, withdrawing his old pleas. The plaintiff confessing the plea and giving notice to tax his costs, under rule 23 of the New Pleading Rules, the court held that the plaintiff was entitled to costs under the rule, if the plea of insolvency stood, but allowed the defendant to withdraw that plea, and to substitute his old pleas again and to go on with the action. *Plummer v. Hedge*, xxviii. 226.

3. *Amendment of replication framed to embarrass.* To an action containing two counts upon two mortgage deeds, and two upon bonds collateral to them, the defendant pleaded to each count the Statute of Limitations, 3 & 4 Will. IV. c. 42; to which the plaintiff replied, that the defendant, before the commencement of the suit, made an acknowledgment that the debt remained unpaid, and due to the plaintiff, within the true intent and meaning of the statute, and that the action was brought within twenty years after such acknowledgment. *Held*, that this replication was framed to embarrass and prejudice the fair trial of the cause, and according to the provisions of 15 & 16 Vict. c. 76, s. 52, must be amended by specifying one or more of the modes of acknowledgment mentioned in the statute. *Forsyth v. Bristowe*, xvi. 523.

4. The declaration stated that the plaintiff entered into the service of the defendant as a commercial traveller at a yearly salary, and that the defendant agreed to continue

him in his employ for a whole year, and then alleged that the defendant discharged him. It was proved that there was a usage in the trade that commercial travellers should be dismissed with a three months' notice. *Held*, that the contract was not proved, the condition as to the notice not being in defeasance of the contract, but forming part of it; but that the plaintiff ought to have been allowed to amend at the trial, without costs. *Metzner v. Bolton*, xxiv. 537.

5. A case stood thus stated on the pleadings: A contracted to sell to B 100 hogsheads of Gingelly oil, "expected to arrive by the ship *Resolute* from Madras." The *Resolute* arrived with more than 100 hogsheads of the oil on board, but only 34 hogsheads were consigned to or under the control of A. *Held*, that in such case it could not be taken as a condition of the obligation to perform the defendant's contract that the oil arriving in the ship should be under his power or control. The plea was allowed to be amended so as to read, that of the 100 hogsheads "expected to arrive" per The *Resolute*, only 34 hogsheads did arrive, and that these had been tendered, &c.; whether or not the plea as amended would state a good defence, *quære*. *Fischel v. Scott*, xxviii. 404.

6. *Variance*. In a writ of error brought to reverse a judgment of waiver against a woman, the judgment was called a judgment of outlawry. *Held*, upon plea of *nul tiel record*, that this was a fatal variance, and that the defendant in error was entitled to judgment. *Burnett v. Phillips*, vi. 467.

7. A plea of set-off stated that the plaintiffs authorized one G. W., trading as G. W. and Co., to sell the goods for the price of which the action was brought, as and for the proper goods of him G. W., and that he did so sell them; and that G. W. was indebted to the defendant, &c. The evidence was, that the plaintiffs authorized G. W. to sell the goods as and for the goods of G. W. and Co., which firm consisted of G. W. and L. S. *Held*, that this was a material variance. The construction of 3 & 4 Will. IV. c. 42, s. 24, decided, as to the form of judgment in such case. *Addington v. Magan*, ii. 327. See INDICTMENT, AMENDMENT.

XII. Practice.

1. Practice in case of a change in the defendant's name. *Hibblethwaite v. The Leeds and Thirsk Railway Co.* vi. 523.

2. *Non-joinder of co-contractor*. If an action is brought against two, who plead non-assumpsit, and the evidence fails to fix one of them, the plaintiff must be nonsuited, and, therefore, to a plea in abatement for non-joinder of a co-contractor, the plaintiff may reply the infancy of such alleged co-contractor. *Boyle v. Webster*, x. 394. It is otherwise in America. See note.

3. *Grant of leave to demur*. The court granted leave to the defendant, under the 15 & 16 Vict. c. 76, s. 80, to demur and plead not guilty, with a traverse on an affidavit of the defendant's attorney, that he was informed and believed that the defendant had just cause to plead those pleas, and that the declaration would be held bad in substance on demurrer, and that the objections raised to it by the demurrer were good and valid objections in law. *Price v. Hewett*, xviii. 522.

4. *Signing judgment*. A variance betwixt the pleas as delivered and the abstract, which is not substantial or calculated to embarrass the plaintiff, will not entitle the plaintiff to sign judgment. Where an abstract of several inconsistent pleas is delivered, the proper course is for the plaintiff not to consent to such abstract, but to go before the judge, and oppose the pleas being allowed. *Dunmore v. Tarleton*, xvi. 391.

5. *Debt on bond*. To debt upon bond, the defendant may plead as to part, payment in satisfaction *post diem* under 4 & 5 Ann. c. 16, s. 12. *Husband v. Davis*, iv. 342.

6. *Set-off*. Where to a plea of set-off the plaintiff replies that he is not indebted as in the plea alleged, he may under this replication avail himself of the objection that the debt is due not from himself alone, but from a third party jointly with him. *Arnold v. Bainbrige*, xxiv. 451.

7. *Plea to action on judgment.* Pleas which might have been pleaded to the original action cannot be pleaded to an action upon the judgment. *The Bank of Australasia v. Nias*, iv. 252.

XIII. General Principles.

1. *In privy council.* The rule in pleading, "*Qui ponit faletur*," must be received with some modification. It must be rigidly enforced with respect to every averment made by a party alleging within his own personal knowledge, but the same rule must be applied less stringently, and in some instances rejected, when the party states facts not within his personal knowledge. *Greville v. Tylee*, xxiv. 53.

2. It is sufficient for a pleading to say that proceedings have been according to the Insolvent Act, and the process on which the defendant is in custody need not be alleged in the replication. *Wickens v. Goatley*, viii. 420.

3. *Bill of exchange—Plea of want of consideration.* A plea of want of consideration, in an action on a bill of exchange, must, besides showing the circumstances, distinctly allege that there was no other consideration than that mentioned. *Boden v. Wright*, xxii. 445.

4. *Action by foreign correspondent against proprietor of newspaper—Pleas alleging breach of plaintiff's stipulations.* Declaration, that defendant engaged plaintiff as salaried correspondent of a New York paper, due notice to be given of termination of the engagement: breach, discharge without cause or notice. Also, counts in *indebitatus*. Pleas: 1. That it was a condition that plaintiff should write by each steamer, which he neglected to do on several occasions. 2. A condition that plaintiff might draw on defendant for his salary, as it fell due, but should never anticipate any part of it; that he did draw several bills so anticipating, which were dishonored, to the damage of defendant's credit. 3. As to 50*l.*, that it was attached in defendant's hands under a trustee process in New York, and paid over to the judgment creditor under the law of that State; both plaintiff and defendant being citizens thereof, and defendant a resident there. Held, upon demurrer, that the first two of the above pleas alleged only a breach by the plaintiff of stipulations in the contract, for which he might be made liable in a cross-action for damages, and were, therefore, no bar to the action. But that the other plea was sufficient, and a good defence *pro tanto*. *Gould v. Webb*, xxx. 331.

5. *Plaintiff entering appearance for defendant—Notice to agents of a corporation.* To an action on a judgment, the defendants, a corporation, pleaded that they were not served with process in the action, but that the plaintiff irregularly caused an appearance to be entered for the defendants, when they were not within the jurisdiction of the court. By order of the court, before the trial, agents of the defendants had received notice of the action. The plea was held bad, the defendants not showing that they had no notice of the summons, and did not appear in the action. *Sheehy v. The Professional Life Assurance Co.* xxiv. 268.

6. *Action by transferee of bond—Plea that sum was not borrowed of plaintiff, &c.* The defendants were authorized to borrow money necessary for the purposes of the act, and to give bonds for the same, which bonds were assignable. In an action by the plaintiff, as transferee of one of such bonds, the condition of which recited that the defendants had, in pursuance of the said acts, borrowed of one T. P. 5,000*l.*, for enabling them to carry the said acts into execution, the defendants pleaded that they did not borrow the said sum of the said T. P., or any part thereof, for the purposes of the said acts, and that they were not authorized to make the said bond, and that the same was made contrary to the provisions of the said act. Held, upon general demurrer the plea was bad, as not alleging that the money was not necessary. *Horton v. The Westminster Improvement Commissioners*, xiv. 378.

7. *Pleas of conspiracy and fraud.* The defendants also pleaded, that at and before the bond was made, C. M. and W. M., were entitled to receive from the defendants,

certain bonds; that the said T. P. and others conspired fraudulently to procure for T. P. one of the said bonds to which the said C. M. and W. M. were entitled, and that by means of such conspiracy and fraud they procured the said C. M. and W. M., to authorize the defendants to give to the said T. P. one of the said bonds, and that the bond sued upon was thereupon given to T. P. by the defendants, and that they the defendants had never borrowed any sum of money from the said T. P. *Held*, bad on general demurrer, because the defendants could not set up as a defence the fraud that had been committed upon C. M. and W. M., by whose directions they had, in pursuance of their contract with them, given the bond to T. P. *Id.*

8. *Debt on bond—Acknowledgment within twenty years.* Debt on a bond, conditioned for the repayment by T. W. to J. B., before June 5th, 1818, of certain stock, and for the payment of certain sums in lieu of dividends. Breach, 1st, that the stock had not been replaced; 2d, that the dividends on such stock were semi-annual, only one of which was payable before said June 5th; that J. B., on the 11th of September, 1824, died; and that if the said stock had continued standing in J. B.'s name, or the plaintiff's, as administrator, a sum, to wit, &c., would have been payable half-yearly as dividends, and the money payable in lieu of such dividends, and becoming due after J. B.'s death, amounted to a large sum, to wit, &c. And although the said stock had not been transferred into the name of J. B. or the plaintiff, yet the said T. W. and the defendants had wholly failed to pay the sums which became due in lieu of the said several dividends. Plea, the Statute of Limitations. Replication, as to 1st breach, a sufficient acknowledgment on Sept. 10th, 1824; as to 2d, traversing the plea. Rejoinder, traversing first part of replication. An agreement, acted upon until J. B.'s death, was proved, by which T. W. was to board J. B. in part satisfaction of the dividends due him. *Held*, first, that supposing the issue raised by the rejoinder cast upon the plaintiff the burden of proving an acknowledgment within twenty years next before the commencement of the action, the above was sufficient evidence to entitle the plaintiff to the verdict on that issue, as also on the second issue raised by the replication. Secondly, that the bond was not within the 3 & 4 Will. IV. c. 42, s. 5; that the replication, therefore, as to the first breach, set up no answer in law to the plea; but as to the second breach, that a cause of action still existed upon the part of the condition which stipulated for the payment, from time to time, of such sums as would have been payable by way of dividends, if the stock had continued standing in J. B.'s name. Judgment for plaintiff. Damages to be confined to those claimed in the second breach. *Blair v. Ormond*, vii. 318.

9. *Plea of no notice of action—Misfeasance in making false return—Nonfeasance—“Sum,” meaning of.* A declaration stated that the plaintiffs in a court of record recovered a debt of 50*l.*, and sued out a *fi. fa.* directed to the defendant as the officer for executing the process; that the defendant did not levy, but falsely returned *nulla bona*. The second plea set out the record, which stated that the action was in debt for goods sold; that the plaintiffs demanded 50*l.*, which they recovered, together with 6*l.* 15*s.* 8*d.* as damages and costs. The last plea stated that no notice of action had been given under the local act of parliament establishing the said court of record. Demurrer. Replication, to the second plea, that the debt sought to be recovered was 50*l.*, and that no damages were sought to be recovered except such as were necessary for enabling the plaintiffs to recover their costs. Demurrer. The local act provided that in all actions “for any thing done in pursuance of this act” notice of action should be given to the defendant. Another section of the local act provided that the said court of record should “have authority to try actions of assumpsit, covenant, and debt,” &c., “provided the sum or damages sought to be recovered shall not exceed 50*l.*” *Held*, first, that the last plea was good; that the defendant was entitled to notice of action, part of the cause of action being for a misfeasance in making a false return. *Quære*, whether in case of a mere nonfeasance notice of action would have been necessary. Secondly, that the replication was good, the cause of action being within

the jurisdiction of the inferior court. That the word "sum" in the act of parliament meant "debt"; and that the action was substantially for 50*l.* debt only, the damages being merely nominal for the purpose of carrying costs. *Joule v. Taylor*, vii. 574.

10. It is discretionary with the judge whether he will allow a party to plead and demur together, although the affidavit may be made as required by the 15 & 16 Vict. c. 76, s. 80. *Thompson v. Knowles*, xxviii. 497.

11. *Allegation of a right subject to qualification or limitation.* The Faversham Oyster Fishery, a company in the nature of a prescriptive corporation, had power, by its constitution, (confirmed by an act of parliament of 3 Vict. c. 59,) at certain courts called water-courts, to make orders, rules, and regulations for the government and management of the company, and for imposing and levying fines and penalties on its members for the breach or non-observance of such orders, rules, and regulations; and also to appoint a foreman and a jury of twelve, who should have the management and regulation of the fishery, and of the affairs of the company. By a water-court order of the 31st of July, 1790, it was ordered, amongst other things, "that all such tenants [freemen or members of the company] as have boats shall work for the company in regular turn, unless that he or his boat shall be incapable of doing business; that is to say, each man, being so capable, shall succeed him who worked last, as he stands in the company's list." And by a subsequent order of the 29th of July, 1797, reciting the order of the 31st of July, 1790, it was "declared, ordered, and decreed that nothing in the said recited orders, or either of them, contained, was meant or intended to deprive or hinder, or shall deprive or hinder, the foreman and jury of this company, or the major part of them assembled on the company's affairs, from exercising at all times their ancient and accustomed discretionary powers of regulating the business of the said company, by postponing or setting aside the turn of any of the tenants of this manor and hundred, in doing any business of the said company, for reasons appearing to the said foreman and jury, or the major part of them, to be satisfactory, expedient, or proper, for that purpose." On the 12th of July, 1852, an order to the following effect was made by the foreman and jury: "As the commencement of the season for the selling of oysters is drawing near, in order to provide salesmen, it is ordered that the foreman put out a notice for persons, freemen of the company, who are desirous of going to London as salesmen, to give in their names to him or any one of the jury on or before the 19th instant; and that the jury proceed to the electing of such on or as soon after that time as convenient. And, in order that the company may be provided with fitting and proper vessels to take the oysters to market, it is ordered that notice be posted at the usual place, to require those freemen that have boats fitting and proper, to give notice to the foreman or any one of the jury of their intention of working for the company." There was no evidence of the giving of such notice by the foreman under the above order; but the plaintiff had notice of it on the 14th of July. On the 19th, a further order was made by the foreman and jury, as follows: "It is ordered that three men (naming them) go to Billingsgate, as salesmen. The following are the names of those that have given notice, according to the notice of the 13th of July, of their intention of carrying oysters for the company (naming the men and their boats): and it is ordered that the above-named boats do carry the oysters to Billingsgate Market, and that no boats be allowed to take a turn with them until after the 31st of October." The plaintiff not having given notice of his intention to carry until the 18th of August, the defendant, acting under the order of the 19th of July, refused to employ him and his boat until after the 31st of October. Before the year 1850, the practice had been, that the foreman and jury ascertained, either by notice or by personal application, before the commencement of each season, who could carry, and then the freemen, after they had ceased to be employed elsewhere, gave notice, and came in after standing by one turn. The plaintiff himself had, however, been excluded in the year 1851, by reason of his omission to give notice of his readiness. In an action against the foreman, for excluding the plaintiff and his

boat from turns of carrying, under the above circumstances, it was *held*, that the order of the 31st of July, 1790, was properly alleged in the declaration as giving the freemen, having boats, an absolute right to work in turn, and that the incapacity of the man or his boat, not being in the nature of a qualification or limitation of the right, need not be noticed. *Hills v. Hunt*, xxviii. 381.

12. *Production and proof of order set forth in plea.* The defendant justified under the orders of the 12th and 19th of July, 1852, stating that, by the former, those freemen who intended to work for the company were thereby required to give notice of such their intention on or before the 19th of July; that the plaintiff omitted to give such notice; that, by the order of the 19th, notice was given that such only of the freemen as had given notice should be employed in carrying oysters for the company, and that those who had not given notice should be excluded until after the 31st of October; and that, by reason of the last-mentioned order or regulation, the defendant, as foreman, refused to employ the plaintiff, as he lawfully might, &c. *Held*, that the plea was not sustained by the production and proof of the order above set forth; and that the plea could not be made good by striking out the order of the 12th of July. *Ib.*

13. *Power to make order.* *Quære*, whether the foreman and jury had power to make the order of the 19th of July, 1852, and whether, if they had, it was a reasonable one,—the notice of the 12th giving no intimation of the time at which the freemen were required to give notice of their intention to carry, nor informing them of the consequences of their omission to do so. *Ib.*

14. *Liability to pay the rent-charge—Covenant by tenant to pay.* A declaration stated that the plaintiff was lessee of a farm under the defendant, and that, after the determination of the lease, a sum of money became due and payable to the ecclesiastical commissioners for a tithe rent-charge upon the said farm, which the defendant, as owner, was liable to pay, but refused to do so, and that in consequence a distress was put in, and a stack of the plaintiff's, which was lawfully on the farm, was seized and sold, and the plaintiff claimed to be indemnified against the seizure and sale. Plea, that the defendant was not liable to pay the said tithe rent-charge as alleged, on which issue was joined. It was proved that the plaintiff had in his lease covenanted to pay the tithe rent-charge and had a right of onstand for his ricks, &c., till the May after the end of his term. The term expired at Michaelmas, 1852, and the tithe rent-charge in question became payable on the 1st of October following, but by the custom of the country the tenant was bound to pay the tithe rent-charge falling due immediately after the end of his tenancy. *Held*, that on this issue the defendant was entitled to the verdict, as the 6 & 7 Will. IV. c. 71, s. 67, creates no personal liability upon the owner of the lands charged with the tithe rent. *Griffenhoofe v. Daubuz*, xxviii. 220.

15. *Scire facias against member of joint-stock company—Plea of no rule or order obtained.* A writ of *scire facias* is the proper remedy against a member of a joint-stock company, the plaintiffs having failed, after due diligence, to obtain satisfaction from the effects of the company. In such case the plea that no rule or order had, before issuing the *scire facias*, been obtained of the court or judge is bad. *Marson v. Lund*, vi. 319.

16. *Sci. fa.* against a member of a company registered under 7 & 8 Vict. c. 110, to obtain satisfaction of a judgment, which the plaintiff had failed to obtain by execution against the effects of the company. Plea, first, that due diligence had not been used, concluding with a verification; secondly, that no order of court had been obtained to issue the *sci. fa.* Replication traversing the first plea, concluding to the country. Demurrer to the second plea. Demurrer to the replication. *Held*, that the plaintiff was not precluded by the 68th section of the statute from proceeding by *sci. fa.* under the 66th. *Held*, also, as to the pleadings, first, that the second plea was bad, secondly,

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at the replication was sufficient, and properly concluded to the country. *Marson v. und, iii. 442.*

17. *Case on claim, how established.* A claim was filed for the payment of the purchase money of wool. For this a check had been given to the plaintiffs' agent, which check had been lost. Claim dismissed from deficiencies in the allegations and the proofs. *Held*, that a case upon claim under the orders of April, 1850, must be established in the ordinary way, *secundum allegata et probata.* *Johns v. Mason, iii. 272.*

18. *Mortgage to benefit building society—Arbitrators to settle disputes between society and members.* The declaration alleged the making of a mortgage by the defendant to the trustees of a benefit building society, to secure repayment of loans to him, and containing covenants on his part to observe the rules of the society. It alleged, as breaches, non-payment of monthly instalments, fines, &c., on his part, due pursuant to rules of the society. The first plea stated a rule as to the appointment of arbitrators to settle disputes between the society and its members, in case the decision of the directors thereon were unsatisfactory, that arbitrators had been appointed as the society and the defendant as a member thereof, that he had never had notice of any decision of the directors on said disputes, that arbitrators had been appointed as aforesaid, and that he had been and was willing to submit to their decision. The second plea was to the effect, that after a member had executed a mortgage and failed to pay subscriptions, &c., secured thereby, the directors were to appoint a person to collect the rents of the mortgaged premises, and, under certain circumstances, to sell them. It admitted failure to pay on the part of the defendant, but alleged that the said premises were sufficient security for the money advanced, that defendant was willing to have a collector appointed as aforesaid, that he would, if appointed, have received all the money needed by the company, but that no such person had been appointed, nor had defendant been required to collect the rents, &c., himself. Verification. Reply cation to the first plea, that by accident, mistake, and oversight of the society, no arbitrators had ever been elected or appointed, without this, that, &c. *Held*, on demurrer to the second plea and the replication, first, that the declaration showed a good cause of action in the plaintiffs as trustees under the 6 & 7 Will. IV. c. 32, and 10 Geo. IV. c. 56. Secondly, that the proceeding by arbitration provided for by the 27th section of the 10 Geo. IV. c. 56, and the 33d rule of the society was imperative to the exclusion of the right to bring an action, and therefore that the first plea was good. But, thirdly, that the replication was a sufficient answer to such plea, and was not open to the objection that the society was thereby taking advantage of its own wrong. Fourthly, that the second plea was no answer to the plaintiff's right to maintain the action. *Reeves v. White, x. 332.*

19. *Sufficient consideration not disclosed—Non-delivery of signed bill.* A declarator stated that the defendant was indebted to the plaintiffs in divers unliquidated debts the amount of which was in dispute between them; that a fixed amount was agreed upon by them, and the disputes were ended; that the plaintiffs had not made a further claim, and that the debts were satisfied upon the terms in that behalf. Bre non-payment. Plea, that the plaintiffs did not, "one calendar month before commencement of this suit, deliver to the defendant a signed bill." *Held*, first the plea was good; secondly, that the declaration was bad in not disclosing a sufficient consideration for the defendant's promise to pay. *Bridgman v. Dean, viii. 534.*

20. *Treasurer's bond, action on—Failure of plea to answer whole declaration plusage.* A local act required the treasurer of a turnpike to give security, and that he should, when required by the trustees, produce to them his accounts, over the balance to them, or to such person as they should direct. A general provision provided that the accounting should be to the trustees, or such person as they provided that the general act was repealed. An action was brought against the treasurer on condition of which was that the treasurer should account

according to the direction of the general and local acts. Defendant pleaded the repeal of the general act, and alleged performance up to the time of repeal. Plaintiff replied, first, that the trustees required the treasurer to account to certain persons appointed by them, which he refused to do; and secondly, that the treasurer received money which he did not account for and pay over, according to the intent of the local and general acts, and of the bond. Rejoinder and demurrer. *Held*, that the replication was bad, for that the first breach stated that the treasurer was required to account to persons appointed by the trustees, whereas after the repeal of the general act he could not be so required; and the second breach was bad, because, although the reference to the general act was surplusage, yet it contained no allegation of a requisition by the trustees to pay or account, which was a condition precedent within the local act, on which the breach must rest. That the plea was bad, since, by not answering the alleged non-performance of the condition of the bond subsequent to the repeal of the general act, it failed to answer the whole declaration. That the bond might be put in force, notwithstanding the repeal of the general act, since there might be a performance of so much of the condition as depended upon the local act, although so much as depended upon the general act was become impossible. *Davis v. Cary*, iii. 368.

21. The plea of tender is not a plea in bar of the action. *Cooch v. Maltby*, xxviii. 192.

22. The sum paid in upon the tender is a part of the amount recovered by the plaintiff. *Ib.*

23. A pleading, to be good on demurrer, since the passing of the Common-law Procedure Act, must be good in substance, and such as would have been held to be good on general demurrer before the passing of that statute. *Richards v. Leavis*, xxviii. 157.

24. *Special contract to carry—Traverse of delivery and acceptance.* In a declaration on the case, the allegation of a delivery to be carried is equivalent to an allegation of a delivery to be safely and securely carried, subject to such exceptions as the law will create. Consequently, in case of a special contract to carry, wherein the liability of the defendants is limited, the plea of the defendants traversing *modo et formâ* the delivery and acceptance so alleged in the declaration is good. *Austin v. The Manchester, Sheffield, &c. Railway Co.* v. 329.

25. *Money due—Assignment of chose in action.* To a count for money due—plea, that a joint debtor resided in California; that by the law of C. a debt was assignable; that this debt was so assigned, and the assignee sued and recovered. Replication, that by the law of C. the assignee might reassign to the creditor, who might sue, notwithstanding the assignee had recovered judgment, unless the whole was levied; that the assignee did so reassign, &c. *Held*, that if the plea was good, the replication was good, because assignment is in each the same; and that the plea was good if it amounted to an averment that the assignee had the exclusive right to sue. *Thompson v. Bell*, xxv. 171.

26. *Money had and received—Fraud—Rescission of contract.* A sent a horse to B, an auctioneer, to be sold without warranty on certain false representations, the falsehood of which were concealed from B. B sold the horse accordingly, and received the price; but before he paid over the price to A, the purchaser discovered the fraud, rescinded the contract, gave B notice not to pay the price to A, and demanded it back from B. *Held*, a defence to an action by A against B to recover the price as money had and received to A's use. *Stevens v. Legh*, xxiv. 210.

27. *Accommodation bill—Plea in bar to maintenance of action.* To an action by the indorsee of a bill of exchange, the defendant pleaded that the bill was an accommodation bill; that the drawer indorsed the bill and other bills to the plaintiffs as security for the repayment to them of 30*l.* advanced by them to him, and that the bill was satisfied by payment to them by the acceptor of one of the other bills of the money so advanced. *Held*, that the plea was no bar to the further maintenance of the action,

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payment having been made by a stranger, and not having been ratified by the plaintiffs. *Kemp v. Balls*, xxviii. 498.

28. *Special replication—New assignment of trespasses.* Matter which before the statute 15 & 16 Vict. c. 76, ss. 77, 79, was the subject of a special replication, is not in issue by the general traverse given by these sections. Trespass *quare clausum egit*; plea justifying under a right to dig soil. Replication,—“And the plaintiff joins issue on the plea.” *Held*, that the right only was put in issue, and that trespasses, extra the right, should have been new assigned. *Glover v. Dixon*, xxiv. 490.

29. *Covenant against surety on indenture of apprenticeship—Plea of no services to perform for plaintiffs jointly—Replication.* In covenant against a surety on an indenture of apprenticeship of A, to serve B and C, the defendant pleaded that there never were or was any service or services for A to perform to or for the plaintiffs jointly. Replication, that the plaintiffs were surgeons living apart from each other and not in partnership, which facts the defendant well knew at the time of the execution of the indenture. *Held*, bad. The proper course would have been to take issue on the plea. *Popham v. Jones*, xxiv. 359.

30. When the objection to a plea on demurrer was that it was too general, it was held a sufficient answer to the demurrer, that the declaration was as general as the plea. Per Parke, B. *Thompson v. Knowles*, xxviii. 497.

31. *Circuity of action.* A plea is not good in avoidance of circuity of action, unless it shows that the sum which the defendant is entitled to recover from the plaintiff must, in law, be the same as that for which the plaintiff sues. It is not enough that a jury would probably give the defendant the same sum, as damages. *Charles v. Alton*, xxvi. 319.

32. In an action by the public officer of a banking copartnership, the court allowed a plea denying that the copartnership were, at the commencement of the suit, carrying on the business of bankers. *Roe v. Fuller*, viii. 553.

33. *Plea, when issuable.* A plea is not issuable which has been already decided to be bad by the judgment of a court. *Beauclerk v. Hook*, vii. 888.

34. *Error to reverse outlawry.* In error to reverse outlawry, the error assigned being that, at the time of issuing the *exigi facias*, the plaintiff in error was beyond the seas, the defendant pleaded that the plaintiff left the realm before the awarding of the *exigi facias*, and voluntarily remained absent; and that he had notice that he was about to be demanded at the county courts, and might have returned before they were holden. *Held*, that this plea was not issuable. *Ib.*

35. *Lease by mortgagor in possession—Notice of mortgage by mortgagee to tenant and claim of rent.* Where a mortgage had been effected, and then a lease granted by the mortgagor in possession, upon which rent had become due, but before payment the mortgagee had given notice of the mortgage to the tenant in possession, and claimed the rent in arrear—*held*, upon demurrer to the plea, in an action for use and occupation brought for such rent in arrears by the mortgagor, against the tenant in possession, that an averment of such notice and claim by the mortgagee, without an accompanying averment of a consequent payment by the defendant, was no sufficient bar to the plaintiff's right of action. *Wilton v. Dunn*, vii. 406.

36. *Covenant as surety—Plea to damage only.* A declaration stated, that the defendants as surety did covenant with the plaintiffs that B should at all times, whilst he continued in his office, faithfully account for all sums which he should receive, and that a certificate under the hand of the auditor of the district, stating the amount of loss, should be conclusive evidence against the defendants of the truth of the certificate. The declaration then averred, “that, after the making of the deed, B. received divers moneys which he did not account for, and that the auditor certified a loss to the amount of 800*l.*, and alleged, as a breach, the non-payment of that sum. Plea that B. was at the time of making the deed in arrear; and that the loss certified was occasioned as well by such arrears as by the non-accounting in the declaration

mentioned; without this, that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises in the declaration mentioned to the amount of 800*l.* *Held*, on special demurrer, that the plea was bad, as being a plea to the damage only. *The Guardians, &c. of Romford Union v. The British Guarantee Association*, xiv. 504.

36. A plea merely to the damages and not to the cause of action is bad. *Atkinson v. Stephens*, xiv. 407.

37. *Pleas of infancy and agreement to receive less sum.* Plea to an action, that, at the time of the accruing of the cause thereof, the defendant was an infant, and also in the same plea that an agreement had been made according to which the defendant was to pay a lesser given sum, which the plaintiff agreed to receive in discharge of all causes of action against him, the defendant. *Held*, that the plea of infancy was not material, the agreement being sufficient of itself. *Cooper v. Parker*, xxiv. 325.

38. *Detinue by shareholder for documents in possession of accountant.* The plaintiff, a shareholder and purser in a mining company, delivered certain documents to the defendant, an accountant, in pursuance of a resolution of the shareholders, in order that the defendant might report on the state of the company's affairs. *Held*, that these facts constitute a good plea to an action of detinue for the documents, brought in the name of the plaintiff alone. *Atwood v. Ernest*, xxiv. 262.

39. *Action on policy of insurance—Partial loss—Set-off of sum due for premiums—Adjustment.* Declaration on a valued policy of marine insurance, underwritten by the defendant for 100*l.* on goods from D. to L., alleging a partial loss above 5*l.* per cent. and a breach of the policy by reason of the defendant's non-payment of the loss or any part thereof, or of the 100*l.*, or a proportional or any part thereof. Plea that, before action, the proportional sum which the defendant was liable to pay in respect of the loss, was, by agreement between the plaintiff and the defendant, adjusted at a certain rate per cent. and thereby then liquidated and ascertained to be a certain sum, against which the defendant is willing to set off a larger sum due to him from the plaintiff for premiums of insurance. *Held*, on demurrer, to be a bad plea; that the action was for unliquidated damages, and that the adjustment did not make them liquidated, but was only evidence for a jury of the amount of damages. *Luckie v. Bushby*, xxiv. 256.

40. *Agreement by husband to pay annuity to wife living apart—Fraudulent representations by trustee of settlements.* It is a good answer to an action by the trustee of a deed of settlement against the husband for non-payment of the stipulated annuity to the wife living apart from her husband, to say, that he was induced to make the deed by the false representations of the trustee, who was indirectly to receive benefit from the transaction; inasmuch as, though he represented the wife to be virtuous, he had been guilty of illicit intercourse with her before the making of the said deed. The plea is good, though it does not allege that the trustee knew the woman to be the wife of the defendant at the time of the illicit intercourse. *Evans v. Edmonds*, xxiv. 227.

41. *Scire facias on judgment—Insufficient schedules.* *Scire facias* on a judgment. Plea, that after the recovery of the judgment, the defendant was a prisoner, and, according to the provisions of the 3 & 4 Vict. c. 107, petitioned the insolvent court for his discharge; that afterwards, the defendant delivered to the court a schedule, containing a full and true description of all debts due from him, and of all persons to whom he was indebted, together with the nature and amount of such debts. The plea then stated, that, by an order of adjudication, it was ordered that the defendant be discharged from custody as to the several debts due to the persons named in the schedule; and that the defendant was, by such order of adjudication, discharged from the said judgment debt. Replication, that the defendant was not, by the order of adjudication, adjudged or ordered to be discharged from the said debt. *Held*, that, upon these pleadings, the objection was not open that the schedule did not contain a full and true description of the plaintiffs as judgment creditors, nor of the nature and amount of their debt. *Jackson v. Chichester*, xvi. 581.

42. *Similiter*. If a rejoinder concludes to the country with an &c., but no *similiter* be added, the defendant is not entitled to judgment as in case of a nonsuit, inasmuch as the issue is not joined, and the *similiter* will not be intended from the "&c." The *similiter* would be intended from the &c. after verdict. *Knaggs v. Knaggs*, vi. 238.

43. *Action for money paid—Pleas of gaming and wagering contracts*. To an action for money paid, the defendant pleaded, secondly, that the causes of action accrued, after the passing of the 8 & 9 Vict. c. 109, by virtue of contracts between the plaintiff and defendant, which contracts were by way of gaming and wagering, contrary to the said statute, namely, by way of wager on the market price, on certain days, of shares in the English and Australian Copper Smelting Company, and to pay the differences thereon; thirdly, that the causes of action accrued to the plaintiff, as a broker in the city of London, in the purchasing and selling for the defendant, in the city of London, of shares in a mining company called the English and Australian Copper Smelting Company, and that the plaintiff was not at the time of such purchasing, or the accruing of the causes of action, a broker duly authorized. *Held*, that the pleas were bad, as they did not exclude the possibility of the defendant having requested the plaintiff to pay the money, and the fact of its having been so paid. *Jessoph v. Lutwyche*, xxviii. 523.

44. *Agreement to pay in consideration of withdrawing summons in bankruptcy—Plea of want of notice*. The declaration stated that, in consideration of the plaintiff's withdrawing a summons issued out of the court of bankruptcy against W., the defendants promised to pay the plaintiff the amount of the debt due from W. to the plaintiff. Breach, non-payment of the said sum. Plea that the defendants had no notice that the plaintiff had withdrawn the summons. *Held*, that the plea was bad, as such notice was not necessary. *Alhusen v. Prest*, vi. 576.

45. *Action for breach of condition of sale—Rescission—Estoppel*. To an action for not allowing the plaintiff to carry away from defendant's lands certain trees, according to the condition of their sale, it is no answer to plead that before breach, the plaintiff fraudulently carried away certain other trees, equal in value and number to those claimed, falsely representing them to be the trees purchased—such plea showing no rescission of the contract or an estoppel. *Lewis v. Clifton*, xxv. 380.

46. *Action for balance due—Plea of never indebted*. If, in an action for a common money demand, the claim being for a balance, and no specific credit given in particulars for payment, the defendant plead only never indebted, the plaintiff will recover if he prove any amount ever due; and the defendant will not be allowed to prove that nothing was due beyond what had been paid. (See the decisions collected in the note to this case.) *Booth v. Lamburn*, xxv. 409.

47. *Debt on bond—Plea of release by deed*. To an action on a bond, the defendant pleaded that since the bond was signed he and the plaintiff had made a written agreement, in which it was agreed that the agreement itself might be pleaded by the defendant in bar to all claims, &c. *Held*, that the plea ought to have set out so much of the deed as operated as a release, and to have expressly averred that the deed did so operate, and that the above plea was, therefore, bad. *Wilson v. Braddyll*, xxv. 550.

48. *Debt for rent—Pleas of never indebted and payment*. Declaration in debt stated, that whilst the defendant was assignee of a term of years, to wit, on the 25th of March, 1849, parcel of the rent for three quarters of a year then elapsed, became in arrear, and unpaid. Plea, except as to 7l. 10s. paid into court, never indebted. The defendant became assignee in May, 1850, and the rent was paid, (including the sum paid into court,) up to the 20th of September, 1851, when the defendant ceased to be assignee. *Held*, that the time when the rent became due, as stated in the declaration, was material, and, therefore, there was a good defence under the plea of never indebted, and that a plea of payment of all rent due from the defendant was unnecessary. *Johnson v. Gibson*, xvi. 282.

XIV. *Miscellaneous Cases.*

1. *Account—Allegation of reasonable time.* A declaration in account stated that A and B, the tenants in common in fee, made a lease with a general covenant on the part of the lessee to pay the rent (without a saying to whom) on Michaelmas and Lady-day. A died, and, on the following Lady-day, the tenant paid half year's rent to B. It appeared at the trial that B, the plaintiff, the heir at law of A, received 12s. 6d. from B; but he claimed 6l. 5s., which was the amount of half of the half year's rent. *Held*, on motion in arrest of judgment, that the declaration which was in the usual form was good, without any allegation that, after a request to account, a reasonable time had elapsed before the action was brought. *Beer v. Beer*, ix. 468.

2. *New assignment—Action against common carriers—Allegation of gross negligence—Amendment—Surplusage.* The plaintiffs declared against the defendants as common carriers, subject to the terms of a special notice, for the loss of a truss of silk by the gross negligence of the defendants and the felonious acts of their servants. The defendants pleaded, except as to the gross negligence and felony, that the goods were such as are excepted in the Carriers' Act, and that the plaintiffs did not declare their value. The plaintiffs new assigned, that they had brought the action for that the defendants' servants had feloniously stolen the goods. The new assignment was *held* bad, on demurrer; and the plaintiffs were allowed to amend on payment of costs, and to reply that the goods were lost by the felony of the defendants' servants through the gross negligence of the defendants. *Held* also, that the allegation of gross negligence and felony in the declaration was surplusage, and that a replication of felony only without an allegation of gross negligence would have been bad. *Butt v. The Great Western Railway Co.* vii. 443.

3. *Colonial judgment, action on—Insolvency.* To an action on a judgment at the Cape of Good Hope, the defendant pleaded that by an ordinance in that country relating to insolvents, it was enacted that the court might, on the petition of an insolvent, place his estate under sequestration, and that further execution of any judgment against him or his estate for any debt should, after lodging the order for sequestration, be stayed during the pendency of such sequestration, and that all actions pending against any insolvent for any debt provable against his estate should, upon any order being made for sequestration, be stayed. The declaration then stated the petition of defendant, the surrender of his estate, its being under sequestration, and that it was distributed, and upon such distribution the plaintiffs received a dividend of 1s. 6d. in the pound on the amount of the judgment debt in the declaration. *Held*, on demurrer, that the plea was bad, as it merely showed a temporary suspension of the execution during the pendency of the sequestration, but not a discharge of the person or estate of the insolvent. *Frith v. Wollaston*, viii. 559.

4. *Insufficient allegations.* In an action of trover and conversion, the defendant pleaded that he was lawfully possessed of a certain close, &c., and that at the time of the alleged conversion, he was excavating the earth and soil of the said close for the purpose of making, and was then excavating, digging, and making, in and upon the said close, a certain saw-pit, &c.; and because the said goods and chattels in the plaintiff's declaration mentioned were without the lease or license of the defendant, and against his will, &c., put and placed upon the said close by the plaintiff, and were then so buried in the said close and so imbedded in the earth and soil thereof that, without a little cutting the same, the defendant could not excavate, dig, or make the said saw-pit upon the said close, he, the defendant, at the time of the alleged conversion, dug and made the said pit, doing no unnecessary damage to the plaintiff, &c. *Held*, that it was a misdirection to leave it to the jury to find what was the defendant's intention in making the saw-pit in that place, whether he really intended to cut the timber, or *bonâ fide* had an intention of making the saw-pit; and that the plea was bad, as it did not state that the timber was buried in the place by the plaintiff. *Simmons v. Lillystone*, xx. 445.

5. *Insolvency—Detinue.* Sect. 44 of the 1 & 2 Vict. c. 110, provides that, in case any prisoner as to whose estates and effects any vesting order shall have been made, shall, by the consent or default of his detaining creditor, be discharged out of custody without any adjudication being made, in such case no action shall be commenced against the provisional assignee, nor against any person duly acting under his authority, except to recover any property, &c., of such prisoner detained after an order made by the insolvent court for the delivery thereof and demand made thereupon. To an action of detinue, the plea stated proceedings in the insolvent court and the making of a vesting order, whereby the goods of the plaintiff in the declaration mentioned, became vested in S. S., the provisional assignee; and alleged that the defendant, as the servant and by the authority of the said S. S., so being such provisional assignee after the making of the said vesting order, detained the said goods in the declaration mentioned. The replication alleged that, before the defendant detained the said goods, the plaintiff was discharged out of custody by the default of his detaining creditor, without any adjudication being made by the court, and that the defendant did not detain the said goods by virtue of any order, authority, or command of the said S. S. made or given to the defendant before the plaintiff was so discharged as aforesaid. On special demurrer to the replication, it was *held*, that it admitted that the goods were detained by the defendant under the authority of S. S. given after the plaintiff's discharge, but before any order of the insolvent court for the delivery of the goods; and that although, on the discharge without adjudication, the property revested in the insolvent, the plea was an answer to the action. *Held*, also, that the allegation in the plea, that the defendant detained by the authority of the provisional assignee, was not premature, and might have been traversed by the replication. *Kernot v. Pittis*, xiv. 77.

6. To the sum of 3,000*l.*, parcel, &c., of an *indebitatus* count in debt, the defendant pleaded a subsequent agreement to deliver to the plaintiffs an indenture of covenant to pay the said sum of 3,000*l.* on a certain day, and that the defendant, in pursuance of such agreement, did, with the consent and at the request of the plaintiffs, execute and deliver to the plaintiffs such indenture, and did thereby covenant to pay the said sum of 3,000*l.* Replication, that the said indenture was made by way of security for the payment of the said debt of 3,000*l.*, and that it was always expressed by the said indenture that it was made as such security. *Held*, that the plea was a good plea of merger as to so much of the debt to which it was pleaded, and that the replication was no answer to it. *Price v. Moulton*, ii. 303.

7. *Nolle prosequi—Nonsuit.* Where, in an action of contract against two, one of the defendants pleaded never indebted and the other never indebted and infancy, and the plaintiff joined issue on all the pleas except that of infancy, as to which he entered a *nolle prosequi*, it was *held*, that the plaintiff had thereby admitted that there never was any joint binding contract, and that he ought to be nonsuited. *Boyle v. Webster*, x. 394.

8. *Incomplete issue—Notice of trial.* Declaration contained two counts. The issues on the first count were complete; the second resulted in two surrejoinders, concluding to the country. The plaintiff added *similiter*, and delivered issue, with notice of trial for the 7th August. On the 6th, the defendants returned the issue and notice of trial, having demurred to one surrejoinder, and delivered a rebutter to the other. On the 7th, the plaintiff redelivered the issue, stating that he should rely on the notice of trial and the issues in fact. The plaintiff then entered a *remittitur* as to the proceedings demurred to, tried the cause, and (the defendants not appearing) obtained a verdict. *Held*, that the issue was incomplete on the 7th; that the notice of trial for that day was, therefore, void, and it could not be rendered valid by any subsequent proceedings. *Poole v. Pain*, viii. 314.

9. *Plea of "not guilty by statute."* Under a plea of "not guilty by statute" a jail-keeper, against whom an action on the case is brought, for not having the body

of a debtor before the court pursuant to a *habeas corpus ad satisfaciendum*, may give in evidence the statute and special matter. *Harvey v. Hudson*, i. 428.

10. *Semble*, that sect. 75 of the Common-law Procedure Act applies only to pleas that confess and avoid, and not to pleas of denial. *Wilkinson v. Kirby*, xxvi. 371.

11. *General issue—Partnership—Mortgage*. Where there had been a negotiation by one of two partners, with the sanction of the other, for an advance of 2,000*l.* to the partnership, of which 500*l.* was, in consequence, advanced, and afterwards 1,500*l.*, on an agreement in writing for a mortgage, as security for the whole 2,000*l.*, which was subsequently executed, it was *held*, that, in an action for the 2,000*l.* on the common counts, the agreement being produced, but not the deed, there was a defence as to the whole amount on the general issue; the question not being raised at the trial, and left to the jury, and found by them in favor of the plaintiff, that the 500*l.* was originally a separate and independent advance, not made in contemplation of the deed; in which case the defendant might have applied to amend his plea by pleading the merger of the simple contract debt in the subsequent specialty. *Holder v. Montgomery*, xxx. 516.

12. *Poor rate—Costs of distress—Tender*. In an action of trespass the defendants pleaded in justification that the plaintiff was duly assessed for the poor rate; that the same not being paid on demand, he was duly summoned before two justices; that he did not appear, but that the churchwardens and overseers of the township appeared, and the justices, after proof of the rate, &c., did, pursuant to the statute, issue their warrant to the overseers, to levy by distress upon the goods of the plaintiff the said rate, and a further sum for costs incurred by the churchwardens and overseers; that the warrant was delivered to T. as such overseer to be executed, and by virtue thereof the defendants, as servants of the said T. as such overseer and at his command, and for the purpose of executing the same, as such servants, committed the trespasses complained of. The plaintiff replied that before execution or notice of the warrant he tendered to T. the amount of the rate. *Held*, upon demurrer, that the replication was bad for not averring a tender of the costs; also, that the plea was good, as the justices had power to award costs to the parties applying for the warrant, and the overseers had a right to appoint deputies for the execution of the warrant. *Walsh v. Southwell*, iv. 420.

13. *Collision—Negligence—Plea—Replication*. To a declaration for negligence in causing a collision in the Thames, the defendant pleaded that the merits had been tried in the court of admiralty, where it was held that the collision occurred through the plaintiffs' negligence, and not by the defendant's. *Held*, a bad plea, for not showing that the collision occurred within the admiralty jurisdiction; and that the allegation "that due proceedings were taken, and in due form of law determined," did not cure the defect. *Harris v. Willis*, xxix. 280.

14. The replication was, that the plaintiffs had duly appealed to her Majesty in council against the decision, and that the appeal was pending. *Held*, a bad replication. *Id.*

15. *Informal plea of fraud, &c.* To a declaration upon a written agreement to purchase of the defendant his term in a farm, &c., alleging that the defendant had not delivered up possession, the sixth plea stated that the defendant in his lease covenanted with the lessor not to assign without his consent; and being desirous of parting with the farm, applied to the lessor, who stated that if he could find a successor eligible as tenant, after an opportunity of inquiring, there would be no obstacle; that the agreement was made for the purpose of J. M. becoming occupier of the farm, and the defendant was induced to enter into it on the faith that the plaintiff knew; and the plaintiff, to induce the defendant to enter into it, represented, that J. M. was a person of respectability, &c., and could give references; whereas, J. M. was not, &c., as the plaintiff well knew. *Held*, that the sixth plea was a good, though informal, plea of fraud; and that the representation was material to the agreement, and not collateral. *Canham v. Barry*, xxix. 290.

16. The seventh plea alleged that the agreement in the declaration was entered into "on the condition and subject to the terms" that the said J. M. should give references, &c. *Held*, that it was a bad plea, as endeavoring to vary the terms of a written contract; *dissentiente*, Maule, J., who held that the plea might mean that the contract in the declaration contained the condition and terms, though they were not set out. *Ib.*

17. If a libel plead that a marriage was procured by the parents of the man, the woman being only fourteen years old, and under their custody and control, the facts pleaded raise a sufficient case of fraud to make the libel admissible. *Hull v. Hull*, v. 589.

18. *Consideration of promissory notes—Composition—Preference.* To counts upon three several promissory notes, the defendants pleaded that they were indebted to the plaintiff in a certain sum and had accepted four bills of exchange for the amount, drawn by the plaintiff, and payable to his order; that the defendants compounded with their creditors, to which composition the plaintiff agreed, receiving a preference over the other creditors, and giving a release of the debt; that it was his duty to take up the bills of exchange, which he did not do till he was induced to do so by the defendants giving him the promissory notes mentioned, and that there was no other consideration for the notes. The plaintiff replied *de injuria absque tali causa*. *Held*, that the plea was proved; and that, as the fraudulent preference of the plaintiff did not make the composition void against him, there was no sufficient consideration for the notes. *Mallalieu v. Hodgson*, v. 279.

19. As to pleadings in an action for freight, see, *Tindall v. Taylor*, xxviii. 210; *Place v. Potts*, xx. 505.

20. As to pleadings in an action for breach of the covenants in a lease to repair and cultivate, see *Martyn v. Clue*, xvi. 262.

21. As to pleadings in an action upon a policy of marine insurance, see *Hall v. Janson*, xxix. 111.

See PARTIES.



XV. Pleadings in Equity.

1. *Bill against representatives of deceased trustees—Cestuis que trust.* A bill against the representatives of deceased trustees by co-plaintiffs claiming a beneficial interest as *cestuis que trust* in the subject-matter of the suit, one of them at the same time representing the estate of one of the several trustees who was either primarily liable or jointly liable with his co-trustees for a breach of trust, cannot be sustained, must be dismissed, and with costs as against those defendants who have taken objection by their answer. *Griffith v. Vanheythuysan*, iv. 25.

2. *Erroneous allegation—Specific performance.* A tenant for life filed a bill properly setting forth his title, but by mistake alleging that he was tenant in tail. Prayer of the bill was to restrain certain persons from trespassing upon his mine to obtain an account and payment for their past alleged workings. The suit was promised under an agreement, whereby the defendants were to pay a certain sum with costs subsequently to be taxed. *Held*, that the erroneous allegation in the bill could not have led to a misapprehension of it, so as to prevent a court of equity enforcing the agreement for compromise, and that the defendants were not entitled to have the plaintiff's title deduced and verified. *Richardson v. Eyton*, xv. 51.

3. *Revoking charter—Allegation of fraud on shareholders.* General allegation on one shareholder, of fraud on all the shareholders and on the crown, may be ground for revoking the charter of a company, taking away its grant. *M' Lindsay*, xi. 249.

4. *Sale by prior mortgagee—Notice to puisne incumbrancer—Purchase from incumbrancer.* An annuitant having power of entry and distress, to secure his

charged upon certain leasehold houses, was served with notice by a railway company of their intention to buy. The company subsequently purchased the property from a prior mortgagee, who had a power of sale. The annuitant filed a bill, not containing any allegations of fraud, or other improper conduct on the part of the company in their purchase from the first incumbrancer, praying payment of the annuity and all arrears, or of the amount proper for the redemption of the annuity. *Held*, that the plaintiff was not entitled, on such a bill, to the relief he asked, and it was dismissed. *Hill v. The Great Northern Railway Co.* xxvii. 198.

5. *Answer*. The defendants to a bill (against brokers) were interrogated as to which of them received the several sums of money, and whether the same were paid in cash or checks. They set forth an account of their receipts as joint, and only specified the sums received, which was *held* sufficient. The answer stated, that an account of all dealings was set forth in the schedules, and stated that the defendants have set forth, to the best of their belief or otherwise, a full account. *Held*, sufficient. *Robinson v. Lamond*, ii. 144.

6. *When answer must support plea*. Where a bill alleges facts which, if true, would contradict the plea or be evidence to discredit it, the plea must be supported by an answer, if not denying, at least giving the plaintiffs discovery as to those facts. *Hunt v. Penrice*, xxiii. 326.

7. As to sufficiency of answer, see also *White v. Barker*, xv. 325; *Chadwick v. Chadwick*, xiii. 525; *Williams v. Trye*, xxiii. 501; *Owen v. Homan*, iii. 112.

8. *Plea—False description of plaintiff*. A plea that the description given of the plaintiff in his bill is false, will lie, but the plea must sufficiently aver that the description was false at the time of filing the bill. *Smith v. Smith*, xxiii. 265.

9. *Demurrer—Amendment—Heriots and reliefs—Confusion of boundaries*. The plaintiffs, who were lords of a manor, alleged by their bill that thirty-eight estates held by the defendant within the manor, had been subject, from time immemorial, to the payment of certain sums in lieu of heriots and reliefs; that by reason of the confusion of boundaries, the plaintiffs could not ascertain in respect of what particular estates the payments were respectively due, and were therefore unable to recover the amount by distress. The bill prayed that the plaintiffs might be declared entitled to the several sums claimed, and that the precise boundaries of the estates might be ascertained. The bill alleged the heriots and reliefs to be payable by custom, but there was no allegation of a custom of distress. A demurrer was allowed, without costs, and leave given to amend. *The Mayor, &c. of Basingstoke v. Lord Bolton*, xv. 539.

10. A filed a bill to make shares which B held in a bank available to the payment of a debt due him from B, alleging that though the company had a prior charge on the shares for a debt due them from B, for this debt they had other securities. A demurrer was allowed because the persons who had given these securities were not made parties; and this, although the bill contained a charge to discover who persons interested in the relief were, since it did not allege that the plaintiffs did not know who they were. Costs taxed; leave to amend given, &c. *Macintyre v. Connell*, iii. 249.

11. *Bill for collection of note alleged to be lost—Amendment—Answer*. Where executors file a bill stating that the defendant is indebted to them on a promissory note which has been lost, praying an account, &c., offering to indemnify the defendant, &c., and the defendant answers that he has the note and nothing is due thereon, the bill must be amended, as the plaintiffs can have no title to relief in equity on this frame of the bill. *Cooke v. Darwin*, xxiii. 625.

12. *Demurrer—Injunction*. The fact that the plaintiff has not obtained a verdict at law is no ground for a demurrer to a bill for injunction. *Sollau v. De Held*, ix. 104.

13. *Bill for discovery in aid of a plea*. A bill for discovery in aid of a plea, pleaded by the plaintiff in equity to an action by a trustee upon a covenant entered into by

the plaintiff in equity for the payment of an annuity to the plaintiff at law, upon trust for one C. N., stated that the deed of covenant was valid on the face of it, but that the consideration for it was a prospective illicit cohabitation subsequently had between the plaintiff and the said C. N., which had been since discontinued, and that discovery of the true consideration was necessary for his defence at law. Demurrer for want of equity by the plaintiff at law overruled, no discovery being sought which could by possibility subject him to pains and penalties. Although, where a bill is for discovery and relief, it may be demurrable, yet where it is for discovery only, in aid of a defence at law, it will not be demurrable, unless the discovery would infringe upon some known rule. *Benyon v. Nettlefold*, ii. 113.

14. *Remote possibility of party's interest.* Where a party, having only a remote possibility of interest in an estate, filed a bill for relief, claiming to be equitable tenant in tail, it was *held*, that, though he had no title to the relief prayed for, yet the remote possibility of his becoming interested prevented the bill from being demurrable. *Egerton v. Brownlow*, vii. 170.

15. *Death of party may change effect of demurrer—Practice.* A change in title, as by the death of a party, may destroy the force of a demurrer; in such case the original bill should be left to take its course, and a new bill filed stating real title. *Wright v. Vernon*, xv. 261.

16. *Insurance.* The A. Company, in 1847, granted an insurance for 3,000*l.* on the life of C. D., and afterwards, as a cross insurance, insured the life of C. D. for 1,000*l.* in the I. and L. Company. In 1848, the 3,000*l.* policy was bought by the A. Company from the grantee, in consideration of an annuity. In 1850, C. D. died, and the A. Company brought an action to recover the 1,000*l.* The I. and L. Company filed a bill to restrain the action, and to have the 1,000*l.* policy delivered up, it being alleged that, in consequence of the purchase of the 3,000*l.* policy, the 1,000*l.* policy became invalid. A demurrer to this bill was *held* not to be sustainable. *The India, &c. Life Assurance Co. v. Dalby*, vii. 250.

17. *Speaking demurrer.* The demurrer to a bill for specific performance, stating "that it appears by the bill that neither the agreement which is alleged by the bill and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this defendant, nor any other person lawfully authorized within the meaning of the statute," is not a speaking demurrer. *Wood v. Midgley*, xxvii. 206.

18. *Impertinence—Allegation of solvency—Answer setting up concealment of the fact of insolvency.* Bill by the *cestui que trust* under a marriage settlement to compel the trustee to pay money, which the husband had covenanted to settle, but which covenant the trustee had neglected to enforce previously to the bankruptcy of the husband, some years after his marriage. The bill alleged that for many years the husband was in prosperous circumstances, and the covenant ought then to have been enforced. The trustee, by his answer, stated that the husband, at the time of his marriage, was in very needy and embarrassed circumstances, and continued so until his bankruptcy, and set forth several transactions, alleged to have been fraudulently contrived by the husband, and that he had, both previously and subsequently to his marriage, resorted to fraudulent means to supply his wants and avert discovery of his true position. *Held*, that where the bill alleged solvency, it was not irrelevant for the defendant to introduce a statement of fraudulent practices committed from time to time to conceal the fact of insolvency. *Balguy v. Broadhurst*, i. 166.

19. Matter ought not, at the commencement of a suit, to be treated as impertinent, which may, at the hearing, be found relevant. *Reeves v. Baker*, xvii. 569.

20. *Scandal.* The answer of a defendant contained these passages: "The plaintiff is desirous of annoying and harassing the defendant to extort money from him." "The plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant, in order to be relieved from being

harassed by the vexatious and illegal conduct of the plaintiff." The plaintiff took exceptions to these passages for scandal. The exceptions were overruled. *Stanton v. Holmes*, iii. 171.

21. A trustee called on the defendant to set forth whether, for the reasons in the bill stated, or some other and what reasons, he was not unable to execute the trusts, "or how otherwise." The defendant, in his answer, imputed to the plaintiff's solicitor needless delay in effecting a proposed compromise, his inducement being to favor another solicitor, his personal friend. *Held*, that the statement was not scandalous. *Reeves v. Baker*, xvii. 509.

PLEDGE.

1. *Sale of pledge alleged to be fraudulent—Claim of pledgor not prejudiced by payment in full to pledgee.* A defendant in an action on bills of exchange, to secure which he had made a deposit of nine warrants, with power to the plaintiff to sell the nine and apply the proceeds towards the payment of the bills, claimed that the plaintiff had made a fraudulent sale, and applied for a stay of proceedings on payment of the whole debt and costs, but it was *held*, that the defendant would not be prejudiced, in any cross claim which he might have, by paying the less sum demanded in the declaration, and that the plaintiffs were not bound to accept more than was actually due. *Arnold v. Goodered*, viii. 332.

2. *Of property not belonging to pledgor.* *Semble*, that where property is pledged to which the pledgor has no title, and which he has no right to pledge, the pledgee is bound to return it to the true owner; his undertaking, in the absence of a special contract to the contrary, being that he will return it to the pledgor, provided it turns out not to be the property of another. *Cheesman v. Excell*, iv. 438.

3. *Right of factor to pledge goods intrusted to him for sale.* Notice to a pledgee of the fact that the goods pledged were consigned to the pledgor with directions to sell simply, will not vitiate the pledge; otherwise, if the pledgee had notice that the consignee was prohibited from pledging. *Navulshaw v. Brownrigg*, xiii. 261.

POOR AND POOR LAWS.

See PAUPERS.

POWER.

I. CREATION OF POWERS; EXTINGUISHMENT.

II. REVOCATION OF POWERS; NEW APPOINTMENT, &c.

III. EXECUTION OF POWERS.

IV. MISCELLANEOUS CASES.

I. *Creation of Powers; Extinguishment.*

1. *Creation of power.* The rule has been long established, that the donee of a power must either expressly refer to the power, or to the subject-matter of it. *Cooke v. Cunliffe*, vii. 415.

2. A condition annexed to an appointment, and inconsistent with the power, is void. *Blacket v. Lamb*, x. 5.

3. *Extinguishment by deed.* By a marriage settlement property was conveyed to trustees for the benefit of the wife for life, then for the husband for life, giving him the power of appointment by will; and, in default of such appointment, for the benefit of the children of the marriage, with remainder over. By a subsequent deed, which recited that there were no children, the husband and wife conveyed to trustees for sale, covenanting to levy a fine for the purpose of extinguishing the interests of the wife,

which fine and release were to extinguish the husband's power of appointment, except to confirm the deed. The fine was levied, but subsequently, contrary to expectation, a child of the marriage was born. The husband confirmed the deed by will. The child refused to join in the sale of the estate. *Held*, that the power of appointment was extinguished by the deed, except to confirm the same, and specific performance of the contract for sale was decreed. *Walmsley v. Jowett*, xxiii. 353.

II. Revocation of Powers ; New Appointment, &c.

1. *Power not exhausted by a revocable act.* By law, a power which, in any mode and to any extent whatever, has been exercised revocably, and the revocable appointment made under which has been revoked, without being operated upon, is generally, if not universally, of the same force, and exercisable in the same manner, as if the revoked appointment had not existed ; and a power cannot be necessarily exhausted by a revocable act, although exercising otherwise the power to the utmost, more than by a conditional act, or by an act of merely partial execution—i. e. of execution in no sense and in no possibility full and complete. *Evans v. Saunders*, xxxi. 366 ; *Montagu v. Kater*, xx. 387.

2. *Power to appoint by deed or will—Distinct powers—Revocation—New appointment.* A power to appoint by deed or will does not constitute two separate and distinct powers, but is a single power, with a restriction on its exercise, requiring it to be exercised by one or other of those two instruments, but leaving to the donee the option, within the limits of that restriction, to choose which instrument he will use in exercising the power. *Evans v. Saunders*, xxxi. 366.

3. Where, by the terms of the reservation of powers of revocation and new appointment, the donee is authorized to exercise them, at his option, either by the same or by different deeds, if he first exercises by deed the power of revocation, the power of new appointment continues to subsist as a valid operative power, capable of being exercised by a subsequent deed ; and admitting that it is as competent to the donee of such powers, exercising only the power of revocation, to release, extinguish, or destroy the power of appointment which was reserved to him, yet the mere exercise of the power of revocation as above will not *per se* have any such effect. *Id.*

4. *Revocation by will.* Personal estate (a first fund) was settled upon trust for such children and in such shares as A B should appoint by deed or will. Personal estate (a second fund) was bequeathed upon trust for such children and issue of children, and in such shares as A B should appoint by deed or will. By a deed-poll, executed with the formalities required by the will, A B appointed one fifth of the second fund to one of her children, and declared that, in case she should not otherwise direct, the remainder of that fund should belong to her other three children and the children of a deceased child, and then she reserved to herself a power of revocation and new appointment. A B made her will, by which she gave, devised, and bequeathed, and by virtue of the power given by the settlement, "or otherwise howsoever enabling her," appointed all the first fund or funds she "otherwise had power to appoint" in a particular manner. *Held*, that the will did not operate as a revocation and new appointment of what had been previously appointed by deed. *Pomfret v. Perring*, xxxi. 289.

5. *Revocation—New appointment.* A, tenant for life, and B, tenant in tail, of estates, subject to prior charges, suffered a recovery, and by a deed of 1793, resettled the estates in strict settlement, and power was given to A to charge the estates with 3,000*l.*, and to B to charge the estates with 6,000*l.* respectively, for their own benefit. The deed contained a joint power to A and B, of revocation and new appointment. A and B by deed revoked "all the uses, trusts, limitations, intents, and purposes" by the deed of 1793 limited ; and declared that the estates, "subject to the several charges and incumbrances created," should enure to the new uses. *Held*, that the power to charge the 3,000*l.* and 6,000*l.* was not thereby revoked. *Evans v. Evans*, xix. 533.

6. *Lessee not liable to contribute to charges on estate.* A. and B., under the power of leasing, demised part of the settled estates to S., the wife of B., by way of jointure. *Held*, that S., in respect to her life interest, was not liable to contribute to the charges on the estates. *Ib.*

7. *New power, reservation of, by deed of appointee.* Where a person has a general power of appointment by deed, whether it is a primary power, (i. e. a power preceding the uses declared in default of appointment,) or be a power of appointment connected with a power of revocation, and following the uses declared by the instrument creating the power, and exercises that power of appointment, and by the deed exercising that power reserves to himself a new power of appointment, whether such new power be reserved as a primary power or as connected with a power of revocation, such power so reserved is to all intents and purposes a new power, newly created by him, and is not the old power, which he has exercised; and it is equally a new power, whatever the kind or degree of restriction which he has thought fit to impose on its exercise—i. e. whether such restriction be precisely the same in kind and degree as that imposed on the old power or be greater or less in kind or degree. *Evans v. Saunders*, xxxi. 366.

8. *General power of appointment.* A general power of appointment over the fee will not be exhausted by an appointment to uses exhausting the fee, but reserving a power or revocation. Where a general power of appointment by deed or will has been exercised by an appointment by deed, reserving a power of revocation and appointment to new uses to be exercised by deed only, the creation of this last power to appoint by deed only cannot, without clear evidence of intention, be taken as operating to destroy the original power to appoint by deed or will; and, *semble*, that if it is to be taken as at all affecting such original power, it is to be considered merely as in substitution of that branch of the original power which it purports to replace, namely, the power to appoint by deed. *Semble*, that two general powers of appointment in fee can exist in the same person at the same time. *Ib.*

III. Execution of Powers.

1. *Execution by will.* The testator, a tenant for life of real estate, with remainder to such of his children as he might by deed or will appoint, made an appointment to trustees upon trust for A, his son, his heirs, &c., and, to be conveyed to him when he should attain the age of twenty-three; and in case of the death of A before he should attain the age of twenty-one, then to the use of the testator's other sons in tail, with remainder over. The testator then ordered that the rents and profits of the residue of the estate should accumulate for the aforesaid purposes. *Held*, that the power of appointment was duly exercised. *Peard v. Kekewich*, xi. 120.

2. A testatrix, having a life estate in sums of stock, with a power of appointment by deed or will, if by will, to be by her signed and published in the presence of two or more witnesses, by her will, which was unattested, and did not refer to the power, gave several sums to charities, &c. She had neither at the date of her will nor at her death any sums of stock of her own upon which the will could operate. *Held*, affirming the decision of *Wigram, V. C.*, first, that the testatrix intended by this will to execute her powers of appointment; and that, these being specific gifts, the state of the testatrix's property at the date of the will and at her death might be looked at. Secondly, that, notwithstanding that the power required the will to be signed and published in the presence of two or more witnesses, the will was a good execution of the power in favor of charities. *Innes v. Sayer*, viii. 157.

3. *Will—Power—27th section of the Wills Act.* A testator bequeathed certain property to A, for life, with remainder to such persons as A should, by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed and delivered in the presence of, and attested by two or more witnesses, appoint. A made a will,

dated after the operation of the Wills Act. *Held*, that the will was an execution of the power independently of the Wills Act. *Turner v. Turner*, xiii. 204.

4. *Appointment first by deed afterwards revoked, and secondly by will.* A having, under a settlement, a general power of appointment either by deed or will, appointed by several successive deeds, in each deed revoking former appointments, and reserving powers of revocation and new appointment by deed only. By a deed poll she afterwards revoked the last deed of appointment. By her will she made a devise, purporting to be in exercise of her original power of appointment. *Held*, that after the execution of the first deed of appointment the original power was gone, and therefore that the will of A was inoperative. *Evans v. Saunders*, xvii. 314.

5. *Dealing with specific property by will.* When it is clear that a testator is dealing with any specific property in his will, whether the property over which he has a power be real or personal, the will must be taken as a valid execution of the power. *Lake v. Currie*, xiii. 485.

6. *Residue of funds.* By a marriage settlement power was given to the wife to dispose by will immediately of a part of certain funds; and, after the death of her husband, of the residue of the funds. By her will she disposed of certain sums and then gave and bequeathed all the rest, residue, &c., of her personal estate to certain persons. She died in the lifetime of her husband. *Held*, that the will operated as an execution of her power as to the residue of the funds. *Harvey v. Stracey*, xiii. 13.

7. Estates were settled to such uses as S. S. should appoint by deed sealed and delivered, or by will signed and published, &c. S. S. exercised the power by her will, of which the attestation clause was: "Signed and sealed in the presence of," &c. No attestation was contained of the publication. *Held*, that the power was well exercised. *Vincent v. The Bishop of Sodor and Man*, iii. 198.

8. *By settlement of part of the property by a widow on one of her own issue.* A. K., by will, gave all his realty and personalty to his wife O., to bring up his children, and when they came of age, "to settle" on them what she should deem "prudence," reserving to herself maintenance. If she married again, T. P. was to become trustee for the children of the testator. At his wife's death what property remained was to be equally divided among the children of the testator then living. The wife and five children survived the testator; two children afterwards died under twenty-one. The widow settled part of the property on one of the children and her issue. *Held*, that this was a bad execution of the power, so far as it gave any interest to grandchildren. *Kennerley v. Kennerley*, xii. 343.

9. *Defective execution of, which will not be aided in equity.* Lands were settled to such uses as A and B should, by a joint deed, executed in the presence of witnesses, appoint; and, in default of appointment, to use in strict settlement, A and B being the first tenants for life in succession. In 1845, the S. W. Railway Company, contracted with A and B for the sale of land, but the price was not fixed. In 1846, the company advanced part of the consideration money to them on their joint receipt, in which it was stated that the money was "in respect of the lands, part of our estates, required for the purposes of the S. W. Railway Company." Before any formal exercise of their joint power by A and B, A died. Afterwards, other parts of the settled lands were contracted to be sold to the company. *Held*, that this was not such a contract as could be enforced against B; and that the receipt was not such a defective execution of the power as would be aided in equity. *Morgan v. Milman*, xiii. 312.

10. B., the obligee of a bond for the payment of a sum of money, assigned the same, on her marriage, to C., by way of settlement, for her own separate use for life, then for her children, &c. Years after, B.'s husband, being indebted to his bankers, induced her to sign an unsealed and unattested paper, of whose contents she was ignorant, guaranteeing the repayment of advances made to him and promising to deposit the bond as security, which was afterwards done. By the deed of settlement to C. it was provided that the bond was to be held in trust for B., &c., and for any person

to whom she might assign it, or appoint by a sealed instrument, attested by two witnesses. *Held*, that the paper signed by her in favor of the bankers was not such a defective execution of her power as equity would aid, but that her life estate was bound. *Thackwell v. Gardiner*, xii. 285.

11. *Fraudulent exercise of power.* Where a father, having the power of appointment to several children, makes a corrupt bargain in favor of one of them, and then appoints the remainder to the others, the last appointment is valid, even if it were somewhat influenced by the corrupt bargain first made. *Rowley v. Rowley*, xxiii. 302.

12. *Married woman's power to dispose of settled property.* A power enabling a married woman to dispose of settled property in the event of her dying in the lifetime of her husband, is satisfied by her surviving him, and becoming absolutely entitled to the property; and a will executed by her during their joint lives was held to be inoperative as an appointment. *Trimmell v. Fell*, xix. 606.

IV. *Miscellaneous Cases.*

1. *Power of Sale—Settlement.* A, the protector of a settlement containing a power of sale by the trustees with her consent, does not, by becoming an executing party to a disentailing deed, in which her life-interest is expressly reserved, deprive herself of her right to consent to a sale of the estates comprised in such settlement. *Hill v. Prichard*, xxiii. 549.

2. *Perpetual power.* A power to be exercised solely by virtue of a contract between the parties to a settlement, and which provides that a debt upon an estate shall be liquidated in a particular manner, is not within the doctrine of perpetuity, to whatever extent of time the operation of that contract extends. In this case the power could have been barred by the tenant in tail on his attaining the age of twenty-one. *Briggs v. The Earl of Oxford*, xi. 265.

See APPOINTMENT. WILLS.

PRACTICE.

I. IN HOUSE OF LORDS AND PRIVY COUNCIL.

II. IN ADMIRALTY.

III. IN CONSISTORY COURT AND PREROGATIVE COURT.

IV. IN QUEEN'S BENCH BAIL COURT.

V. IN COUNTY COURT.

VI. IN CRIMINAL CASES.

VII. BANKRUPTCY.

VIII. ADMINISTRATION, &C.

IX. APPEARANCE, ATTACHMENT FOR WANT OF; DISTINGUISH TO COMPEL, &C.

X. ABSENT PARTY.

XI. NOTICE OF ACTION; OF TRIAL, &C.

XII. RIGHT TO BEGIN.

XIII. POSTPONEMENT OF TRIAL.

XIV. JUSTICES' AND JUDGES' ORDERS; ORDERS OF COURSE.

XV. JUDGMENTS.

XVI. STAY OF PROCEEDINGS.

XVII. APPEALS.

XVIII. WAIVER.

XIX. PEREMPTORY UNDERTAKING.

XX. AFFIDAVITS.

- XXI. EVIDENCE.
- XXII. UNDER COMMON-LAW PROCEDURE ACT AND OTHER STATUTES.
- XXIII. MOTIONS.
- XXIV. CREDITORS' SUITS.
- XXV. CLAIMS.
- XXVI. UNDER CHANCERY PROCEDURE AMENDMENT ACT, AND OTHER STATUTES.
- XXVII. UNDER WINDING UP ACTS.
- XXVIII. ATTACHMENT FOR WANT OF ANSWER, &c.
- XXIX. REHEARING IN CHANCERY.
- XXX. DISMISSAL OF BILL.
- XXXI. SENDING CASE TO COURT OF LAW.
- XXXII. MISCELLANEOUS CASES AT COMMON LAW.
- XXXIII. MISCELLANEOUS CASES IN EQUITY.

I. *In House of Lords and Privy Council.*

1. The lords allowed the opinion of a learned judge who had been present at the hearing of the cause, but who was unable to attend when the judge's opinions were delivered, to be read by one of his brethren, but it was expressly declared that this could not be done as a matter of course. *Stephenson v. Higginson*, xviii. 50.

2. The House of Lords, in disposing of a case where there were to be calculations of payments on one side and of interest on the other, laid down certain principles, and desired the parties on both sides to furnish an agreed statement of facts as to the sums to which these principles were to be applied. The House required this statement of sums to be delivered in before the minutes of the order of the House were given to the parties, and refused to hear counsel on the subject of this statement and of the minutes. *Birch v. Joy*, xviii. 16.

3. An application to advance an appeal for hearing must be made to the appeal committee, and not to the House. *Ib.*

4. When the question is one of fact only, and has been tried by a jury in the court below, the Privy Council will not reverse a judgment upon such finding, unless they are satisfied that the judgment is clearly wrong. *Moore v. Lucas*, xxiv. 70.

II. *In Admiralty.*

1. *Examination of witnesses in court.* Where it is intended to examine witnesses in court, application for a summons for all the witnesses ought to be made before any one of them is produced and examined. *The Resultatet*, xxii. 620.

2. *Cause of damage—Act on petition—Libel refused.* An action in a cause of damage was entered on behalf of the owners of one ship against another; an appearance was given for the latter, and other steps taken as if the suit were to be by act on petition. Defendant's proctor accordingly prepared his act from statements of the crew, who then left the country. Defendant's proctor then prayed a libel, which was refused. *The Baldur*, xx. 627.

3. *Objections to report of registrar and merchants.* In considering objections to the report of the registrar and merchants, in a cause of damage, the court forms its opinion upon the whole of the evidence, whether laid before the registrar and merchants, or brought in subsequently; and will, although inclined to confirm the report, especially in matters within the practical knowledge of the merchants, direct the report to be reformed. *The Alfred*, ii. 541.

4. The evidence on objections to the report of the registrar and merchants being

unsatisfactory, the court offered to the objecting party to refer the accounts back to the registrar, and a merchant and surveyor of shipping to be chosen by the court; expressing its intention to overrule the objections if this course was not assented to. *The Sir George Seymour*, xxii. 618.

5. *Attendance of Trinity masters.* Application was made to the court for the attendance of Trinity masters upon the admissibility of a plea, the allegations therein being charged to be, as matter of fact and of nautical experience, impossible. Application refused. *The Vargas*, iv. 599.

III. In Consistory Court and Prerogative Court.

1. Where parishioners are cited to show cause against the faculty, the proper mode of proceeding in their behalf is by act on petition. *Knapp v. The Parishioners of St. Mary*, v. 562.

2. Faculty to exhume a corpse, with a view to its identity, decreed. *In re Pope*, v. 585.

3. Where the crown has an interest, and the queen's proctor, on notice being given to him, neither consents to nor opposes the grant prayed, he must be served with a decree. *In the goods of Hamilton*, v. 561.

4. A testamentary suit was compromised, and a private act of parliament, settling the rights of the several persons interested, obtained; the several testamentary papers had, in the course of the proceedings in the cause, been brought into the registry. The court refused to order them to be delivered out for the purpose of being examined. *Eyres v. Brodrick*, v. 599.

IV. In Queen's Bench Bail Court.

1. It is not absolutely necessary that the plaintiff's affidavit, in support of the application to the judge to hold the defendant to bail in an action for criminal conversation, should have averred that the plaintiff had sustained damages to the amount of 20*l.*, if the court, on the motion to rescind the order, can see that the judge was justified in holding that the affidavit showed sufficiently that the plaintiff had sustained damage to that amount. The affidavit need not state that the writ of summons has been sued out. It is enough if the judge, at the time of the application for the order, was satisfied that it had issued. It is competent for the defendant to apply to the court to be discharged out of custody, although he has already applied for that purpose, but in vain, to the same judge who made the order warranting his arrest. On such a motion to the court, the defendant may use additional affidavits to those used before the judge, and may show as grounds of discharge that the plaintiff has no cause of action, and also that he, the defendant, has no intention of leaving the country. *Bullock v. Jenkins*, ii. 195.

2. On a motion to rescind a judge's order to hold a defendant to bail in an action, the court will not receive affidavits of collateral facts not submitted to the notice of the judge. *Ib.*

V. In County Court.

1. *Notice of appeal—Bond to pay costs.* The defendant, against whom judgment had been recovered in a county court, gave the plaintiff notice of appeal, and entered into a bond with a surety conditioned to pay the costs of the appeal, whatever the event might be, and the amount of the judgment in case the appeal were dismissed. Afterwards the defendant withdrew the notice of appeal, and gave the plaintiff another notice of appeal, which included additional grounds. The court held, that they had jurisdiction to hear the appeal, and after argument directed judgment to be entered for the appellant with costs, notwithstanding the terms of the bond. *Daniels v. Charley*, vii. 524.

2. *Removal of plaint in replevin—Bond—Costs.* The statute provides that the bond for the removal of a plaint in replevin from a county court to a superior court shall be given to parties in the suit, but if the judge takes the bond himself as obligee, the bond is, nevertheless, good. Secondly, though the suit is improperly removed into the superior court, the proceedings after removal are valid, and the full amount of costs may be recovered by the judge as plaintiff on the bond. *Stansfeld v. Hellawell*, xi. 559.

3. *Address of claimant.* A claimant in the particulars delivered, in pursuance of the 145th rule, was described as of 24 Elizabeth Street, Islington, whereas his true address was 20 Elizabeth Terrace, Islington. *Held*, that the address was sufficiently set forth; and that the county court judge was not justified in dismissing the summons. *Hardy v. Walker*, xxiv. 448.

4. *Particulars of claim—Prohibition—County court.* Where a county court judge decides that the particulars of a claim in an interpleader summons are not sufficient according to the rules made under the County Courts Act, and refuses on that account to hear the claimant, a prohibition lies to stay the further proceedings under the execution, if the particulars ought to have been held sufficient. *Ib.*

5. *Reduction of claim to give jurisdiction—Costs.* The abandonment of the excess above 50*l.* of a claim in a county court, in order to give the court jurisdiction, must be the act of the plaintiff himself, or of some person authorized by him, and not the act of the judge. *Hill v. Swift*, xxix. 482.

6. *Per Alderson, B.* When a cause is brought before a county court over which it has no jurisdiction, the court should not allow jurisdiction to be given it by an act of the plaintiff, without compelling him to pay the costs of the opposite party up to that time. *Ib.*

7. *Notice of appeal.* The judge of a county court thinking a notice of appeal good, is sufficient to give the court of appeal jurisdiction, by rule 151 of county court rules, without statement of grounds of dissatisfaction. *Cannon v. Johnson*, x. 323.

8. *Removal of judge.* An instrument removing a county court judge from office need not set out all the proceedings instituted in order to the removal, with the specific charges or the evidence adduced. If it be drawn up in the words of the act of parliament it will be presumed, until the contrary is proved, that the chancellor has duly exercised his jurisdiction. *Ex parte Ramshay*, x. 445.

9. *Removal of judgment.* The judgment of a county court may be removed into a superior court, under the 1 & 2 Vict. c. 110, s. 22, although the party against whom it has been obtained has already been examined by the judge of the county court, and committed to jail, under the 9 & 10 Vict. c. 95, s. 99. *Copeman v. Gladden*, i. 528.

10. *Suggestion to deprive plaintiff of costs—Affidavits.* Where the defendant's affidavits, on a motion for a suggestion under the County Courts Act to deprive the plaintiff of costs, stated that the residence of the plaintiff was within twenty miles of that of the defendant, and that the cause of action arose wholly within the jurisdiction of the county court of B., which facts were denied by the affidavit of the plaintiff, the court refused to determine those questions on affidavits, and directed the suggestion to be entered, leaving it to the plaintiff to traverse its allegations. *Lewis v. Forsyth*, i. 464. See also *Hush v. Long*, iv. 199.

11. *Order for payment or committal.* An order on a judgment summons, under the 98th and 99th sections of the 9 & 10 Vict. c. 95, by which the judge of a county court ordered a party to pay a debt (previously recovered) by instalments, or on default to be committed to prison, is bad; the party being entitled to a summons to show cause against the committal. *Abley v. Dale*, i. 359.

12. *Notice of claim.* Under the 39th rule of practice for the county courts, a notice of claim to certain goods, stating that they had been assigned to the claimant by deed,

was held to be sufficient, although it did not appear that the deed was good as against creditors. *Regina v. Richards*, iii. 410.

13. *Judge refusing to adjudicate.* If a judge of a county court refuse to adjudicate upon a claim, under sect. 118 of stat. 9 & 10 Vict. c. 95, in consequence of a mistake as to the sufficiency of a notice or other preliminary matter, a *mandamus* will be granted to compel him to hear and determine the claim. *Ib.*

14. *Writ of trial.* A writ of trial, under the 3 & 4 Will. IV. c. 42, cannot be directed to a judge of a county court established under the 9 & 10 Vict. c. 95. *Owens v. Breese*, iv. 536.

15. *Warrant of commitment, how long in force.* The 131st rule made by the county court judges, under the 12 & 13 Vict. c. 101, s. 12, directs that warrants of commitment shall bear date on the day in which the order for commitment was made, and shall continue in force for three calendar months and no longer. Held, that a person arrested under a warrant, within three calendar months after its date, might be detained in custody after the expiration of the three months. *Hayes v. Keene*, xii. 526.

16. *Plaint for recovery of possession—Freehold and leasehold.* The proviso in sect. 58 of stat. 9 & 10 Vict. c. 95, excluding the county court from cognizance of any action in which the title to corporeal hereditaments is in question, applies to the plaintiff for recovery of possession under sect. 122. Therefore, where defendant occupied freehold and leasehold premises under A B in his lifetime, and after his death plaintiff, who claimed under the will of A B, gave defendant notice to quit, and took out proceedings against him, under sect. 122 of stat. 9 & 10 Vict. c. 95, and produced probate of the will, a prohibition was issued as to the freehold premises, but was refused as to the leasehold premises, the probate being conclusive. *Kerkin v. Kerkin*, xxviii. 114.

17. A judgment of the county court cannot be removed into the superior courts for the purpose of issuing execution thereon. *Moreton v. Holt*, xxix. 418.

18. *Mandamus—Nonsuit.* See *Regina v. Stapylton*, vii. 390; *Regina v. The Clerk of County Court of Surrey*, xii. 428; *Outhwaite v. Hudson*, xi. 563.

VI. In Criminal Cases.

1. *Prisoners in custody and on bail—Certiorari to remove indictment.* Several of the defendants were indicted for a misdemeanor. One was in custody on the charge, the others were out on bail. The court of queen's bench, on the application of one of the defendants who was out on bail, granted a *certiorari* to remove the indictment into that court, on the terms that if the defendant in prison did not consent, the applicant was to find bail for him. *Regina v. Drake*, xviii. 410.

2. *Application to judge at chambers—Habeas corpus ad respondendum.* An application for a *habeas corpus ad respondendum* to take a prisoner, in custody on a charge of felony, before justices to answer to another charge of felony, must be made to a judge at chambers, and not to the court. *Regina v. Isaacs*, vi. 185.

3. *Joint and separate convictions.* The stat. 11 & 12 Vict. c. 44, s. 5, which prescribes that if a justice shall refuse to do any act relating to his office, he may be directed by rule of court to do it, does not authorize the court to order justices to draw up one joint conviction instead of two separate convictions against each of two persons against whom a joint information has been laid, and heard and determined before the justices. *In re Clee and Osborne*, x. 365.

4. *Joint plea and appearance.* Where prisoners had joined in their plea at the trial, and were represented by counsel appearing for them jointly, and not separately, it was held, that according to the practice of the court of criminal appeal, they are not entitled to appear by separate counsel at the hearing of the appeal. *Regina v. Bird*, ii. 448.

5. *Recognizance, enlargement of*—Compelling short-hand writer to furnish copy of notes of evidence. A judge of the court of exchequer, sitting at *Nisi Prius*, acting under the provisions of the 14 & 15 Vict. c. 100, s. 19, compelled the defendant in a cause to enter into recognizances to appear and take his trial for perjury at the next session of the central criminal court, and bound the plaintiff in recognizances to prosecute. *Held*, that the court of exchequer had no power either to enlarge those recognizances to a subsequent session of the central criminal court, or to compel a short-hand writer, who was neither an officer nor attorney of the court, to furnish the plaintiff with a copy of his notes of the evidence given by the defendant. *Horridge v. Hawkins*, vii. 582.

6. *Recognizance*. Defendant, being convicted at sessions and imprisoned, brought error in the queen's bench and afterwards in the exchequer. In the latter, he recognized to surrender himself personally, to be dealt with "as our court of exchequer chamber may order." This recognizance was filed in the queen's bench, and defendant discharged by a judge at chambers. On motion, in the queen's bench, to apprehend and recommit him, it was *held*, that the recognizance was before the court, though not appearing in the affidavits. The statute requires it should run "according to the said judgment," and not as above. Therefore, rule absolute. *Dugdale v. Regina*, xx. 86.

7. As no *certiorari* issues out of the court of exchequer, a conviction is properly brought before it, if verified by affidavit. *In re Allison*, xxix. 406.

8. The judge before whom a crown case reserved was tried at the assizes, died before signing it, under sect. 11 & 12 Vict. c. 78, s. 2. The court directed the other judge in the commission to sign it. *Regina v. Featherstone*, xxvi. 570.

9. *Leave to demur*. An indictment against the inhabitants of a township for non-repair of a highway contained no allegation that the defendants had ever repaired the road. The court granted leave to the defendants to demur, with liberty to plead over in case judgment were given against them on the demurrer. *Regina v. Tryddyn*, x. 402.

VII. Bankruptcy.

1. *Bankruptcy of defendant*. If a defendant becomes bankrupt before answer and before decree, the plaintiff can obtain an order to prosecute the suit against the assignees without filing a bill of revivor or supplemental bill. *Lash v. Miller*, xxxi. 387.

2. *Affidavit of debt*. Where a creditor files an affidavit of debt, under the Bankruptcy Consolidation Act, 12 & 13 Vict. c. 106, s. 78, he is bound to notice and deduct any sum due to the debtor arising out of the same transaction as that out of which his own debt arises, and to claim for the difference only; and if he omits to do so, he will be held not to have had reasonable or probable cause for making the affidavit in the amount at which it was made. *Marshall v. Sharland*, i. 281.

3. *Refusal of certificate—Fraud—Rehearing*. Where, under the 5 & 6 Vict. c. 122, s. 39, the bankruptcy commissioner refused the bankrupt his certificate, the commissioner has no jurisdiction to rehear the application for the certificate, except upon the grounds stated in the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 100, namely, false evidence, improper suppression of evidence, or other fraud. *Ex parte Higginson*, x. 150.

4. *Bankrupt-law Consolidation Act—Inspection of documents, &c.* Permission to inspect the documents, instruments, and orders mentioned in the 232d section of the Bankrupt-law Consolidation Act, 1849, applied for under that section by a creditor who has proved his debt, or his attorney, may be refused, until the applicant discloses the use he intends to make of the evidence to be obtained by such inspection. And where the object is to dispute the adjudication, the application may be refused

altogether, as not being a reasonable request within the meaning of the statute. *Ex parte Rimell*, x. 128.

5. Whether the affidavit of the petitioning creditor, the proofs of the act of bankruptcy, and the other proofs filed in court as the foundation of an adjudication in bankruptcy, are within the language of the 232d section of the statute, *quære*. *Ib*.

6. *Verdicts against assignees*. A party having got verdicts against the assignees in respect of some property in the possession of the bankrupt at the time of his bankruptcy, was about to issue execution against the official assignee, in respect of the costs of the actions. The court declined to interfere, considering the ingredient of bankruptcy utterly immaterial in the result of the actions. *Johnson, ex parte*, vii. 314.

7. *Repeal of Bankrupt Acts*. The Vice-Chancellor declined to interfere in a case involving the construction of the repeal by the last Bankrupt Act of the acts mentioned in the schedule thereto annexed. *Higginson, ex parte*, vii. 307.

8. *Entering appearance for assignees*. Leave given to enter an appearance for the assignees of a defendant who had become bankrupt, the assignees having been served with an order, under the 52d section of the 15 & 16 Vict. c. 86, and not having appeared thereto. *Cross v. Thomas*, xvii. 308.

9. *Holding bill till costs in bankruptcy obtained*. The holder of a dishonored bill of exchange brought an action against the acceptor, and simultaneously with it instituted proceedings against him in bankruptcy. The action having been stayed on payment of the debt and costs, the plaintiff claimed to hold the bill until he should have obtained the amount of his costs in bankruptcy. *Held*, that he was not so entitled, and that the bill should be delivered up to the defendant. *Cows v. Taylor*, xxviii. 552.

10. *Order for sale of goods*. An order for the sale of goods in the reputed ownership of the bankrupt after an actual sale by a mortgagee, should be made *ex parte*, so as to save the mortgagee's rights at law. *Ex parte Barlow, In re Marygold*, xix. 464.

11. In proceeding *ex parte* for protection under the Trader-Debtor Arrangement sections of the Bankrupt-law Consolidation Act, 1849, the trader is bound to take an order strictly correct and strictly regular. *Ex parte Bowers*, x. 1.

12. A commissioner may attend to circumstances of equitable invalidity upon an application to retain or not retain an adjudication. *Ex parte Johnstone*, v. 234.

VIII. Administration, &c.

1. *Inquiries as to secret trusts connected with Roman Catholic religion*. Inquiries whether legacies given by a will were held upon any secret trusts connected with the Roman Catholic religion, cannot be directed upon a claim filed for administration. If more than the common administration decree is wanted, a bill must be filed for the purpose. *Gilpin v. Magee*, vii. 153.

2. *Two suits—Stay of proceedings*. Where there are two suits for the administration of the same estate filed in different branches of the court, and a decree has been obtained in one suit, in order to stay proceedings in the other suit, application should be made in the suit in which the decree has been obtained. *Ladbroke v. Bleaden*, xiii. 371.

3. *Proceeding in absence of representative of deceased defendant*. After order in an administration claim, dated April, 1852, one of the executors, defendants, who was also residuary legatee, died insolvent, never having proved nor possessed assets. His widow refused to take out administration, and his children could not be found. An order was made, under section 44, on application *ex parte*, that the suit should proceed without making the representative of the deceased executor a party, and that the inquiries before the Master should proceed as though such representative had been served with a writ of summons. *Rogers v. Jones*, xiii. 437.

4. *Supplemental bill to bring in absent party.* After decree for the common administration accounts, the conduct of the suit was taken from the plaintiff and given to a defendant; and the Master afterwards declared that the accounts could not be usefully prosecuted, the record having been defective from the beginning, by reason of the absence of a party materially interested in the result of the accounts. To remedy this defect, the defendant to whom the conduct of the decree was intrusted, without notice to the plaintiff, filed a bill in the nature of a supplemental bill, bringing the absent party before the court. The court dismissed, with costs, a motion by the plaintiff in the original suit to remove the supplemental bill from the file, for irregularity. *Lee v. Lee*, xix. 244.

5. Where an illegitimate person interested in the subject of the suit dies intestate, it is not sufficient that the attorney-general is made a party to the suit in respect of his interest, but administration must be taken out. *Lewis v. Lewis*, x. 156.

6. An executor may be charged, on further directions, with interest on his balances, though it be not prayed by the bill. *Hollingsworth v. Shakeshaft*, xi. 308.

7. *Semble*, a bill filed by one executor in his own name, and that of an infant *cestui que trust*, against another executor, praying accounts against the defendant, but not against himself, nor offering to pay into court what he held of the testator's assets, is not a proper form of suit. *Ashley v. Allden*, x. 314.

8. A bill filed against persons entitled to take out letters of administration who then proceed to take them, is well filed. *Horner v. Horner*, xxiii. 607.

9. Leave given that a creditor, so found by the Master, not a party to the suit for administration, might serve notice of motion for an order to revive, under sect. 52. *Lowes v. Lowes*, xiii. 438.

10. Administration claim by an executor who had not possessed any assets. Order made in prescribed form, without variation on that account. *Holme v. Holme*, vii. 261.

11. In an administration suit, an inquiry as to the propriety of maintenance to an infant may be directed by the decree at the hearing. *Cross v. Beavan*, v. 129.

IX. *Appearance, Attachment for Want of; Distringas to compel, &c.*

1. *Non-appearance of defendant—Final judgment signed—Leave to come in and defend on terms.* The plaintiff sued the defendant upon a judgment recovered against him in a county court. The writ was specially indorsed. A *capias* was obtained under 1 & 2 Vict. c. 110, s. 3, and the defendant arrested; but he did not appear to the action, and final judgment was signed. Subsequently, the court of queen's bench decided that no action would lie upon a county court judgment, and thereupon a motion was made for the defendant to be allowed to come in and defend the action, and that he might be discharged from custody. The court refused the application, except upon the terms of the debt and costs being paid into court. *Austin v. Mills*, xx. 496.

2. *Appearance for infant defendant, setting aside.* Where an appearance *sec. stat.* was entered for an infant defendant, the court, on application made more than four days after service of the notice of declaration, set aside the appearance and all subsequent proceedings without costs, the defendant undertaking to appear regularly by guardian within four days. *Leech v. Clabburn*, vi. 581.

3. *Appearance for absconding defendant.* A motion to enter an appearance for an absconding defendant is within the terms of the 31st order of May, 1845, and will be granted although the defendant is absconding on account of a criminal proceeding against him. *Allen v. Loder*, iv. 24.

4. *No calls or appointments.* The defendant had no known residence, and could not be found, but he called occasionally at his solicitors' for letters and answered such letters, posting them in London. The plaintiff's solicitor wrote to the defendant, en-

closing a copy of the writ of summons, directed to the defendant at his solicitors', and a correspondence afterwards passed between the plaintiff's attorney and the defendant respecting a compromise of the plaintiff's claim. The court granted a *distringas* to compel an appearance, though there had not been the usual calls and appointments. *Gorringe v. Terrewest*, iv. 187.

5. *Non-appearance of executor plaintiff—Bankruptcy.* Plaintiff, an executor, did not appear at the hearing; and upon proof of service of the *subpœna* to hear judgment, the bill was dismissed with costs. An application to restore the cause to the paper, on the ground that the plaintiff had, seven months previously, become bankrupt, and believed that his rights passed to the assignees, which was not the fact, refused with costs. *Frost v. Hilton*, xxi. 541.

6. Leave given to enter an appearance for the assignees of a defendant who had become bankrupt, the assignees having been served with an order, under the 52d section of the 15 & 16 Vict. c. 86, and not having appeared thereto. *Cross v. Thomas*, xvii. 308.

7. Entering an appearance for a defendant out of the jurisdiction, against whom an order had been made for substituted service of an order to revive. *Foster v. Menzies*, xix. 653.

8. A warrant of commitment, under the 9 & 10 Vict. c. 95, s. 105, for non-appearance on a judgment summons, issued six months after the order of commitment, is regular. *O'Neill, ex parte*, ii. 330.

9. The court refused to set aside a *distringas* on affidavits contradicting the original affidavit, which was sufficient, if true, on which the *distringas* was obtained. *Whitaker v. Crocker*, iii. 507.

10. Where a defendant, who was in the habit of frequently coming to England, had been duly served with the bill out of the jurisdiction, the court refused to issue an attachment for want of appearance. *Hackwood v. Lockerby*, xxxi. 531.

11. On a motion to compel the appearance of the defendant upon an affidavit sworn to four days previous, the court adjudged the affidavit too old, and refused to grant a *distringas*. *Drinkwater v. Mills*, xxii. 452.

12. *Revivor.* The order to revive being obtained under the Chancery Improvement Act, and served upon the defendant, the suit stands revived without any appearance by the defendant. *Ward v. Cartwright*, xxi. 109.

13. Under an order an appearance was allowed to be entered for a defendant to a bill of revivor, long after service of the *subpœna*. *Norton v. Fisk*, vii. 292.

X. Absent Party.

1. *Defendant out of jurisdiction—Judge's order allowing plaintiff to proceed—Application to set aside.* A writ of summons was issued in the common form for a defendant resident or supposed to reside within the jurisdiction, and a judge's order was obtained under the 17th section of the Common-law Procedure Act, 1852, to enable the plaintiff to proceed as if personal service had been effected. On application to set aside the judge's order, upon an affidavit that the defendant was residing out of the jurisdiction at the time the writ issued, and down to the time of swearing the affidavit, it was held, that the application was rightly made to set aside the order, and not the writ itself; and as the fact was that the defendant was not within the jurisdiction, the proceedings subsequent to the writ must be set aside. *Hesketh v. Fleming*, xxx. 259.

2. *Infant defendant out of jurisdiction.* An infant defendant was out of the jurisdiction until after a decree in the cause, directing a reference to the Master to take accounts, which was proceeding when he came within the jurisdiction. The proper course is for the infant, on motion, to obtain an order appointing a guardian; and by a separate order, to obtain a reference to the Master to inquire whether it is for the

infant's benefit to adopt the proceedings; and, if so, then that the infant adopt them, and attend the future proceedings. *Copley v. Smihson*, xix. 306.

3. *Bill for foreclosure.* A bill of foreclosure was filed by a sub-mortgagee; the mortgagee had died and his representative was not known. *Held*, that the court could not, under the 44th section of the Chancery Amendment Act, direct the suit to proceed in the absence of a representative of the mortgagee, against whose estate a decree was asked. *Bruiton v. Birch*, xix. 583.

4. The 44th section of the Chancery Amendment Act gives the court a discretionary power of proceeding with a suit in the absence of the personal representative of a deceased defendant, whose interests were identical with those of the plaintiff. *Cox v. Taylor*, xix. 582.

5. Where an order has been made on motion and affidavit of service in the absence of parties, the court will, on proper application, give the absent party leave to move to discharge the order. *Mapp v. Elcock*, xix. 505.

6. Plaintiff allowed to enter an appearance for a defendant out of the jurisdiction against whom an order had been made for substituted service of an order to revive. *Foster v. Menzies*, xix. 653.

XI. *Notice of Action, of Trial, &c.*

1. *Notice of action, when not necessary—County court plaintiff—Particulars of demand.* The plaintiff's particulars of demand in a plaint in a county court were: first, for unlawfully entering the plaintiff's premises, and seizing cattle under color of a distress; second, for unlawfully selling three other cattle not distrained; third, for not having the cattle so sold, appraised before selling them; fourth, for continuing on the plaintiff's premises, and proceeding to sell the plaintiff's cattle, after an abandonment of the distress. The notice of action stated that the plaintiff would bring his plaint against the defendant for having, on the 11th of March, entered his premises, and seized three heifers there, and for having continued there several days, and also for that defendants, against the plaintiff's will, on the 17th of March, did seize, sell, and remove from the plaintiff's premises, three heifers belonging to him. *Held*, that the plaintiff was entitled to go into evidence in support of the fourth item in the particulars, as it was one for which no notice of action was necessary, or, if necessary, the notice given was large enough to apply to it. *Howard v. Remer*, xxii. 312.

2. *Suit for having given plaintiff into custody.* The defendant was sued (in the third count) for having given the plaintiff into custody on a charge of doing wilful damage to the defendant's property, and (in the fourth count) for having given him into custody on a charge of larceny. The jury found that the plaintiff had not, on either occasion, committed the offence with which he was charged, but that the defendant, on both, *bonâ fide* believed that he had. *Held*, as to each count, that the defendant was entitled to notice of action; and that it was not necessary for him to show that he knew of the statutes. *Read v. Coker*, xxiv. 218.

3. *Notice of bill for removal of trustee.* Notice of a bill for the removal of a trustee, &c., must be served upon the parties beneficially interested before the court can grant the prayer of the bill. *Lewellin v. Cobbold*, xxiii. 48.

4. *Notice of passing and entering decree.* Enrolment of a decree by the plaintiff vacated, on the ground that it being the settled practice of the court that notice is to be given of passing and entering a decree, the omission to give this notice had under the circumstances of the case been a surprise on the defendant. *Hargrave v. Hargrave*, vii. 14.

5. *Notice of declaration.* A plaintiff who files a declaration within one year after the process is returnable, is to be deemed out of court, within the Reg. Gen. Hil. term, pl. 35, unless he also serves notice of declaration within the same period. *Eadon v. Roberts*, xxiv. 413.

6. *Service of order a sufficient notice.* A decree had been taken *pro confesso* against a defendant, and an order obtained, limiting the time within which he might apply to have it set aside. The order was served on him with a copy of the decree. *Held*, that the service of the order limiting the time was sufficient notice, and ordered that the decree be made absolute. *Trilley v. Keefe*, x. 293.

7. *Notice of intention to produce record.* Two days' notice to a defendant of the plaintiff's intention to produce the record in court, on a plea of *nul tiel record*, is sufficient; where the plaintiff gives a defendant notice to produce it, four days should be given. *Hopkins v. Doggett*, iv. 322. See also *Maguire v. Kincaird*, xiv. 357.

8. *Affidavit on motion to set aside a step in a cause.* Upon a motion to set aside a step in a cause, on the ground that a term's notice of proceeding was necessary, the affidavit must distinctly allege that a term's notice has not been given; it is not enough to state "that no step or proceeding in the cause" has been taken. *Minchiner v. Martin*, xxii. 450.

9. Where the plaintiff's proceedings have been suspended by an order for security for costs, *semble*, that no notice would be necessary if security were given. *Ib.*

10. *Twenty days' notice under Common-law Procedure Act—Application to extend time for proceeding.* Where a defendant has given twenty days' notice to proceed to trial, under sect. 101 of the 15 & 16 Vict. c. 76, the plaintiff may come into court, and, on satisfactorily explaining the delay in not going to trial, obtain an extension of time. It is not necessary that the rule should specify the particular period for which an extension of the time is required. The plaintiff need not wait until the expiration of the twenty days, or until the defendant has entered a suggestion, before applying to the court or a judge, under the 101st section. The defendant's attorney may give the twenty days' notice to proceed to trial, although it is only for the purpose of obtaining his own costs. *Knight v. Gaunt*, xvi. 98. See also *Farthing v. Castles*, xvi. 280.

11. *Month's notice.* *Semble*, where notice, under the 101st section, was given on the 10th of January, (the new rules coming into operation on the 11th,) the 176th rule, which requires a month's notice of an intention to proceed "in all causes in which there have been no proceedings for one year from the last proceeding had," does not apply, as the statutory twenty days' notice is a proceeding in the cause. *Ib.*

12. *Death of attorney.* Defendant's attorney died after notice of trial had been given him. Subsequent proceedings terminated in judgment against defendant. He obtained a rule to set them aside, swearing that he had had no notice of them, but not swearing that he was not aware of his attorney's death immediately after it occurred. Rule discharged. *Ashly v. Brown*, iii. 489.

13. *Stay by injunction—Fresh notice of trial.* A town cause having been made a *remanet*, and then postponed by consent to the sittings after Hilary term, 1849, further proceedings were stayed by an injunction obtained by the defendant on the 11th of January, 1849. The injunction was dissolved on the 7th of August, 1850. *Held*, that the plaintiff was not bound to give a fresh notice of trial for the sittings after Michaelmas term. *The Stockton, &c. Railway Co. v. Fox*, ii. 378.

14. *Short notice of trial—Writ of trial.* The defendant, having obtained time to plead, taking short notice of trial, if necessary, before the sheriff, delivered two pleas on the 5th of August, whereupon the defendant on the 10th, delivered a replication joining issue on the pleas, and on the following day delivered the issue with notice of trial indorsed to try the issue before the sheriff on the 18th. The defendant having returned the issue and notice of trial, and the cause having been had in his absence, it was objected that the plaintiff was not entitled to give short notice of trial; and that the word "issue" had been improperly used for "issues." *Held*, that the writ of trial was good. *Flowers v. Welch*, xxiv. 409.

XII. *Right to begin.*

1. In cases of appeal the counsel for the appellant are entitled to begin, and the crown has a general right of reply in all cases where the crown has an interest. *Thandos v. The Commissioners of Inland Revenue*, v. 449.
2. Where defendant appeals against the whole decree, except as to costs, the plaintiff begins. *Senhouse v. Hall*, xxvii. 350.
3. Upon an appeal from the whole order made on a "claim," the plaintiff begins. *Neathway v. Reed*, xvii. 150. See also *Sims v. Helling*, xi. 42.
4. The test to determine the order of beginning at a trial is to consider which party would be entitled to the verdict supposing no evidence given on either side; as the burden of proof must lie on his adversary. *Leete v. The Gresham Life Ins. Society*, vii. 578.
5. Where a petition to dismiss an appeal for incompetency has been directed by the appeal committee to be argued at the bar of the House of Lords, the counsel for the petitioner is entitled to begin. *Geils v. Geils*, xiv. 1.

XIII. *Postponement of Trial.*

1. *Absence of material witness.* Where a rule was moved on behalf of the defendant, for the postponement of the trial, on the ground of the absence of a material witness, who was on his voyage to Australia, the court, in making absolute the rule, imposed terms, that the plaintiff, if he should recover, should have interest on the sum recovered, from the day when the cause would have been tried, had the defendant been ready. *Thompson v. Lewis*, xxii. 464.
2. *Second postponement.* The court will renew the postponement of trial of a cause on account of the absence of a material witness beyond seas, if satisfied that there is a reasonable expectation of his return to this country, even although the trial has already been postponed for a year, and it is not certain when he will return. *Thompson v. Lewis*, xxv. 405.
3. *Issues of fact and in law.* Where the defendant had pleaded and demurred to the declaration, and the demurrer had been decided in this court, an order to postpone the trial of the issues of fact until after the issues in law had been finally disposed of in the court of error, was refused; sect. 80 of the Common-law Procedure Act applying only to the disposing of the issue by the court in which it is first raised. *Lumley v. Gye*, xx. 168.
4. *Admission of liability in action for debt—Postponement on terms.* Where a defendant, who has clearly admitted a liability to a certain amount in an action for a debt, obtains, by promise of payment, some advantage from the plaintiff, as, allowing a larger credit, or doing further work, the postponement of the trial at his instance, even on the ground of the absence of material and necessary witnesses, will not be allowed, except on the terms of paying such admitted sum into court, or at least finding security for its payment. *Gilbert v. Michael*, xxx. 515.

XIV. *Justices' and Judges' Orders; Orders of Course.*

1. *Judge's order and not an award—Conditional order.* An action having been referred to one of the judges, he decided that the costs should be paid by a parish which some of the parties were officers. The court adopted the order, and the construction of the order was then referred to another judge, who made an order that defendant should pay the plaintiffs their costs on a given day, unless they should have been previously paid by the parish. This order was made a rule of court, and execution was afterward taken out against the defendants for the costs. *Held*, that the second order was a judge's order, and not an award, and that the judge had a right

make it. Secondly, that the order being conditional, was not an "order to pay money," within the meaning of the 1 & 2 Vict. c. 110, upon which execution could issue. *Gibbs v. Flight*, xxiv. 285.

2. *Application to set aside.* The rule, that an application to set aside a judge's order cannot be made after the end of the term next following the making of the order, applies to a judge's order to prohibit further proceedings in a county court, for want of jurisdiction, made under the 9 & 10 Vict. c. 95, s. 58, and 13 & 14 Vict. c. 61, s. 22. *Jordan v. Wilcoxon*, xxv. 246.

3. Upon a motion to set aside a judge's order, the affidavits on which the order was obtained should be brought before the court. But, a rule to set aside a judge's order having been discharged on that ground, the court allowed a second application to be made. *Pocock v. Pickering*, xi. 461.

4. *Bad part of justices' order severed from good.* Where the court, exercising its appellate jurisdiction, can clearly sever the bad part of an order, made by justices of the peace, from the good, they will quash the order as to the bad part and leave it to stand as to the residue. *Regina v. Green*, iv. 197.

5. *Validity of justices' order—Distress warrant.* This court will inquire into the validity of an order of justices before compelling them, under 11 & 12 Vict. c. 44, s. 5, to issue a distress warrant to enforce such order, and will refuse a rule for that purpose where the order appears to be invalid. *Regina v. Collins*, ix. 283.

6. A party, upon appearing before two justices upon a summons for non-payment of a church rate, under the 53 Geo. III. c. 127, s. 7, stated to the justices that he disputed the validity of the rate, and specified several objections. Whereupon the justices adjourned the hearing, to admit of the party in the mean time taking steps to dispute the rate. On the day of adjournment, no such steps having been taken, the justices made an order for the payment of the amount claimed; but afterwards declined to issue a distress warrant to enforce that order. *Held*, that the order was made without jurisdiction, and therefore that a rule, under the 11 & 12 Vict. c. 44, s. 5, to compel the issuing of a distress warrant to enforce it, could not be granted. *Ib.*

7. *Justices' order directing railway company to repair highway.* An order of justices under sect. 58 of stat. 8 & 9 Vict. c. 20, directing a railway company to repair damage done by them to a road in the course of making the railway, need not specify the particulars of the damage, nor what repairs were to be done; it is sufficient if it states the length of the damaged part of the road, and orders the company to make good all damage done. *The London and N. W. Railway Co. v. Wetherall*, ii. 265.

8. In a justices' order under 5 & 6 Vict. c. 54, s. 16, the facts of the complaint must clearly appear. *Regina v. Williams*, xi. 354.

9. *Title of order.* By an order entitled in a cause and in the matter of the Trustee Act, A was ordered to transfer a sum of money into court. The affidavit of service of this order on A, was entitled in the cause only. A was committed for contempt for refusing to obey the order. The writ of attachment was discharged for irregularity, on the ground of the difference between the title of the order and the title of the affidavit. *Mackenzie v. Mackenzie*, xi. 41.

10. *Certiorari—Proceedings for the assessment of railway damages.* An adjudication by two justices, under the Lands Clauses Consolidation Act, 1845, and Railways Clauses Consolidation Act, 1845, of the sum (below 50*l.*) to be paid by a railway company as compensation to a party whose lands have been injuriously affected by the exercise of their statutory powers, is an order within stat. 11 & 12 Vict. c. 43, s. 1, and is bad, under sect. 11, if the complaint on which the order is founded be made more than six calendar months after the cause of complaint arose. Such order may be brought up by *certiorari*, to be quashed. *In re Edmundson*, xxiv. 169.

11. *Order of course to change agent.* Where a London agent was employed by a country solicitor under a special agreement, an order of course, obtained by the coun-

try solicitor to change the agent without disclosing the agreement, was discharged, with costs, for irregularity. *Richards v. The Scarborough Market Co.* xvii. 269.

12. *Order of course.* It is an order of course to revive a suit against an official assignee, whose predecessor, a defendant, had died without putting in his answer. *Gordon v. Jesson*, xv. 571.

13. Applications to discharge orders obtained as of course at the Rolls, should be made to the court to which the cause is attached. *Cooper v. Knox*, xi. 39.

14. An order of course, in a suit attached to one of the courts, may be obtained in any other court. *Magan v. Magan*, xii. 283.

15. Where the time limited by an order of course was seven days, which, according to the practice, would have been eight days, it was *held*, under the circumstances, that the irregularity was not sufficient to discharge the order. *Ib.*

16. On application for orders of course, all material facts must be stated. *Re Winterbottom*, xv. 94.

XV. Judgments.

1. *Judgment as in case of nonsuit.* The 15 & 16 Vict. c. 76, s. 100, by which judgment, as in case of a nonsuit, is abolished, applies to actions, including actions of ejectment, commenced before the passing of the act; but pending proceedings towards obtaining that judgment, in such actions, may be carried on to completion. *Morgan v. Jones*, xvi. 506.

2. Sect. 101 of the 15 & 16 Vict. c. 76, (substituting proceedings for judgment as in case of a nonsuit,) is applicable to actions commenced before the 24th of October, 1852. *Dunn v. Coutts*, xvi. 137.

3. *Sufficiency of affidavit.* An affidavit, stating that the plaintiff has given notice of trial, and has not proceeded to trial pursuant to the said notice, is sufficient to call upon a plaintiff to show cause why there should not be a judgment as in case of nonsuit against him. *Driscoll v. Whalley*, x. 436.

4. *Notice of trial given and countermanded.* The defendant induced the plaintiff to discount his acceptance upon his representation that he was of age, and when it was presented for payment raised no objection on the ground of infancy, but being sued upon it pleaded infancy. The plaintiff satisfying himself on inquiry that the plea was untrue, joined issue and gave notice of trial; but subsequently ascertaining that the plea was true, countermanded the notice, and took no further proceedings. *Held*, that the defendant was not entitled to judgment as in case of nonsuit. *Newton v. Farrall*, iv. 430.

5. Upon a motion for judgment as in case of a nonsuit, it is enough if the affidavit shows a default, without going on to negative that the plaintiff has since proceeded to trial; that fact should come from the other side. *Blackman v. Asplin*, xxii. 465.

6. Issue was joined in 1844; the court, in 1851, discharged, with costs, a rule for judgment as in case of a nonsuit. *Dixon v. Roper*, xii. 520.

7. On an appeal from a county court, where judgment below has been given for the plaintiff, the court of common pleas, under the 13 & 14 Vict. c. 61, s. 14, has power to order a nonsuit to be entered. *Fuller v. Cleveley*, xx. 276.

8. *Entry of judgment—Charging defendant's land and taking him in execution.* The plaintiff, after making an entry of a judgment obtained against the defendant in the book of the senior master of the common pleas, pursuant to 1 & 2 Vict. c. 110, s. 19, with a view of charging the defendant's real estate, took him in execution under the same judgment. The defendant became insolvent, and his assignee contracted to sell his real estate. The purchaser refused to complete the purchase in consequence of the entry of the judgment which charged the property. The plaintiff having refused to consent to an entry of satisfaction being made in the book, the court, on the application of the assignee, granted a rule ordering the plaintiff's attorney to attend

before the senior master of the common pleas, and consent to an entry being made that the plaintiff had taken the defendant in execution under the judgment after having made the entry. *Lewis v. Dyson*, x. 385.

9. *Entering up judgment on warrant of attorney—Affidavit.* Upon a motion to enter up judgment on an old warrant of attorney, the affidavit is properly intituled in the cause in which the judgment is to be entered. Where a warrant of attorney is given to three trustees of a joint-stock bank, to secure a debt due to the copartnership, the judgment thereon is properly entered up in the name of the public officer for the time being. *Bell v. Fisk*, xxii. 408.

10. Application for leave to enter up judgment, upon a warrant of attorney, must be made to a judge at chambers, and not to the court. *Handley v. Roberts*, xvi. 103.

11. *Signing final judgment—Interlocutory judgment—Rule to pay money.* After an interlocutory judgment had been entered for 25*l.* for default, the rest of the action was referred, and an award made. There was no power of entering up judgment on the issues referred. After the lapse of a year, the plaintiff gave the defendant notice that the court would be moved in a week. Within a month from the date of the notice, in Hilary term last, the plaintiff applied for a rule calling on the defendant to pay the 25*l.*, or why the plaintiff should not be allowed to sign final judgment. There was a proper demand of the money. The rule was discharged, on the ground that there had not been a month's notice of proceeding. A subsequent notice was given by the plaintiff that he would after a month proceed in the action by applying to sign final judgment. After the month had expired, the plaintiff applied for a rule similar to the previous one of Hilary term. There had been no fresh personal demand of the money since the discharge of the last rule. The court made the rule absolute. *Burlington v. Richardson*, xxii. 119.

12. *Signing judgment as for want of plea—Setting aside.* The L. & E. R. Co., having given a bond, were afterwards by act of parliament amalgamated with certain other lines, under the name of the E. A. R. Co., to which all the liabilities of the L. & E. R. Co. were transferred. To an action against the E. A. R. Co. upon the bond, the defendants, after setting out the deed on oyer, pleaded as follows: "which being read and heard, the defendants say that the said writing obligatory is not their deed." The plaintiff having signed judgment as for want of a plea, the court refused a rule to set aside the judgment, there being no affidavit of merits. *Selby v. The East Anglian Railway Co.* vii. 568.

13. *Signing final judgment for want of appearance to writ specially indorsed.* A plaintiff cannot sign final judgment under the 25th section of the Common-law Procedure Act, 1852, for want of appearance to a writ specially indorsed, the indorsement specifying as part of his claim, (*inter alia*,) the expense of noting and commission on a bill of exchange; the same being unliquidated damages. *Rogers v. Hunt*, xxviii. 469.

14. *Signing judgment—Verdict for defendant on one count and for plaintiff on the other.* A verdict was returned for defendant on one count of a declaration, and on the other for plaintiff, who did not sign judgment. On application by defendant, both parties attending, the *postea* was delivered to him and he signed judgment for plaintiff on the first count, and for himself on the second. Upon application to set aside the judgment so signed, it was *held*, that if plaintiff intended to enter a *nolle prosequi* or *retraxit* upon the first count, he should have declared that intention upon the hearing of the summons; and that the judgment was properly signed by defendant. *Taylor v. Nesfield*, xxx. 112.

15. *Rule to plead—Time to plead.* An order to plead several matters was obtained after the rule office was closed, upon the day that the time for pleading expired. The pleas were delivered the same evening, with a copy of the order and a notice that the rule would be drawn up and served as soon as it could be obtained from the office.

At ten o'clock the following day, the plaintiff signed judgment. *Held*, that the judgment was regular. *Glen v. Lewis*, xiv. 461.

16. *Judgment against casual ejector—Lapse of two terms.* The court refused a rule nisi for judgment against the casual ejector in a country cause, where two terms had been allowed to elapse since service of the declaration, by reason of negotiations pending between the parties as to the settlement of the action; it not being shown that the tenant had taken advantage of the delay to avoid fresh service. *Panton v. Roe*, x. 509.

17. *Nunc pro tunc.* The court gives a party leave to enter judgment *nunc pro tunc* after the expiration of two terms, only when the delay has been the act of the court itself. *Freeman v. Tranch*, xiv. 224.

XVI. Stay of Proceedings.

1. *To enforce further answer.* Order made by the Lord Chancellor staying proceedings to enforce further answer, pending an appeal from the order by which the defendant's answer was declared insufficient. *Stainton v. Chadwick*, vii. 13.

2. *By reason of pendency of foreign suit.* Before this court interposes, upon an interlocutory application to stay proceedings, in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice and covers the whole subject of the suit. *Ostell v. Le Page*, xxi. 640.

3. *Further time to answer applied for—Stay of execution.* In a suit to stay proceedings at law, a defendant obtained time to answer, and then pressed on the action, and obtained judgment. After a very considerable delay, he again applied for further time to answer; but it was *held*, that as he came for an indulgence, it could only be granted upon the terms of staying execution in the action. *Zulueta v. Vinent*, xxi. 581.

4. *Service of writ beyond jurisdiction of court—Voluntary appearance.* A writ of summons having been served upon the defendant, in France, he appeared by attorney, and the declaration having been delivered, he obtained an order to inspect, and inspected, the promissory notes on which the action was brought; he then applied to the court to set aside the writ and all subsequent proceedings, on the ground of the writ having been served beyond the jurisdiction of the court, and of the action having been brought for a breach of a contract made beyond the jurisdiction of the court. *Held*, that the writ being regular, and the appearance voluntary, the defendant was not entitled to set aside the writ and all subsequent proceedings. *Forbes v. Smith*, xxix. 415.

5. *Separate actions by passengers in ship.* Where eight passengers in a ship signed a round robin, and employed the same attorney to bring separate actions against the owners, for damages arising out of a breach of contract for the passage, whereby the plaintiffs suffered in their health, the court refused a rule to stay proceedings in seven of the actions till one should be tried, although the defendants offered to undertake not to defend the others, if there should be a verdict found against them on such trial. *Westbrook v. The Australian Royal Mail Steam, &c. Co.* xxiv. 327.

6. *Similar suits between same parties in India and England.* Where there has been a final decree in a suit in India, upon motion by the defendant in a similar suit in England, between the same parties and for the same purpose, the court in England will make an order staying all proceedings in the English suit, without prejudice to any proceedings which the plaintiff may be advised to adopt with reference to the decree and proceedings in India. *Ostell v. Lepage*, xvii. 57.

7. *One decree in two suits.* Where there are two suits, one by the executor and the other by the residuary legatee, and one decree is made in both, the former is stayed. *Kelk v. Archer*, xii. 298.

8. *Administration order—Costs.* When an order, under a summons to administer

an estate, will effect all that can be directed by a decree in a prior suit instituted by bill or claim for the administration of the same estate, the court will, on motion, stay the proceedings in the second suit on payment of the plaintiff's costs. *Ritchie v. Humberstone*, xxi. 456.

9. *Payment into court—Bill and cross bill.* A suit will not be stayed upon an interlocutory application by a defendant paying into court all that a plaintiff claims by his bill, and leaving a portion of the claim to be adjudicated upon in a cross suit. The defendant in the first suit must wholly satisfy the claims of the plaintiff. *Orton v. Bainbrigge*, xxi. 444.

10. *Interpleader bill.* In a case of interpleader, where the claim of the principal defendant was legal, and the claims of the other defendants were derived from him, and equitable only, and did not extend to the whole amount recovered at law, it was held, that an application restraining legal proceedings, obtained on an interpleader bill, could be sustained. *Hamilton v. Marks*, xix. 321.

11. One vice-chancellor cannot stay proceedings in the court of another vice-chancellor after decree. *Scotto v. Stone*, xix. 616.

12. *F frivolous action—Tender.* An action of debt having been brought in the superior court to recover 9*l.* 10*s.*, the defendants pleaded, except as to 8*l.* 14*s.*, never indebted, and as to 8*l.* 14*s.*, a tender and payment of that sum into court. The jury found a verdict for the plaintiff on the first issue, damages 16*s.*, and for the defendants on the plea of tender. A motion having been made to stay the proceedings on payment of the debt, without costs, on the ground of the action being frivolous, the court refused the rule. *Nurden v. Fairbanks*, i. 471.

13. *Action by provisional assignee against debtor of insolvent.* The court will not stay an action by the provisional assignees of an insolvent debtor against an alleged debtor of the insolvent, on the ground that by an order of *nisi prius*, made in an action between the insolvent himself and the same debtor for the same cause of action, all matters in difference in the cause were referred to an arbitrator, before whom the matters so referred are still pending. *Sturgis v. Curzon*, vii. 599.

XVII. Appeals.

1. Where the case transmitted to the court of common pleas contains no signature of the revising barrister at the end of it, the court of common pleas cannot entertain the appeal. But the court allowed an appeal to be argued, the respondent consenting to have the signature inserted. *Burton v. Brooks*, vii. 483.

2. Where no counsel appears for the respondent, the counsel for the appellant will be heard, upon proving service of the notice of appeal. *Pownall v. Hood*, vii. 489.

3. It is not an essential preliminary to the hearing of an appeal against an order of removal that the original order should be in court. *Semble*, it is sufficient for the appellants to file a copy of the original order with the clerk of the peace at the time of entering the appeal, and to give notice to the respondents to produce the original order; and this appears to be the practice. *Regina v. The Recorder of Manchester*, v. 352.

XVIII. Waiver.

1. When a plaintiff's case wholly fails, it cannot be aided by the gift or waiver of one defendant, as against his co-defendant. *Hollingsworth v. Shakeshaft*, xi. 308.

2. A delay for three years to seek the discharge of an order allowing a party to sue in *formâ pauperis* amounts to a waiver of all right to object to such order. *Parkinson v. Hanbury*, xxi. 445.

3. After service of a writ an order was obtained irregularly, without an affidavit as
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to the existence of a good cause of action. *Held*, that the irregularity was waived by the defendant's attending before the Master, and entering upon the inquiry before him. *Harrison v. Williams*, xxix. 192.

XIX. Peremptory Undertaking.

1. A peremptory undertaking will not be discharged or enlarged on the ground that it has been discovered, since it was given, that the defendant is insolvent. *Emden v. Dewey*, iii. 409.

2. On a peremptory undertaking to try at the first sittings, the plaintiff cannot throw the trial over the sittings by getting a rule for a special jury. *Levy v. Moylan*, iv. 346.

3. An affidavit in support of a rule to enlarge a peremptory undertaking, on the ground of the absence of a witness, is not sufficient if it does not state the name of such witness, nor allege him to be a necessary as well as a material witness. *Levien v. Heathwaite*, v. 420.

XX. Affidavits.

1. *Used at a subsequent hearing.* Affidavits filed in a suit, will be allowed to be made use of on the hearing of a petition subsequently presented, and on a different part of the case. *Jones v. Turnbull*; *In re Turnbull*, xxi. 79.

2. *Objection to form of.* Upon a motion to dissolve an injunction, it is not the proper time to object to the form of the plaintiff's affidavit denying collusion; but any such objection should be taken on demurrer, when the court might grant leave to amend the affidavit. *Hamilton v. Marks*, xix. 321.

3. *Fresh affidavits.* Where a judge declined to make an order to give the plaintiff his costs under the County Courts Act, 13 & 14 Vict. c. 61, s. 13, and an application is made to the court, fresh affidavits may be used in addition to those made use of before the judge. *Sanderson v. Procter*, xxvi. 564.

4. *Misnomer.* The defendant was sued as "H. W. B." He appeared as "Henry William B." The declaration described him as "Henry William B., sued as H. W. B." The affidavits were entitled "Hilary John B., sued as Henry William B." The court admitted the affidavits. *Baldwin v. Bauerman*, x. 510.

5. *Conclusive title to dividends.* It is not imperative on the court to require from a tenant for life an affidavit of conclusive title to the dividends of a fund paid into court under the Lands Clauses Consolidation Act. *In re Braye*, xv. 515.

6. *Motion for rule nisi, on ground of surprise.* An affidavit on which to found a motion for a rule nisi, on the ground of surprise, should state, not only that the evidence adduced at the trial was unexpected, but that the party on whose behalf the application is made, would have been prepared, had it not been for the surprise, with evidence to contradict the evidence adduced. *Waller v. Brandeis*, xxiv. 245.

7. *Rule nisi for attachment.* The affidavit upon which a rule nisi for an attachment for not paying a sum awarded by an arbitrator is moved for, must directly negative the payment of the money at the particular time and place mentioned in the award. *Oldacre v. Smith*, xxiv. 242.

8. *Distress warrant.* A rule calling upon justices to show cause why they should not issue a distress warrant, was founded upon an affidavit, showing the refusal only, but not stating the proceedings which took place before the justices, or the reason why they refused. The parties showing cause against the rule made no affidavit. *Held*, that the affidavit must be construed in favor of the party making it; and that the rule should be absolute. *Regina v. Deverell*, xxv. 160.

9. *Application for leave to plead by way of traverse and demur to same pleading.* Where a party applies for leave to plead by way of traverse, and demur to the

same pleading, under the 15 & 16 Vict. c. 76, s. 80, he ought to swear that the allegations proposed to be traversed are untrue. *Semble*, that, in such cases, if the facts are within his own personal knowledge, he must swear positively to that effect; if not, then that he is so informed and believes; and if a third person is vouched he should show either that he has made inquiry of that person, or that it would be impossible or inconvenient to do so. *Lumley v. Gye*, xiv. 442.

10. *Application to reply by traverse and special replication.* On an application to reply double by a traverse and special replication, it was *held*, that it is sufficient to make an affidavit in general terms, that there is reasonable ground to traverse the plea, and that the matters proposed to be replied are true, and the facts need not be set forth so as to enable the court, or a judge, to determine upon the necessity for the application, unless the court or judge require it. *Pennall v. Clarke*, xxii. 494.

11. *Application to rescind judge's order.* An application to rescind a judge's order may be made on affidavits contradicting those upon which the order was obtained, without disclosing a defence upon the merits. *Quære*, whether, if the order stands, the judgment signed in pursuance of it can be set aside without such affidavits as are mentioned in the statute. *Quære*, also whether the words of the 27th section of the 15 & 16 Vict. c. 76, being affirmative, take away the general power of the court over its judgments, or are merely cumulative. *Hall v. Scotson*, xxiv. 473.

12. An affidavit to found a motion under the 3 & 4 Will. IV. c. 74, s. 91, must describe the deponent as "wife of," &c., even though it discloses circumstances showing a well-grounded belief that the husband is dead. *Ex parte Sparrow*, xxii. 435. See AFFIDAVIT.

XXI. Evidence.

1. *Reading of affidavit after closing of evidence.* An affidavit in answer to affidavits of the other party may, under special circumstances, be read after the time for closing the evidence. *Hope v. Threlfall*, xxiii. 193.

2. Where the validity of a deed was impeached by the answer, although no cross bill had been filed to set it aside, the court refused to allow the plaintiff to prove the deed by affidavit at the hearing, the defendant having elected that the evidence should be taken orally. *Hitchcock v. Carew*, xxiii. 237.

3. *Chancery Amendment Act—Vivâ voce examination of witnesses—Evidence of a party to the cause on appeal not before the court below.* The court of appeal has jurisdiction, under the 39th section of the statute 15 & 16 Vict. c. 86, to require the production and examination before itself of a party to a cause, although he may not have been orally examined in the court below. *Hope v. Threlfall*, xxvii. 241.

4. *Vivâ voce evidence.* Where it is the practice of the court below to admit *vivâ voce* evidence, the court of appeal will proceed upon that evidence as contained in the judge's notes, and not direct the proceedings to commence *de novo*. *Williams v. Williams*, xxiv. 607.

5. *Orders of January, 1855.* Where, before the month of January, 1855, issue was joined in a cause in which the plaintiff elected to take evidence orally and had examined his witnesses, a defendant applied, under the 7th order of January 18, 1855, for leave to prove his case by affidavit. Turner, L. J., agreeing with the Master of the Rolls in the particular case before the court, refused the application. *Musgrove v. Smith*, xxxi. 341.

6. Since the 14 & 15 Vict. c. 99, a plaintiff may examine a defendant as a witness as to matters in which he is interested and yet obtain a decree against him. *Robinson v. Briggs*, xix. 611.

7. In a cause at issue, before the orders of 7th August, 1852, the parties, in July, 1852, agreed to postpone publication till the 2d November, on the ground that the new practice would then come into operation. The case was one in which it was not

clear, but probable, that oral examination might be the most effective. *Held*, that the postponement of publication was not an agreement to adopt the new practice; but, in the absence of special reasons to the contrary, there being a probability of advantage in applying the new practice, it ought, according to the intention of the act, to be applied. *Howard v. Howard*, xix. 124.

8. *Ex parte applications.* In *ex parte* applications, seeking to affect the ownership of property, the strictest proof of title will be required; and the bar are expected to assist the court with any authorities that may exist upon the point. *In re Chorley*, ix. 214.

9. *Foreign law.* Although a point of foreign law has been proved in this country and acted upon in reported cases, the courts will not act upon such decisions without the law being proved in each case as it arises. *M'Cormick v. Garnett*, xxvii. 339.

10. *Witness—Order for examination of—Time of making—*1 Will. IV. c. 22, s. 4. The general rule is, that an order for the examination of a witness under 1 Will. IV. c. 22, s. 4, will not be made until after issue joined in the cause, but the practice in that respect is not imperative, and the rule may be relaxed where a case of urgent necessity is made out. *Fynney v. Beasley*, vi. 186.

11. A instructed B, his broker, to purchase goods for him, which B did, and delivered to A a bought note. A paid the purchase-money, and received from B a delivery order for the goods indorsed to him by B. This turning out to be void, A brought an action against B. The court gave the plaintiff leave to deliver interrogatories to B under the 17 & 18 Vict. c. 125, s. 51, to ascertain whether B entered into the contract as agent or principal, and if as agent, for whom, and by what authority; the application being founded on the required affidavit; the plaintiff further deposing that he believed there was no other principal, and setting out letters to justify this belief. *Thöl v. Leask*, xxix. 485.

12. The rule for leave to deliver interrogatories under the 17 & 18 Vict. c. 125, s. 51, is only a rule to show cause. *Thöl v. Leask*, xxix. 481.

13. *Parties as witnesses and advocates.* The 2d section of the act to amend the law of evidence, 14 & 15 Vict. c. 99, does not abridge the former right of a party to a suit to act as his own advocate; and a judge at *Nisi Prius* has no authority to prevent a party to a suit addressing the jury as his own advocate, and afterwards giving evidence as a witness in support of his own case, but such a course of proceeding is most objectionable. *Cobbett v. Hudson*, xvi. 138.

14. The court in banc will not interfere on the suggestion that the judge at *Nisi Prius* has admitted evidence at an improper stage of the cause, if the evidence is not in itself inadmissible; unless it appears that an irregularity has occurred causing actual injustice. So held, although the judge had reserved leave to move for a non-suit on the question whether he ought to have allowed the evidence. *Doe d. Nicoll v. Bower*, xx. 200.

XXII. Under Common-law Procedure Amendment Act and other Statutes.

1. *Interrogatories to parties.* Assuming that the court has power under the 17 & 18 Vict. c. 125, s. 51, to allow a party to a suit to deliver written interrogatories to his adversary at other stages of the cause than with the declaration or plea, they will not exercise this power unless a case of urgency is made out, and in this case the affidavits of the interrogating party were held to be insufficient. *Quære*, whether the right to deliver interrogatories under this section is limited to cases where a discovery can be obtained in a court of equity? *Martin v. Hemming*, xxviii. 544.

2. *Small Debts Act—Certificate of judge.* Under the City of London Small Debts Act, 15 Vict. c. 77, ss. 119, 120, and 121, in actions on contract, where less than 20*l.* is recovered, the certificate of the judge must be granted at the trial; but where the recovery is of a sum between 20*l.* and 50*l.* the certificate may be granted at any time. *Chaplin v. Levy*, xxv. 500.

3. *Orders.* Orders under the 17th section of the Common-law Procedure Act will in general be granted absolute in the first instance, and need not be served. *Barringer v. Handley*, xiv. 254.

4. *Particulars of demand.* Where a writ is specially indorsed under the Common-law Procedure Act, *semble*, that it is irregular for the plaintiff to deliver any other particulars of demand besides those indorsed on the writ, without leave of the court or a judge. But where the plaintiff delivered with his declaration other particulars, without leave, and the defendant, instead of objecting, pleaded and went to trial, he was *held* to have waived the irregularity, and the plaintiff was allowed to avail himself of the second particulars. *Fromant v. Ashley*, xviii. 217.

5. *Rule for a suggestion.* To entitle a defendant to a rule for a suggestion under the 143d section of the Common-law Procedure Act, it must be clearly and satisfactorily shown by affidavit, that the facts sought to be added by the suggestion will make the pleading good. *Manley v. Boycot*, xviii. 351, and *Fisher v. Bridges*, xviii. 358.

6. *Pleadings in superior courts—Judgment set aside.* The Common-law Procedure Act applies to all pleadings in the superior courts, whether the action was originally commenced there or not. The declaration stated that the defendant agreed to serve the plaintiff, and not to leave his service without notice. Breach, that he left without notice. Plea, that the plaintiff insulted the defendant, and therefore the defendant gave notice that he should leave forthwith, and that he did leave. The plaintiff, without leave of the court or a judge, replied, taking issue on the plea, and further said that the notice in the declaration was a reasonable notice, and that the notice in the plea was not. The defendant thereupon signed judgment under section 86. The court, without deciding that the judgment was regular, made absolute a rule for setting it aside on terms. *Messiter v. Rose*, xvi. 422.

7. *Motion for judgment—Affidavit.* On a motion for judgment under section 210 of the Common-law Procedure Act, it is no objection to an affidavit that it alleges that more than half a year's rent is due, and that no sufficient distress is to be found on the premises countervailing the arrears then due. *Cross v. Jordan*, xvi. 522.

8. *Affidavits in answer to affidavits—New matter.* The court of common pleas differing from the court of queen's bench, it was *held*, that leave should not be granted, under the 45th section of the Common-law Procedure Act, 1854, to make affidavits in answer to affidavits alleged to contain new matter, until the case comes on to be heard, and the court has so far heard it as to be able to see that there is new matter to be answered. *Hayne v. Robertson*, *Wood v. Cox*, xxx. 442. See also *Simpson v. Sadd*, xxx. 528.

9. *Appeal from judge's order allowing several pleas.* Parties may appeal to the court against a judge's order allowing several pleas on the ground that they are founded on the same ground of defence, although the Common-law Procedure Act enacts that all objections to pleadings on that ground shall be heard on the summons to plead several matters. *Griffith v. Selby*, xxv. 549.

10. *Defendant in prison—Notice of trial.* Where a defendant, who was in prison, had stated that he intended to go through the insolvent court, and that he had made up his mind not to pay anybody, and afterwards, pursuant to the Common-law Procedure Act, 15 & 16 Vict. c. 76, s. 101, served the plaintiff with a twenty days' notice to bring the cause on for trial, the court set aside the notice. *Truscott v. Lau-tour*, xxiv. 487.

11. *Bail in error.* A plaintiff in error who is also plaintiff below is not bound, under the 151st section of the Common-law Procedure Act, to give bail in error, the law as to that point established by preceding statutes not having been altered by that section. *James v. Cockrane*, xxiv. 531.

12. *Leave to traverse and demur.* Where a party has obtained a judge's order for leave to traverse and demur to a pleading under the 80th section of the Common-law Procedure Act, 1852, and judgment has been given against him on the demurrer, the

court will not rescind the order as to the traverse and strike it out. *Sheehy v. The Professional Life Assurance Co.* xxiv. 274.

13. *Suggestion—Judgment for costs—Notice of trial.* Under the 101st section of the Common-law Procedure Act, the defendant is entitled to enter a suggestion on the record, and sign judgment for his costs, when the plaintiff neglects to try a cause at the times mentioned in the section, or to proceed to trial at the assizes or sittings immediately after the expiration of the twenty days' notice to try which the defendant may give under that section. *Judkins v. Atherton*, xxvi. 104.

14. *Renewal of writ of summons.* *Quære*, whether the six months for which a writ of summons renewed under sect. 11 of the Common-law Procedure Act, 1852, is to be available, are to be calculated exclusive or inclusive of the day of renewal. *Anonymous*, xxviii. 337. See also *Black v. Green*, xxix. 260.

15. Where a writ had been renewed on the 1st of May, and, on the 1st of November, an application to renew it again was made to the officer, and he had refused, the court, on the 2d of November, ordered the renewal seal to be affixed *nunc pro tunc*, without expressing any opinion whether the renewal was in time or not. *Ib.*

16. *Ejectment.* An action of ejectment, in which the declaration has been served previous to the passing of the Common-law Procedure Act, 15 & 16 Vict. c. 76, may be proceeded with notwithstanding that statute. *Doe d. Smith v. Roe*, xvi. 504.

17. *Ejectment, affidavit of service of—Waiver by attornment.* *Quære*, whether the affidavit (required by the 112th rule of Hilary term, 1853,) of service of the writ of ejectment under the 170th section of the Common-law Procedure Act, 15 & 16 Vict. c. 76, should show (as under the old practice) that the nature and object of the service were explained to the party served. At all events, an irregularity in that respect is waived by a subsequent attornment. *Edwards v. Griffith*, xxix. 321.

18. *Special case—Judge's order—Error.* On the day before the Common-law Procedure Act, 1854, came into operation, the attorneys on either side signed a consent to a judge's order for stating a special case, under the act of the same name of 1852. The following day, the plaintiff's attorney obtained the order. The case did not contain any clause prohibiting the parties from bringing error upon it. *Held*, that as the judge's sanction was not given until after the act of 1854 had come into force, though the parties had consented to state the case before, error might be brought upon the special case under the last-mentioned act. *Elliott v. Bishop*, xxix. 402.

19. *Special indorsement of writ—Interest.* Where judgment was signed under the Common-law Procedure Act, 1852, on a writ specially indorsed, claiming interest on an I O U, the court refused to set aside the judgment on the ground that the defendant, by not appearing, had admitted a contract, express or implied, to pay interest. *Rodway v. Lucas*, xxix. 398.

20. Although the Common-law Procedure Act, 1852, s. 25, does not limit the right of specially indorsing a writ with interest to cases where there has been either an express or implied contract to pay interest, yet in all cases, except bills of exchange and promissory notes, if any party not entitled to interest makes a claim for it by special indorsement to gain an improper advantage, the court will set aside the judgment and compel the attorney making such indorsement to pay the costs. *Ib.*

21. *Public Health Act—"Party grieved"—"Person disabled."* A rate-payer is not a "party grieved" within the meaning of the Public Health Act, and cannot, without the consent of the attorney-general, sue for a penalty under the act. *Quære*, who is a "person disabled" within the meaning of the act? *Boyce v. Higgins*, xxiv. 355.

22. *Plaintiff bound to declare within a year—Security for costs.* The Reg. Gen., H. T., 2 Will. IV. r. 35, which provided that a plaintiff should be deemed out of court unless he declared within a year after the process was returnable, did not apply to a case where the plaintiff was tied up from declaring by an order obtained by the defendant to stay the proceedings until security were given for his costs. *Ross v. Green*, xxix. 491.

23. *Semble*, the like practice would now be followed under the 15 & 16 Vict. c. 76, s. 58, which has repealed and reenacted the provisions of the Reg. Gen. *Ib.*

24. An undertaking to appear is to be taken as an appearance for the purpose of computing the year within which a plaintiff is bound to declare. *Ib.*

25. When security for costs has been required and given in the course of a year which has already begun to run, the plaintiff will be out of court at the end of the year. *Ib.*

26. A plaintiff, out of the jurisdiction, having failed to comply with an order for security for costs, obtained an order to discharge it, on his return, some years after, and delivered a declaration. *Held*, he was not out of court by the operation of the rule. *Ib.*

27. *Attorney's bill.* The defendant, who was an attorney, wrote to the plaintiff, also an attorney, a letter enclosing a writ of summons in a cause of *P. v. B.*, requesting the plaintiff to serve it, and to send the defendant an account of his charges. The plaintiff, in answer, sent a letter, headed "*P. v. B.*," informing the defendant of the service of the writ, pursuant to his instructions, and that his charges, enumerating the items, were 1*l.* 0*s.* 6*d.* *Held*, that the plaintiff's letter was a compliance with the 6 & 7 Vict. c. 73, s. 37, and gave the defendant sufficient information, by reference to the writ, of the court in which the business was done. *Cozens v. Graham*, xii. 527.

28. *Commissioners of sewers, suits by and against.* By statute, the commissioners of sewers may sue and be sued in the name of their clerk; and this shall include their chief clerk, whose title is secretary. *Held*, that their district clerk, acting for the district where a cause of action arose against them, was not the proper officer to be sued as representing the commissioners. *Clements v. Pollard*, xxx. 551.

29. *Suit by company against member—Nominal plaintiff.* The 3 & 4 Vict. c. 95, after reciting, that several persons had formed themselves into a company, or partnership for effecting assurances on lives, and that difficulties might arise in recovering debts due to the company since, by law, all members of the company must be named in every action or suit for such purpose, enacted that all actions and suits against any person indebted to the company, or upon any bonds, covenants, bills of exchange, promissory notes, contracts, or agreements, and, generally, all other proceedings whatsoever at law, or in equity, by or on behalf of the company, against any person or persons, whether such person or persons be a proprietor or proprietors of the company or not, shall be commenced in the name of the chairman, or of a director, or the secretary of the company as the nominal plaintiff. *Held*, that the company might sue, in the name of the nominal plaintiff, one of its own members for a debt due to the company. *Reddish v. Pinnock*, xxviii. 574.

30. *Production of copy on appeal.* The rule, that upon all motions respecting causes tried before sheriffs, &c., under stat. 3 & 4 Will. IV. c. 42, ss. 17 and 18, the party making the application must produce an examined copy of the sheriffs' notes, &c., is imperative. *Watkins v. Packman*, xxvi. 291.

31. *Warrant of attorney—Attestation.* Attestation to the execution of a warrant of attorney as follows: "Signed, sealed, and delivered in the presence of me, H. C., who, at the request and in the presence of the said J. H. B., J. C., and J. H. P., have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them, and each of them, the nature and contents thereof." *Held*, insufficient, inasmuch as it did not by necessary implication declare the witness to be attorney for the parties executing the warrant of attorney, in pursuance of sect. 9 of stat. 1 & 2 Vict. c. 110. Erle, J., dissenting. *Pocock v. Pickering*, xi. 461.

32. The court allowed a commission for taking the acknowledgment of a married woman in Australia, under the 3 & 4 Will. IV. c. 74, s. 83, to go out with a blank for the Christian name of the husband, which (the marriage having taken place there) was unknown here. *In re Legge*, xxix. 321.

33. The court dispensed with the notarial certificate in the case of an acknowledg-

ment taken at Corfu, under the 3 & 4 Will. IV. c. 74,—it being sworn that there was no English notary in the island. *In re Hurst*, xxix. 340.

34. See *Regina v. The Sadlers' Co.* xx. 152.

XXIII. Motions.

1. *Notice of.* Party required to give notice of motion for an order under the 12th rule of stat. 11 Geo. IV. and 1 Will. IV. c. 36, for the defendant to remain in custody, until an answer or further order should be served upon the defendant. *Aveling v. Martin*, xvii. 261.

2. *Saving, till next seal.* A party moving, may, on the day for which notice is given save the motion till the next seal if he chooses. *In re The Banwen Iron Co.* xvii. 91.

3. *Precedence of.* Where several counsel state that they have respectively pressing motions to make, the court calls on the senior counsel. *Soltau v. De Held*, viii. 132.

4. Where notice of motion has been given for a certain day, that motion does not thereby obtain precedence on that day. *Ib.*

5. *Semble*, on the last day of term, only unopposed motions by the outer bar take precedence, and they yield to pressing motions. *Ib.*

6. *Abandoned.* A motion not made when called on is to be treated as an abandoned motion; the modern practice of setting motions down in a paper makes no difference. *Turner v. Turner*, viii. 137.

7. *Days for hearing—Notice for taking bill pro confesso.* Although it is not the course of the court to hear special motions on other days than those appointed, yet, as every day in term is a motion day, a notice inserted in the Gazette, under the 79th order of May, 1845, for taking a bill *pro confesso* on a day in term, is a good notice, notwithstanding that the day for which notice is given is not a day regularly appointed for motions. *Chaffers v. Baker*, xxvii. 552.

8. *To appoint special examiner.* A motion that a person should be specially appointed by the court to examine witnesses is not a motion of course, but ought to be made in court. *McNeill v. Acton*, xix. 413.

9. *By consent, to enlarge publication.* A motion by consent, in a cause commenced under the old practice, to enlarge publication, to take the evidence orally under the new practice, and to suppress depositions taken under the old practice, is properly made in court instead of by application at chambers. *Atkinson v. The Oxford, Worcester, &c. Railway Co.* xv. 325.

10. *What counts as.* An application by counsel on the part of the crown, to set down a cause for argument, does not count as a motion so as to prevent his moving another case on that day. *Lewin v. Rogers*, xvi. 509.

11. *In arrest of judgment.* Some issues of fact had been found for the plaintiff, and some for the defendant in vacation. Issues in law still remained undetermined at the commencement of the next term. It being admitted that no motion in arrest of judgment, or for judgment *non obstante veredicto*, could be made until the demurrers were determined, *semble*, that no such motion could be made, under the circumstances, after the first four days of term, except by consent. *Harris v. The Great Northern Railway Co.* vii. 495.

12. *For reference to Master.* A motion under the 19th section of the 13 & 14 Vict. c. 35, for a reference to the Master to take an account of the debts of a deceased person, must be made in court. *In re Harrold*, iii. 144.

13. *Affidavit of plaintiff in reply to defendant's answer, after motion opened.* After a motion has been opened, the plaintiff cannot file an affidavit in reply to the defendant's answer, unless the court itself required information as to particular facts. *Smith v. The Swansea Dock Co.* xvii. 55.

14. *Motions for a decree are set down like causes.* *Ames v. Ames*, xxi. 67.

XXIV. *Creditors' Suits.*

1. *Stay of.* A creditor's suit is stayed as a matter of course by a decree in a suit by a residuary legatee for the administration of the same estate, though the inquiries may not be altogether the same in the two suits. *Golder v. Golder*, xii. 211.

2. *Small fund—Apportionment by affidavit.* A creditors' suit coming on for further directions, the fund applicable to the payment of the debts being small, a reference back to the Master to apportion it between the creditors was dispensed with, and the apportionment directed to be made by affidavit. *Bear v. Smith*, ix. 135.

3. *Misapplication of assets—Carrying on trade—Order of inquiry.* The bill in a creditor's suit was filed by a creditor entitled to the payment of a sum of money out of the intestate's assets, after the death of a person then living, and charged that the administratrix had carried on the intestate's business since his death at a loss, and had misapplied assets. Another creditor's suit was instituted in which a decree was obtained and an inquiry directed, whether the carrying on the trade from that date was beneficial. The first suit having come to a hearing, it was *held*, on motion to stay proceedings, that relief was prayed which could not be had in the second, and an inquiry was directed, whether the carrying on the trade had been beneficial from the death of the intestate up to the date of the former order of inquiry. *Underwood v. Jee*, i. 223.

4. *Plaintiff's debt established.* In a creditor's suit, though the plaintiff's debt has been disputed by the defendant and established by the court, the usual decree will be made, and the creditor must prove his debt in the Master's office. *Field v. Titmuss*, ii. 89.

5. *Writ of elegit.* In suits by judgment creditors, under 1 & 2 Vict. c. 110, the plaintiffs' title as to the real estate of the debtor is incomplete until a writ of *elegit* has been sued out. *Smith v. Hurst*, xv. 520.

XXV. *Claims.*

1. *Parties to, bound to state what.* Parties resorting to the summary jurisdiction of the court by claim are bound to state all the facts of the case which are within their own knowledge, and are not justified in merely stating those facts which they may consider material in the view they take as to the relief to which they may be entitled. This rule was applied where a party seeking to have a trust fund administered by the court, suppressed the fact that part of the fund had been severed and paid into court under the Trustee Indemnity Acts. The jurisdiction of the court over a fund paid into court under those acts was determined. *Goode v. West*, vii. 285.

2. *Orders on—Affidavits.* In orders made upon claims, affidavits will be entered as read. Plaintiffs' affidavits are not considered as evidence. Defendants' affidavits are treated as an answer to the bill. *Cockburn v. Green*, iii. 191.

3. Before it will give relief upon a claim, the court must see its way to a decree at the hearing. It will not send the case to originate in the Master's office, there, by means of a roving inquiry, to obtain materials upon which to found a decree which shall work out the rights of the parties. *Eccles v. Cheyne*, v. 212.

4. At the hearing of a claim, a defendant is at liberty to avail himself of the benefit of the Statute of Limitations without pleading it. *Sneed v. Sneed*, vii. 141.

5. The case stated on a claim must be such as would not render a bill demurrable if stated on a bill. *Groves v. Lane*, xiii. 376.

6. Amendment of defective claim allowed on payment of the costs of the day. *Id.*

7. If the plaintiff in a claim make default at the hearing, every defendant who appears is entitled to have the claim dismissed, with costs, without producing any affidavit of service of the writ of summons. *Charlton v. Allen*, xv. 476.

8. Where the plaintiff omitted to prosecute an order upon a claim, it was *held*, that

the court might give a defendant leave to sue out writs of summons, to bring before the Master the parties required by the terms of the order. *Turnbull v. Warne*, xix. 155.

9. The omission to print counsel's name upon a claim requiring his signature will not prevent its being filed. *Coppeard v. Mayhew*, xvii. 406.

10. Where errors had been committed in carrying out the proceedings under an original claim, leave was given to file a supplemental claim. *Naylor v. Robson*, ix. 200.

11. It is not necessary for a defendant who disclaims to make an affidavit of that fact; if he appears at the hearing and disclaims, the claim will be dismissed as against him. *Ladbroke v. Bleden*, xii. 322.

12. Where a defendant to a claim is absconding, and out of the jurisdiction, the court will not give leave to proceed to have the claim taken *pro confesso*, or to enter an appearance on behalf of the defendant. *Smith v. Corles*, i. 126.

13. Where there is a conflict of affidavits it is not a fit case for a claim, but the proper course is to file a bill in the first instance. *Jackson v. Grant*, i. 145.

14. Claims may be decided on affidavits on both sides, on a contested matter of fact, or the court may direct a bill to be filed, or proceedings at law. *Smith v. Constant*, i. 218.

15. When, at the hearing of a claim, a fact is alleged by the plaintiff on his own affidavit, (which affidavit the court will not receive as evidence,) but which fact is not admitted by the defendant, the court will direct the claim to stand over, that the fact may be otherwise substantiated. *Ib.*

16. The affidavit of the defendant has the same degree of weight as an answer. *Ib.*

17. A motion for leave to add parties in a claim does not require notice. *Hayward v. Price*, i. 120.

18. It is no ground for staying a decree upon a claim for the execution of a trust, that a bill has been filed for the execution of the same trust, and embracing, in addition to the objects covered by the claim, other objects not comprised therein. *Scott v. Hastings*, v. 64.

19. Where a question, which ought to have been made the subject of a special claim, is brought before the court on a common claim, the court will give leave to have it filed as a special claim *nunc pro tunc*. *Matthews v. Pincomb*, vi. 70.

20. At the hearing of a foreclosure claim, an issue was directed as to a question of notice, which issue was afterwards abandoned by the defendant. *Held*, that before the claim could come on again for hearing, an order must be made on motion, that the issue should be taken *pro confesso*. *Hartland v. Dancox*, xi. 112.

21. Where a claim is called on and the plaintiff does not appear, the defendant will not be entitled to a decree for the dismissal of the claim with costs, unless he produces, before the rising of the court, an affidavit of service of the writ of summons. *Rackham v. Cooper*, vi. 68.

22. *Orders of April, 1850.* The orders of April, 1850, authorizing proceedings by claim, were intended to apply to simple cases; and in determining what is a simple case, the test is to see whether a decree would have been of course if the case made by the claim had been raised by bill, bringing all proper parties before the court. *Eccles v. Cheyne*, v. 212.

XXVI. Under Chancery Procedure Amendment Act and other Statutes.

1. *Suit against trustees and their solicitor—Dismissal as against solicitor.* If, in a suit by the *cestuis que trust* against the trustees and their solicitor who has misapplied the money intrusted to him by the trustees, the solicitor be examined as a witness and the bill be dismissed as against him, a decree may be still had against the trustees, (on the ground that the solicitor is not a necessary party to the suit.) *Quære*, whether the effect of the statute 6 & 7 Vict. c. 85, is to enable the court to make a decree against

a defendant in equity who has been examined as a witness in the cause. *Rowland v. Witherden*, xi. 131.

2. *Suppression of depositions.* Applications by consent for suppression of depositions, ought in general to be made at chambers, but where the application is besides to take the evidence orally under the new practice, it is proper to make the application in court. — v. —, xvii. 46.

3. *Petition and bill—Petition to pay money out of court.* Under the act 10 & 11 Vict. c. 96, it is entirely a matter for the discretion of the court to direct a bill to be filed, if such a mode of proceeding shall appear to be necessary; but the Lord Chancellor has the same jurisdiction upon petition as upon a bill. On a petition presented under that act, praying for the payment out of court of money then in court, and on cross petition in opposition thereto, the court has full power to declare the validity or invalidity of any deed on which the claim to that money is vested. *Quære*, whether this may not properly be done upon petition alone, without any necessity for filing a cross petition? Such necessity, if it exists, may be dispensed with by consent. *Lewis v. Hillman*, xviii. 34.

4. *Scientific evidence—Practice under 15 & 16 Vict. c. 80, s. 42.* This section explained. *Mildmay v. Methuen*, xiii. 430.

5. *Decree for foreclosure changed to decree for sale.* If a sale under sect. 48 of the Equity Improvement Jurisprudence Act be desired, it must be asked at the hearing; if a decree at the hearing be made for the foreclosure, it cannot afterwards, on motion, be changed to a decree for sale. *Girdlestone v. Lavender*, xv. 9.

6. *Evidence closed—Enlargement of Time—Affidavits.* After the time for closing the evidence in a cause has expired, the court will not extend the time to enable either party to answer it, the special leave mentioned in the 38th section of the statute 15 and 16 Vict. c. 86, being only to be obtained upon special application, and under special circumstances. Consistently with the terms of the 38th section of the statute, and of the 32d order of August, 1852, made thereon, the parties to a suit may abstain from filing their affidavits, till the last hour of the day fixed for closing the evidence in the cause. *Thompson v. Partridge*, xxiii. 227.

7. *Married woman's life interest—Cutting timber.* Where a married woman, having a life interest to her separate use in real estate, with her husband cut timber, and a suit was instituted in one branch of the court to carry into effect the trusts of the settlement, and in another branch there was a suit in which a claim was made on the woman's separate estate in respect of the timber cut, it was *held*, that in the first suit the court could not decide on the right to cut the timber, but the woman, on giving security for the timber, was allowed her income during the suit. *Stacey v. Southey*, xxi. 257.

8. *Abstract of title.* Where the court orders a sale, and before the property is sold, an offer is made by private contract, the court has a discretion under the 56th section of the stat. 15 & 16 Vict. c. 86, to dispense with the rule that the abstract of title shall be laid before the conveyancing counsel. *Gibson v. Woollard*, xxxi. 222.

9. *Absence of claimants.* An act for the improvement of equity jurisdiction does not enable the court to proceed in the absence of all claimants on one side, but only at the discretion of the court in the absence of some of the claimants on one side. *Swallow v. Binns*, xvii. 270.

10. *Interrogatories.* Where a written bill is filed under the Chancery Procedure Amendment Act, interrogatories may be filed before the printed copy of the bill is filed. *Lambert v. Lomas*, xv. 323.

11. *Admission of books of account.* Where, under a decree directing accounts to be taken, no order was obtained under the 54th section of stat. 15 & 16 Vict. c. 86, that the books of account should be taken as *prima facie* evidence, but the judge's chief clerk so admitted them and granted his certificate, the court of appeal, upon a motion to discharge the certificate, refused the same, but without costs. *Newberry v. Benson*, xxvii. 401.

12. *Orders to amend.* Where a voluntary answer has been put in under the 13th section of 15 & 16 Vict. c. 86, the plaintiff cannot obtain an order to amend as of course, after four weeks from the time when under the old practice the answer would have been deemed sufficient. *Rogers v. Fryer*, xxiii. 563.

13. When an order is discharged for irregularity, it will be discharged with costs, even although a special application, if made, would have been granted. *Ib.*

14. *Filing traversing note.* The 26th section of the 15 & 16 Vict. c. 86, cannot be read disjunctively; and therefore where a defendant has been required to answer, and has not answered, the plaintiff's bill, and the time for putting in such answer has expired, the old practice of filing a traversing note must be adopted. *Heath v. Lewis*, xxiii. 33.

15. *Traversing note.* Where a plaintiff has filed a traversing note against one defendant under the 57th order of May, 1845, he may move for a decree under the 15th section of the Procedure Amendment Act, 15 & 16 Vict. c. 86, and the clerk of records and writs is to issue his certificate in order to enable the plaintiff to enter the cause for hearing with the registrar. *Maniere v. Leicester*, xxiii. 286.

16. *Subpœna ad testificandum.* A subpœna *ad testificandum* issues *ex debito justitiæ* without the order of the court, and it is not necessary to obtain such an order beforehand, where there is a probability that the *viâ voce* evidence of a party may be required at the hearing in the case, contemplated by the 39th section of 15 & 16 Vict. c. 86. *May v. Biggenden*, xvii. 225.

17. *Construction of 16 & 17 Vict. c. 78, s. 2.* The words "at their respective places of business," do not relate to the place where the oath is to be administered, but the area within which the solicitors are to be considered as practising. *In re Clerk of Records and Writs*, xxvii. 399.

18. Application for the assistance in equity of a common-law judge under the 14 & 15 Vict. c. 83, is to be made through the Lord Chancellor. *Hay v. Willoughby*, xv. 274.

19. A cause at issue under the old practice, but under which no evidence had been taken, may be completed according to the rules of new practice. *Macintosh v. The Great Western Railway Co.* xv. 347.

20. Cause ordered to stand over till a day named, to enable the plaintiff to prove that a defendant was out of the jurisdiction, which the other defendants objected was not sufficiently proved by the plaintiff's affidavit. *Smith v. Edwards*, xiii. 519.

21. The 52d of 15 & 16 Vict. c. 86, applies to the supplemental decree, and not to the case of a creditor, not a party to the suit, applying on notice served with leave upon all parties, for an order that the suit might be revived, and the proceedings carried on by the creditor. Leave to file a supplemental bill refused on this motion. *Lowes v. Lowes*, xiii. 458.

22. Where a written copy of a bill has been duly stamped and filed under the 6th section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, the printed copy, if brought into the office within the fourteen days prescribed by that section, may be filed without having a stamp affixed. *Jones v. Batten*, xiii. 520.

23. The indorsement on bill of complaint or claim may be altered at the discretion of the court, from the form prescribed by the schedule to the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86, and such indorsement is not required by the act to be printed—*semble*. *Baines v. Ridge*, xv. 387.

24. An order and decree of revivor and supplement by a plaintiff against a co-defendant in a suit commenced by claim, is not within the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86, s. 52. A printed special claim of revivor and supplement must be filed. *Yate v. Lighthead*, xv. 321.

25. An order and decree of revivor and supplement in a suit, instituted by claim, is within the 15 & 16 Vict. c. 86, s. 52. *Martin v. Hadlow*, xv. 319.

26. The birth of one of a class, entitled as such, after the institution of a suit, is

within the 52d section of the Chancery Improvement Act, and justifies an order for the usual supplemental decree. *Fullerton v. Martin*, xix. 121.

27. *Semble*, that the court will not, under the 15 & 16 Vict. c. 86, determine a mere question of law unnecessary to be decided previously to the question of equity, for the mere purpose of making a declaratory decree. *The Trustees of the Birkenhead Docks v. The Birkenhead Dock Co.* xxiii. 389.

28. Where further evidence is necessary after a decree, a special order of the court is not necessary for the oral examination of witnesses before the examiner. Sects. 40 and 41 of the stat. 15 & 16 Vict. c. 86. *Anonymous*, xxiii. 181.

29. An application for the attendance of a common-law judge to hear a case under the 14 & 15 Vict. c. 83, must be made by the Lord Chancellor. *Deerhurst v. Jones*, xiii. 455.

30. In a "special case" under the 13 & 14 Vict. c. 35, various questions were propounded for the opinion of the court; but the Lord Chancellor refused to decide any, except the great question in the case. *Barrington v. Liddell*, xvii. 188.

31. Applications under the 10 & 11 Vict. c. 96, and the 12 & 13 Vict. c. 74, must be by petition, and not by motion. *Harrison v. Masselin*, viii. 64.

32. In directing accounts to be taken under the Masters in Chancery Abolition Act, the accounts are to be directed to be taken in a general form. *In re Catling*, xv. 318.

33. Under the Masters in Chancery Abolition Act, the court cannot act on the opinion of the-conveyancing counsel, in the case of an exchange. *Thornhill v. Thornhill*, xvii. 224.

34. Under the new practice, applications for the production of documents should originate at chambers. *Thornton v. Tenlow*, xiii. 455.

35. Under the act, applications to pay money into court may be also made at chambers. *Davenport v. Davenport*, xiii. 455.

36. A private estate act enacted that, from time to time certain matters relating to the management of the estate should be inquired into before a Master in chancery, and an inquiry was directed before the chief clerk in chambers. *Thornhill v. Thornhill*, xxi. 455.

37. The court will, in a proper case, adjourn the proceedings to chambers for a limited time, to examine the evidence and Master's report, with the assistance of the chief clerk, but not for the case to be gone into before the chief clerk as a judge. *Saunders v. Walter*, xiii. 469.

38. When a petitioner prays for investment in lands, the court on being satisfied that the investment is eligible, will order the petition to stand over for an opinion on the title, and on the return of such opinion to the court an order will be made on the petition. *In re Caddick*, xv. 319.

39. Persons appointed under the "Oaths in Chancery Act, 16 & 17 Vict. c. 78, may administer oaths and take declarations at other places than their respective places of business within ten miles of Lincoln's Inn Hall." *In re "The Oaths in Chancery Act,"* xxiii. 560.

XXVII. Under Winding-up Acts.

1. *Master's discretion—Official manager.* The court will not interfere with the Master's discretion in the appointment of the official manager, unless the party be shown to be unfit. *In re The Merchant Traders', &c. Co.* vii. 247.

2. *Official manager substituted in suit.* A decree was made declaring that a company were bound to indemnify the retired directors, and a reference made to the Master. An order being made to wind up the concern, the official manager was substituted in the suit, and an order for indemnity and payment was made on him, and the Master was directed to make proper calls on the contributories for that purpose. *Gleadow v. The Hull Glass Co.* xv. 142.

3. *Order going beyond notice of motion.* Under the Winding-up Acts, the circumstance that an order goes beyond the notice of motion on which it is made, however immaterial to others, is not so to parties who, being interested and served with notice, do not appear; for they have the right to assume that nothing beyond what is contained in the notice will be asked on the order. *In re The Winding-up Acts; ex parte Carew*, xxvii. 95; *ex parte Underwood*, xxvii. 891.

4. *Enlarging time for giving notice of appeal.* The 33d section of the statute 12 & 13 Vict. c. 108, (the Joint-stock Company's Winding-up Amendment Act,) is imperative; and therefore the court has no authority to enlarge the time for giving notice of appeal, after the three weeks from the making of the order complained of has elapsed. *Ex parte Green*, xxxi. 304.

5. In proceedings by the official manager of a joint-stock company, his name and address, as well as style, should be given. *Ex parte Heritage*, xxiii. 852.

6. The advertisement of the order of reference as to winding up a company, may be dispensed with. *In re The Worcester Corn Exchange*, vii. 227.

7. The Winding-up Acts do not limit the time within which notice must be given of motion for a second rehearing by the great seal. *In re The Direct Exeter, &c. Railway Co.* iv. 149.

8. The order of reference, whether it is expedient to wind up a company, may be dispensed with. *In re The Worcester Corn Exchange*, vii. 227.

XXVIII. Attachment for Want of Answer, &c.

1. *To enforce payment of money.* Where a party who was ordered, in Ireland, by the commissioners under the Incumbered Estates Act, to pay a certain amount of money, and in default thereof to be committed, disobeyed and removed into England, on application to the court of chancery in England the order was enrolled in England, and that court made, at once, an unconditional order for an attachment. *In re Keogh's Estate*, xxvii. 200.

2. *Award, non-payment of.* An agreement of reference having been made a rule of court, the rule being intitled, "In the matter of the arbitration between A and B; A v. B," and 52*l.* 18*s.* and taxed costs of the action of A v. B, the amounts awarded to A, having been duly demanded of B, the court granted an attachment against him for non-payment of those two sums. *In re Pike v. Newman*, xxvi. 296.

3. A rule absolute will be granted for an attachment without a direct affidavit of personal service of the rule nisi, if the affidavits disclose circumstances to satisfy the court that the rule nisi has reached the hands of the party, though they show that he is keeping out of the way to avoid service. *In re Morris*, xxii. 150.

4. An attachment for want of an answer, returnable immediately, against a defendant resident out of the jurisdiction, is irregular. *Zulueta v. Vinet*, xi. 72.

5. An attachment for want of answer will issue against a married woman who, having appeared separately, and obtained an order to answer separately, nevertheless allows the time for answering to expire. *Thicknesse v. Acton*, viii. 47.

XXIX. Rehearing in Chancery.

1. *Decree for foreclosure against infant defendants.* Where a decree for foreclosure has been made against the defendants, subsequently discovered to be infants, the court will not rehear the cause, nor expedite the foreclosure of their equity of redemption, but a supplemental claim must be filed, or another suit instituted. *Scawen v. Nicholson*, xix. 436.

2. *As to validity of will—Lapse of time.* A petition for a rehearing as to the validity of a will, after an acquiescence in the probate of the same for the space of twenty years, was ordered to be taken off the file, where it had been placed by the

order of a judge, it being the opinion of the court that there ought to be no rehearing *Turner v. Turner*, v. 157.

3. *Time.* The time within which a decree or order of chancery may be varied on rehearing has never been defined. The practice has been to allow a party to take his chance of success under a decree before the Master, and, if unsuccessful, to obtain a rehearing of the decree. A decree was allowed to be reheard twelve and a half years after it had been pronounced, and notwithstanding it had been acted upon during that period by sales, &c. *Morgan v. Morgan*, vii. 216.

4. A petition, presented in 1851, to rehear a cause disposed of in 1834, was dismissed with costs. *Townley v. Bedwell*, xv. 92.

5. Where a court is asked to make an order which amounts, in fact, to the variation of an order made by a former Vice-Chancellor, it must be by way of rehearing. *The Attorney-General v. Croft*, vii. 292.

6. A decree was made establishing a will against a married woman as the heiress-at-law of the testator; she and her husband were defendants to the suit, and appeared by counsel, and consented. Upon a motion, by her next friend, she was allowed to present a petition of rehearing. *Turner v. Turner*, ii. 39.

7. Leave to move for a second rehearing by the Lord Chancellor may be applied for *ex parte*, and without notice. *Ex parte Bealy*, iv. 149.

8. The Winding-up Acts do not limit the time within which notice must be given of motion for a second rehearing by the Lord Chancellor. *Ib.*

9. When an order of reversal upon appeal rested in minutes, and the counsel for the respondents stated that material considerations had not been brought before the court, the court acceded to a motion for rehearing, although twenty-one days had elapsed. *Quære*, whether such rehearing was a matter of right. *Ex parte Turner*, xxi. 649.

10. The fact that judges of the court of chancery differ on a question, is no ground for a rehearing before the full court. *Blann v. Bell*, xv. 448.

11. Bill by a lady, who was tenant for life of a trust fund settled on marriage upon herself and her children, against trustees, to make them liable for a breach of trust, associated with her as co-plaintiffs her children. There was no evidence in the cause that these co-plaintiffs were her children, but the answer did not deny it, or raise the issue. *Held*, that it was too late, at the rehearing, to raise the objection; and that even if it had been open, an affidavit would have been received to repel it. *Fowler v. Reynal*, vii. 270.

XXX. Dismissal of Bill.

1. *Parting with interest to co-defendants and disclaiming.* In a case in which, after the bill was filed, two of the defendants, having parted with their interest in the subject-matter of the suit to two co-defendants, without acquainting the plaintiffs therewith, joined in an answer disclaiming and claiming to be dismissed with costs, and the plaintiffs then amended their bill, omitting the names of the two disclaiming defendants, and afterwards served them with a notice of motion to dismiss the bill without costs, an order was made pursuant to the notice of motion. *Hawkins v. Gardiner*, xvii. 34.

2. *For want of prosecution.* A bill was filed in March, 1846, and the answer filed on the following 20th July, in which it was stated that the defendant had become bankrupt in April, 1846, and received her certificate on the 7th July following. The bill was amended in September, 1846, and the answer filed on the 7th November. No proceedings had since been taken. On motion to dismiss for want of prosecution, with costs, the court granted the application, but without costs. *Kemball v. Waldock*, xxiii. 97.

3. *For an instance of special circumstances which take the case out of the general*

rule on a motion to dismiss for want of prosecution, see *Pinfold v. Pinfold*, xv. 10.

4. *Death of defendant.* After a report in favor of the title in a specific performance suit, the defendant died. Upon a motion by his executors and devisees in trust, the court ordered that if the plaintiff did not revive within six weeks, the bill should stand dismissed. *Norton v. White*, xix. 208.

5. *Decision overruled.* If a decision, on the authority of which a suit has been commenced, be overruled, the plaintiff must nevertheless proceed, or have his bill dismissed on the usual terms. *The Lancashire and Yorkshire Railway Co. v. Evans*, xi. 312.

6. Though exceptions for impertinence had been filed after the answer had become sufficient, the defendant had a right to move to dismiss. *Stuart v. Lloyd*, i. 100.

7. Plaintiff having delayed proceedings, bill dismissed for want of prosecution. *Drioli v. Sedgwick*, iii. 77.

8. Vacations are not excepted in the computation of the three months within which, under the 29th order of August, 1842, a plaintiff must set down the cause for hearing or move for a decree; but the court has a discretion to dismiss the bill or give the plaintiff further time. *Bottomley v. Squire*, xxxi. 339.

9. In the case of a bill against several defendants, one only of whom had appeared, and which one was not required to answer, the court permitted that defendant to move to dismiss at the end of three months, although Easter vacation was included in the computation of that period, but gave the plaintiff further time. *Ib.*

10. Where a plaintiff has failed at the hearing to prove his title to a decree for a specific performance on a point not raised by the pleadings, the court dismisses the bill, without prejudice to any other bill that the plaintiff may be advised to file. *Clay v. Rufford*, xix. 350.

11. The dismissal of a bill does not prejudice the right to file another for the same purpose under a different state of circumstances. *The Mayor, &c. of Liverpool v. The Chorley Water-Works Co.* xxi. 620.

12. A pauper plaintiff cannot dismiss his bill *ex parte* without costs. *Parkinson v. Hanbury*, xxi. 445.

XXXI. Sending Case to Court of Law.

1. A question of general law, arising out of circumstances which are likely to occur in other cases, and the decision of which might affect the rights of other persons, is a case in which this court may properly seek the opinion of a court of law. *The Manchester Railway Co. v. The Great Northern Railway Co.* xii. 216. See also *Falkner v. Grace*, xii. 213; *Malcolm v. Scott*, i. 72.

2. The 61st section of the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86, which came into operation on the 1st November, 1852, and deprives the court of chancery of the power of sending cases for the opinion of courts of law, has not a retrospective effect so as to prevent the argument in a court of law of a case sent from chancery before that day. *Hobson v. Neale*, xvi. 509.

XXXII. Miscellaneous Cases at Common Law.

1. *Rule for new trial—Striking out one defendant.* A verdict having been found for both defendants, a rule for a new trial was moved for on the ground of misdirection; but it being admitted that there was no evidence against one of the defendants, the court, in granting the rule *nisi*, imposed as a term that his name should be struck out of the declaration, and the plaintiff should pay his costs. *De Bernardy v. Harding*, xx. 545.

2. *Fines.* The court will not direct the officer of the court to complete a fine,

unless the state of the property and the consent of parties be shown. *In re Scales*, xxii. 438.

3. *No appearance for plaintiff in error.* In a writ of error where no one appeared for the plaintiff in error, the counsel for the defendant in error was required to state the nature of the case, and the judgment of the court below was then affirmed with costs. *Jones v. Cannock*, xviii. 81.

4. *Application for order to party to perform award.* An application for an order directing a party to comply with the terms of an award may be made even before the time for moving that the award be set aside is expired. The court of common pleas will follow the established practice of granting rules to pay pursuant to the award, in cases in which the court would grant an attachment, notwithstanding the doubt expressed in *Creswick v. Harrison*, i. 384. *Hare v. Fleay*, vi. 433.

5. *Procedendo—Judge at chambers.* A judge at chambers has jurisdiction to make an order for the issuing of a writ of *procedendo* to send back proceedings removed by *certiorari* from an inferior court, and it is a matter for the discretion of the judge whether or not a summons to show cause should not in the first instance be granted. *Regina v. Scaife*, xiv. 147.

6. *Wife of plaintiff managing cause for him.* The wife of a plaintiff cannot claim to manage the cause for him at *nisi prius*, he being absent and in custody. And where the judge refused, in such a case, to hear the wife as advocate, and the husband not appearing in person or by attorney, a nonsuit was directed, the court refused to set the nonsuit aside. But, per Lord Campbell, C. J., in an application directly concerning liberty, as a motion for a *habeas corpus*, the wife may be heard on behalf of her husband. *Cobbett v. Hudson*, x. 318.

7. *Plea traversing allegation in declaration—Demurrer to plea.* It is not a general rule of practice that where the plea traverses an allegation in the declaration, and the plaintiff demurs to the plea, he will be put to his election whether the demurrer shall be set aside as frivolous or the allegation be struck out, though this will be done if the plaintiff's pleading appear to be so framed as to entrap or unfairly perplex the defendant. So held, before stat. 15 & 16 Vict. c. 76. *Tallis v. Tallis*, xviii. 154.

8. *Arrest—Affidavits.* Where a plaintiff has arrested the defendant on an *capias* obtained on an affidavit that he has sustained damages from the defendant to the amount of 20*l.*, and that he has probable cause for believing that the defendant is about to quit England, the court will not allow the defendant, on his application to be discharged from custody, to read affidavits denying the existence of a cause of action, as that is a matter to be tried by the jury. *Copeland v. Child*, xviii. 375.

9. *Removal of action to superior court—Wife a witness.* An application by a defendant to remove a cause from a county court was resisted, on the ground that the plaintiff's principal witness being his wife, he would be deprived of her testimony if the cause were removed into a superior court. The court granted the application, on the defendant's consenting that the wife should be examined as a witness. *Hodges v. Lawrence*, xvi. 600.

10. *Change of attorney's name.* On the application of an attorney the court directed that the Master enter on the roll opposite the attorney's name a change in the name, the attorney giving an affidavit that the change was from no improper motive. *In re Dearden*, ii. 355.

11. *Rule to reverse outlawry.* A rule to reverse an outlawry for error in fact where the defendant in error has not pleaded to the assignment of error within the time allowed, is a rule to show cause only, but on its being made absolute no terms will be imposed. *Howard v. Kershaw*, iv. 465.

12. The court will, on motion, reverse an outlawry on mesne process for error in fact, on payment of costs and entering a common appearance, if the case is one in which the defendant could not have been held to bail under the 1 & 2 Vict. c. 110. *Boddington v. De Melfont*, xx. 342.

13. Where two issues are joined in an action, the use of the word "issue," instead of "issues," is not such an irregularity as will set aside the writ of trial, or arrest judgment. *Watson v. Humphries*, xii. 455.

14. *Writ of summons specially indorsed—Execution.* A plaintiff issued a writ of summons specially indorsed, which was served on the 11th of February. The 18th was the last day for appearance by the defendant, and in default of appearance judgment was signed. *Held*, that execution might issue on the 27th of February, although the 26th was a Sunday, the 174th rule of the Rules of Hilary term, 1853, not being applicable to such a case. *Rowberry v. Morgan*, xxv. 488.

15. *Setting aside order.* The plaintiff's attorney took out a summons to attend chambers at half-past three. He attended with counsel at the time specified and for half an hour, in the last five minutes of which attendance (the defendant not appearing) the plaintiff's counsel, knowing that the defendant intended to appear and oppose his motion, applied for and obtained an order from the judge, and went away. Within a few minutes after four, the defendant's attorney came with his counsel to oppose the summons. The court set aside the order, and heard the case on the merits. *Moyse v. Dingle*, xxviii. 191.

16. *Amendment of special case.* The court will not allow a special case to be amended by raising a point which the parties have not raised for their consideration. *Hills v. Hunt*, xxviii. 381.

17. *Order for leave to plead several matters, abandonment of.* It is competent to a party who has obtained an order for leave to plead several matters, to abandon it before service; and it is also competent to him to abandon the summons, pending an adjournment indorsed thereon, without notice of abandonment; and even although the indorsement adds that "the defendant is to take such notice of trial as the plaintiff may be able to give," and the adjournment is to a day on which it will be too late for regular notice to be given, yet he may deliver a plea for which an order is not necessary on the adjournment day, without being bound by the condition expressed in the indorsement. In such a case, or in any case in which an order obtained by one party has any term or condition in favor of the other, the latter should, if he desire to secure the advantage of that condition, apply for leave to draw up the order, or obtain a new substantive order. *Holt v. Forshall*, xxx. 494.

18. *Reversal of judgment.* A verdict was found for the plaintiff in error, on error in fact *coram nobis*, that he, being an infant, had appeared in this suit by attorney. With a view to obtain reversal of the judgment, the plaintiff moved to have the cause put down in the paper for argument. *Held*, that this was a proper course according to practice. *Jackson v. Marshall*, xxx. 174.

19. *Carrying in roll.* If an action has been commenced against good faith, and the defendant pleads judgment recovered against a co-contractor, the court will compel the plaintiff, after he has signed judgment in the former action, to carry in the roll, in order that the record may be completed, and the defendant be provided with evidence in support of his plea. *Chubb v. Burrell*, xxx. 392.

20. *Demurrer books.* Where the plaintiff has, upon the defendant's default, in due time delivered the demurrer books for him to the two junior judges, the defendant cannot be heard, but the plaintiff will have judgment, unless the defendant appears and pays for the books so delivered for him. In the court of common pleas a previous notice of the plaintiff's intention to take the objection, is not required. *Dorsett v. Aspdin*, xx. 288.

21. *Rule nisi to pay money.* According to the practice of the court of queen's bench a rule *nisi* to pay money pursuant to an award, may be issued to show cause at chambers. *Ib.*

22. Applications to review the decision of a judge at chambers should be made in the course of the next term after the decision has been made. *Meredith v. Gittens*, xi. 395.

23. *Rule nisi returnable at chambers.* On the last day of term, the court will make a rule *nisi* concerning a matter of a pressing nature returnable at chambers; but it is not the practice to enlarge rules to be returnable at chambers, without the consent of the parties. *Casse v. Wight*, xxv. 340.

24. *Nonsuit.* A nonsuit was entered in a suit in which, if the plaintiff's counsel had insisted on the case going to the jury, the judge ought as a matter of law to have directed a verdict for the defendant. The counsel did not so insist, but afterwards moved to set aside the nonsuit. *Held*, that the court would not disturb the nonsuit. *Hughes v. The Great Western Railway Co.* xxv. 347.

25. Where a verdict is for a sum between 20*l.* and 50*l.*, an attorney is not deprived, by the 15 & 16 Vict. c. 77, of his privilege of suing in the superior courts. *Borrodaile v. Nelson*, xxv. 360.

26. If an action be brought on a solicitor's bill of costs for business done in the court of chancery, and the defendant has liberty under a judge's order to have the bill taxed, which is done by an officer of the court of chancery, this court will not review the taxation. *Ib.*

27. The court refused to rescind part of a judge's order, right when it was made, although the death of the judge who tried the cause had put the plaintiff in a different position. *Ib.*

28. After issue joined on error in law, either party may set down the case for argument four days before the day of hearing. *The Southeastern Railway Co. v. The Southwestern Railway Co.* xvi. 525.

29. As to signature of counsel to special cases and setting down of special cases for hearing, see *Craig ex parte*, iii. 85; *Hills v. Treacher*, iii. 75.

30. Short-hand writer's notes of a trial not allowed to be read. *Socks v. The Mayor, &c. of Halifax*, v. 491.

31. The court will act upon the notes of counsel, if they agree, although no entry or corresponding minute appears in the registrar's book. *Anderton v. Yates*, vi. 45.

32. The presiding judge at *Nisi Prius* has the entire conduct of the cause list, and may appoint any cause therein to be taken at his discretion. *Dunn v. Coutts*, xvi. 137.

33. The signature of an attorney shall not be required to any pleading, and hence the signature of a party himself may be sufficient. *Udney v. The East India Co.* xxiv. 227.

34. A rule *nisi* to strike an attorney off the roll, after he has been struck off the rolls of the other courts, must be served personally. *In re* — xxiv. 399.

35. An illegal entry and seizure of goods on a Sunday does not render a subsequent entry and seizure of the same goods, on the same writ, illegal. *Percival v. Stamp*, xxiv. 399.

36. Motion for appointing guardian *ad litem* to infants without a commission, and without their appearance in court, refused. *Carwardine v. Wislade*, x. 316.

37. *Writ of error—Delivery of paper books.* On the 24th May, the 28th of the same month was appointed for hearing the argument upon a writ of error, so that it was impossible for the defendant in error to deliver the paper books four clear days before the day of hearing, in pursuance of rule 68 of Reg. Gen., H. T., 1853. *Held*, that the plaintiff in error, having delivered the paper books on behalf of the defendant, could not object to the defendant in error being heard until he had paid for them. *Kernot v. Pittis*, xx. 67.

38. *Affidavit for discharge of poor debtor—Service of notice.* An affidavit for the discharge of a prisoner who had been taken in execution upon a judgment for less than 20*l.*, and had lain more than twelve months in prison upon it, need not state the cause of action for which the judgment was obtained. Notice of the application having been served upon the plaintiff's wife at his residence, the rule may be absolute in the first instance. *Passingham v. Wüherden*, xxviii. 163.

39. *Bill of exceptions.* A bill of exceptions should state what directions the judge gave on the particular issue raised, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions. Per the judges. *Anderson v. Fitzgerald*, xxiv. 1.

40. *Scire facias—Recognizance—Fiat of attorney-general.* Writs of execution having been sued out without effect on a judgment against the publisher of a newspaper for libel, the court allowed a *scire facias* to issue on the recognizance of the sureties taken under the 60 Geo. III. c. 9, and 1 Will. IV. c. 73, the attorney-general's fiat having been first obtained. *Ex parte Brunswick and Lunenburg*, vi. 579.

41. *Rule for special jury.* Where, after notice of trial, the defendant had obtained a rule for a special jury for the purpose of delay, and had nominated but not reduced the special jury, the court refused a rule nisi to discharge the rule for a special jury. *White v. The Eastern Union Railway Co.* ix. 451.

42. *Irregularity cured by consent—Commissary court of Surrey.* In a suit instituted in the commissary court of Surrey, the witnesses were produced, sworn, examined, and repeated in London, all parties consenting to time and place; the case was determined upon the evidence of these witnesses. *Held*, on appeal, that the course taken was an irregularity, and not a nullity, and therefore cured by consent. *Parkes v. Parkes*, xxv. 610.

43. *Time of taking objection.* An objection on the ground of irregularity, must be taken when the facts are first learned, and not when their irregularity is discovered. *Ib.*

XXXIII. Miscellaneous Cases in Equity.

1. *Replication—Subsequent answers—Chancery Procedure Amendment Act—Evidence, oral and by affidavit.* Some of the defendants having put in their answers after replication, leave was given to file a further replication as to the subsequent defendants, and the time for taking evidence was enlarged so as to include all the defendants. The plaintiff, having elected to take evidence orally, moved for leave to read affidavits already filed and to be filed, on account of the age and infirmity of the witnesses, and their residence in the country, the defendants to have liberty to cross-examine orally. *Held*, that there were no circumstances to induce the court, under the 15 & 16 Vict. c. 86, s. 36, to allow affidavits to be read, as a special examiner could be sent down, who might take the examination in chief orally, as well as the cross-examination; and that a question relating to an intricate pedigree, where the witnesses were in humble life, was one in which oral testimony was particularly desirable. *Rogers v. Hooper*, xxiii. 378.

2. Incumbrancers may appear in the Master's office, under the 18th order of April, 1850, and the Master may summon witnesses in the usual way. *Brook v. Biddall*, v. 223.

3. Under an order giving liberty to add parties by amendment or supplemental bill, a plaintiff may do both. *Minn v. Stant*, xv. 116.

4. *Claim for renewal of lease, one party being an infant—Two orders necessary.* On a claim for specific performance of a covenant for the renewal of a lease, rendered necessary by the inability of one of the parties, through his infancy, to grant a new lease, two orders are necessary—one at the hearing for the payment of the consideration money into court, and a second for the execution of the conveyance reciting the former order. *Harvey v. Brooke*, xvii. 64.

5. *Reference to conveyancing counsel.* No special or substantive order will be made in ordinary cases for a reference to conveyancing counsel under the 40th section of the 15 & 16 Vict. c. 80, but the court will adjourn the case, in order that the opinion of counsel may be taken in the mean time. Form of order under such a reference. *Ib.*

6. On motion, the cross-examination of the party in the cause may be deferred until

all the witnesses upon the particular pleading have been dismissed. *Parlby v. Parlby*, ix. 572.

7. *Service.* A was entitled to a sum of stock carried over to his account in a suit. B, a judgment creditor of A, obtained a judge's order under the 1 & 2 Vict. c. 110, charging the stock, and then filed a claim against A, and served him with it. The claim was brought on, and A did not appear. *Held*, that B could not obtain the stock without a petition to be presented in the suit, but that it was not necessary to serve A with the petition. *Reece v. Taylor*, xi. 127.

8. Where there are two petitions appealing from an order, one to the effect that no relief ought to have been granted, and the other that a greater measure of relief ought to have been granted, it is more convenient that the petition asking the relief should be opened first. *Neate v. Pink*, viii. 205.

9. The court of chancery will give no encouragement to any attempt to obtain its decision on important questions of law before the hearing. *Bates v. Brothers*, xxiii. 531.

10. An irregular application to court, in form of a petition by the party, will be given to an attorney in the case, for further proceedings upon it. *In re Hodson's Will*, xxi. 115.

11. The court will hear a petition which belongs to another judge's court which has risen for the vacation. *Holloway v. Phillips*, xxi. 121.

12. The court will in its discretion dispense with the usual certificate of counsel, that a cause is proper to be heard as a short cause. *Hargraves v. White*, xix. 438.

13. Where an amendment made in a bill exceeds two folios, the bill must be reprinted. *Stone v. Davies*, xix. 500.

14. Under the 22d of the General Orders of the 7th of August, 1852, where the plaintiff serves notice of the motion for a decree, he ought to enter it concurrently with the registrar, and no further notice of setting down the cause will be necessary. An *ex parte* application to set down a cause at the expiration of a month from service of the motion, refused. *Boyd v. Jaggard*, xix. 568.

15. An answer was filed by a defendant while in contempt, and an order was made to clear the contempt on payment of the costs; but as they were not paid after taxation, it was *held*, that the plaintiff was entitled to have the answer taken off the file. *Coyle v. Alleyne*, xix. 602.

16. Observations of the Lord Chancellor in condemnation of the modern practice of solicitors in paying the writing clerks of the registrars' offices for drawing up the enrolment, instead of doing it themselves. *Wickenden v. Rayson*, xxxi. 551.

17. "Upon the hearing," means "whenever or wherever a cause is heard." *Hope v. Threlfall*, xxvii. 241.

18. Where a question has been decided in one suit, and the same point was raised on the same subject-matter by other parties to another suit, the court, upon appeal, declined to decide the case upon demurrer. *Evans v. Evans*, xxvii. 343.

19. The forms of decrees of the court, (which are the best exponents of the law, have long existed, and have worked through all difficulties and proved effectual for the purposes of justice,) ought not to be departed from, or added to, or altered, unless in cases of special necessity. *Sherwin v. Shakspeare*, xxvii. 358.

20. The clerk of the Petty Bag should draw up the order on a petition presented in the Petty Bag. *Regina v. The Eastern Archipelago Co.* xxvii. 548.

21. The court may permit but will not compel the removal of a ward out of the jurisdiction. *Dawson v. Jay*, xxvii. 451.

22. By the act 1 & 2 Vict. c. 110, it was the intention of the legislature to make property of a judgment debtor, which is in such a position that the creditor cannot lay hold of it, liable to the judgment. *Watts v. Jefferyes*, iv. 29.

23. Where there is in the possession of any officer of the court property which proves to be liable to a creditor, or to be held for the sole benefit of any person, it is improper to seize it without an order of the court. *Ib.*

24. Investment of funds in court generally must be in consols. *Darwin v. Darwin*, xxi. 110.

25. In the absence of directions made at the hearing of a cause, the court will not, upon an interlocutory application, make any order to restrain the defendants, though very numerous, from attending the subsequent proceedings in the cause, though the result would be a very large saving to the estate of the testator. *Day v. Croft*, vi. 62.

26. A plea was put in to a bill, by which plea the illegitimacy of the plaintiff was averred. The same, having been put in without oath, was overruled. *Semble*, that it is necessary to move to take such a plea off the file. *Wild v. Gladstone*, v. 164.

27. *Motion to dismiss*. The four weeks from the sufficiency of the answer allowed for the amendment of the bill, do not expire until twelve o'clock at night of the last day; notice of motion to dismiss served on the evening of the last day previous to that hour is premature. *Preston v. Collett*, iv. 70.

28. *Setting down exceptions*. Where exceptions for scandal and impertinence had been taken by the defendant to a bill filed for an injunction, but he neglected to set them down for hearing, the plaintiff was allowed to set them down. *Coyle v. Alleyne*, vi. 64.

29. Where, previous to November, 1850, exceptions had been allowed by the Master, and a further answer was put in, the cause can be set down on the old exceptions before the Vice-Chancellor. *Robinson v. Lamond*, ii. 144.

30. The notice of setting down exceptions to a further answer in chancery must state the exceptions to which the plaintiff requires a third answer. *Tanner v. Stratton*, iv. 61.

31. *Administration suit—Interrogatories*. A, B, & C carried on business in partnership as bankers. A died, having made B & D his executors and S a residuary legatee. D was, after the death of A, admitted a partner in the business. A bill was filed by S against B and D for the administration of the estate of A. It stated that the executors had rendered imperfect accounts, that A's capital had been employed in the business, since his death, &c., and contained interrogatories as to these facts. C, the other partner, was not a party to the bill. *Held*, that in a suit so constituted, B and D were not bound to answer the above-mentioned interrogatories. *Simpson v. Chapman*, ii. 30.

32. *Interpleader*. In an interpleader suit, to determine the right of conflicting claimants to portions of an aggregate fund, the court directed inquiries as to the claims of the several defendants, and reserved further directions and costs. One defendant obtained a separate report, finding his title to a portion of the fund; and being unable to set down the cause on further directions, in consequence of the claimants of the other portions of the fund not having proceeded to establish their title, presented his petition for payment of the sum found due to him; but the court refused to order such payment upon petition, or until the cause was heard on further directions, and the costs of the suit could be disposed of. *Bruce v. Elwin*, xii. 222.

33. Form of order, by consent, for hearing a cause upon affidavits. *Sparrow v. The Oxford, &c. Railway Co.* xii. 249.

34. After the appointment of a receiver of the tithes and profits of a vicarage, a creditor of the vicar, having obtained judgment, caused a sequestration to be issued, directed to the same person who was receiver. A motion having been made to commit the creditor, no order was made on the motion, the creditor paying the costs, and undertaking to deal with the tithes as the court should direct. *Hawkins v. Gathercole*, xii. 347.

35. A party to a matter may be examined *vidé voce* by the Master on an inquiry directed to him. *In re Kirby's Trust*, xi. 128.

36. Order for the examination of a witness who had been examined in the cause. Interrogatories for the examination of the witness settled by the Master, who issued

his certificate. Objections to the interrogatories ought to be made upon the depositions being taken, and not by exceptions to the Master's report. *Barker v. Birch*, vii. 46.

37. Where errors in a decree are obvious, the court will rectify them, even after it is enrolled. *Fearon v. Desbrisay*, xi. 185.

38. A party in contempt in a suit in another branch of the court will be ordered to be brought up if wanted for examination. *Hill v. Travis*, xi. 197.

39. The court will not, by one order, direct a reference as to the propriety of a proposed reinvestment, and as to title, and for the completion of the purchase by payment to the vendors, and for taxation and payment of costs. *Ex parte Ductle*, xi. 238.

40. The court will order a reference to the Master to inquire whether it is for the interest of an infant petitioner to expend money in repairs of real estate of which he is tenant in tail in expectancy. *Hood v. Bridport*, xi. 271.

41. *Purchase under decree of court.* If a purchaser buys property under a decree of court, he will not be allowed to pay his purchase-money, nor enter into possession without a full acceptance of title; but if he wishes only to reserve a claim for compensation, in case of defect of title, that may be allowed. *Man v. Ricketts*, xi. 299.

42. When a suit abates, the plaintiff's solicitor should certify this fact to the registrar, in order to prevent its coming into the paper. In cases of default the defendants are entitled to the costs of the day. *Saner v. Deavin*, xi. 338.

43. A supplemental answer may by consent be filed after replication, without withdrawing the replication already filed. *Parsons v. Hardy*, xi. 57.

44. A foreclosure bill was filed by the testator, in which two successive motions for a receiver were refused, one of them with costs. The testator died. His executors did not revive, but filed a new foreclosure bill, without having paid the costs of the refused motion. *Held*, that they were at liberty to do so, but it is not a course to be encouraged. *Long v. Storie*, x. 182.

45. Whether an abated suit can be pleaded in bar to another suit by the personal representatives of the plaintiff in the first suit, *quære?* *Ib.*

46. *Administration suit—Revivor.* Where an inquiry was directed in an administration suit, as to the class of children, parties to the suit, who were tenants in common of an interest under the will, and before the Master's report was brought in, one of the children died intestate, it was *held*, that an order for revivor was sufficient to enable the Master to go on. *King v. Kendall*, x. 145.

47. After decree an administration suit abated by the marriage of a female plaintiff. Previously to such abatement the Master had committed the prosecution of the suit to a pecuniary legatee, who was not a party thereto. *Held*, that such legatee could not revive the suit without the adjudication of the court; that the Master's authority was confined to proceedings in his own office; and that an order to revive made in the case would be abortive. *Williams v. Chard*, vii. 289.

48. The court (Turner, V. C.) will not make an order, asked to save expense, on matters which should go to the Master in the first instance, without the full materials that would be required by the Master. *Ex parte* —, x. 275.

49. When the plaintiff duly gives notice of motion for a decree or decretal order, it is not proper to file a replication. *Duffield v. Sturges*, xv. 519.

50. An answer may be filed, notwithstanding the heading does not contain all usual words. *Rabbeth v. Squire*, xvii. 36.

51. Motions for decree are in effect causes, and must be set down in the cause list. *In re The Banwen Iron Co.* xvii. 91.

52. Where parties differ whether the case is fit for a short cause, the court will not hear an argument. The cause must keep its place on the list. *Ib.*

53. *Jurat.* Where the jurat of one defendant to a joint and several answer has been accidentally cancelled, the answer must be resworn by such defendant; but the jurat

is to be in the old form, namely, as to the truth of the matters stated which are within the knowledge of the defendant, and as to his belief of the truth of the other matters not within his own knowledge. *The Attorney-General v. Henderson*, xvii. 157.

54. *Supplemental bill.* After decree in the original cause, upon a defect of parties, an accounting defendant filed a supplemental bill to bring necessary (new) parties before the court. On a motion by the original plaintiff to take this supplemental bill off the file for irregularity, it was *held*, that after a decree any accounting defendant has a right to file such a bill, to enable the decree to be duly carried out. *Lee v. Lee*, xvii. 265.

55. A class of children being interested, the court, instead of directing the preliminary class inquiry, received the affidavit of the parents proving the class, and then allowed the cause to be heard. *Bush v. Watkins*, vii. 215.

56. An order was made, on petition and by consent. *Held*, that it could only be varied by a proceeding in the nature of one to cancel an agreement, on the ground of fraud or suppression of facts. *Greenwood v. Churchill*, vii. 296.

57. A sum being, on taxation, found due from a solicitor to his client, the order fixing a day for payment must be obtained on notice. *In re Stevenson*, vii. 214.

58. Where a matter is pressing, the accountant-general will grant his direction to pay money into the bank *instantly*. *Foley v. Smith*, vii. 168.

59. The court, on motion by consent, ordered the plaintiff in one suit to serve the plaintiff in another with warrants to attend before the Master in proceedings in the first suit. *Hills v. MacRae*, vii. 48.

60. In a case of emergency, several adhesive stamps, to the amount required to be paid on filing a bill or claim, may be affixed in lieu of one stamp denoting the amount. *Brain v. Brain*, xv. 519.

61. *Order to pay arrears of maintenance out of fund in court.* By the decree, arrears of maintenance were ordered to be paid out of a fund in court, consisting both of *corpus* and rents of real estate, and it was referred to the Master to calculate interest on the arrears. *Held*, that the order was tantamount to a decision, not only that such fund is liable to make such payment, but also the interest directed to be computed thereon, and that the parties could not afterwards contend that the arrears and interest were not payable out of the *corpus*. *Davis v. Browne*, vii. 278.

62. Application for appointment of receiver by consent, should be by summons at chambers. *Blackborough v. Ravenhill*, xv. 16.

63. A plaintiff undertook to file a replication by a given time and failed to do so. *Held*, that the plaintiff must be held to the undertaking; and that, if he had a case entitling him to be relieved from that undertaking, he ought to have made a special application to be discharged from it. *La Mert v. Stanhope*, xv. 156.

64. A supplemental decree may be granted in case of a change or transmission of interest. *Atkinson v. Parker*, xv. 336.

65. A mere change, with ink, of Christian names on a printed bill, is no reason why the bill should not still be called a "printed bill." *Yeatman v. Mousley*, xv. 337.

66. If defendant makes default at the hearing, the plaintiff will be only entitled to such decree as the court considers him entitled to on hearing the pleadings and evidence. *Hakewell v. Webber*, xv. 379.

67. It is sufficient to leave a copy of interrogatories at the office of the solicitor. *Bowen v. Price*, xv. 419.

68. The court will not, on petition of a defendant, direct the plaintiff to enter upon record a statement of supplemental matters, under the above section. *Langdale v. Gill*, xiii. 520.

69. A suit may be revived after the death of one of the parties, by simply handing the brief to the registrar. *Bonfil v. Purchas*, xiii. 439.

70. Though an issue may sometimes be taken *pro confesso*, it is not the practice to order that an action directed by the court to be brought and tried at the next assizes, and not so tried, should be taken as tried. *Bradbury v. The Manchester, Sheffield, &c. Railway Co.* xiii. 477.

71. Where it was by the fault of both plaintiff and defendants that the trial did not take place, a motion by the defendants, that an action ordered to be brought and tried by the plaintiff should be taken as tried, and a verdict found for the defendants, and that the defendants should be discharged from their conditional undertaking, was refused, and the plaintiff was peremptorily ordered to try the action at the next assizes. *Ib.*

72. A defendant cannot have active relief against a plaintiff unless he himself file a bill for that purpose. *Toulmin v. Reid*, xi. 44.

73. A claim to participate in charity funds, which had been appropriated for 240 years to certain parishes, ought to be brought before the court by information and not by petition, under Sir Samuel Romilly's Act, 52 Geo. III. c. 101. *In re Magdalen Land Charity*, xiii. 235.

74. The sanction of the court to the sale of charity estates, &c., can best be obtained by petition, under Romilly's Act. *The Attorney-General v. Biddulph*, xxiii. 620.

75. *Change of solicitor.* Upon the decease of the solicitor employed by a party to a suit, proceedings taken by a new solicitor employed by him are regular, although the change of solicitor is not authorized by any special order of the court. *Whalley v. Whalley*, xvii. 230.

76. *Bill of discovery.* Where a bill of discovery concluded with a prayer that such other orders might be made upon the said defendants, as the nature of the case might require, it was *held*, that, notwithstanding this unusual prayer, the bill was a simple bill for discovery, and a motion to dismiss was refused, without costs. *The South-eastern Railway Co. v. The Submarine Telegraph Co.* xxiii. 14.

77. Where a sum of money is invested, under the Lands Clauses Consolidation Act, the accountant-general deducts the brokerage from the sum, and the company pays the amount of brokerage to the petitioner. *Ex parte Harborough*, xxiii. 17.

78. Where a matter deserves the argument of counsel, it is to be argued in court. *In re Bennett's Estate*, xxiii. 69.

79. Where a deed is to be settled by the court, it is sent to the judge's chambers, and from the judge's chambers it is sent to the conveyancing counsel. *Ib.*

80. A supplemental statement cannot be filed after decree. *Commerell v. Bell*, xxiii. 119.

81. If an order to revive is obtained and served on the defendant, who appears, the order becomes absolute, if no cause is shown against it, even if the defendant's appearance is not recorded. *Hanbury v. Ward*, xxiii. 122.

82. Where an estate was held *pur autre vie*, and it was doubtful whether the *cestui que vie* were living or dead, the court ordered, under the 6 Ann. c. 18, s. 1, the production by the lessee of the *cestui que vie* at a time and place and to parties mentioned in the order. *In re Clossey*, xxiii. 124.

83. A motion for a decree "according to the prayer of the bill," will entitle the plaintiff to all the relief he could have at the hearing of the cause. *Norton v. Steinkopf*, xxiii. 242.

84. *Special case.* A special case is only proper for the purpose of obtaining the opinion of the court in cases of a doubtful construction. It is not similar to a suit or claim, as the court has no power to bind the rights of parties; and upon this case the court declined to give any opinion upon two points which involved disputed rights. *Bailey v. Collett*, xxiii. 263.

85. Where a plaintiff, claiming as mortgagee, frames his bill also as a general creditor's suit, the course is, that he should go in under the general decree for an

account; and if not satisfied under that, then go for the unsatisfied balance against his particular security. *Stone v. Van Heythuysen*, xxiii. 491.

86. The question, who is to have the conduct of the proceedings, will be decided in chambers, as well where the proceedings are in two causes, as where they are in one cause. *Ib.*

87. A person, not a party to the suit, and aggrieved by a decree made in his absence, and afterwards served upon him, so as to attempt to bind him in subsequent proceedings, must move, on notice, for leave to file a bill in the nature of a bill of review. *Kidd v. Cheyne*, xxiii. 501.

88. On a motion for an injunction to restrain the violation of a patent, the plaintiffs were directed to establish their rights at law. After they had issued their writ, the defendants pleaded to the bill in equity that the plaintiffs were not the first inventors. The court gave the plaintiffs leave to apply to have the order for trial amended, so that the action at law might be confined to the same issue as that raised by the plea in equity. *Young v. White*, xxiii. 517.

89. This court has jurisdiction, under the 2d of the General Orders of August 7, 1852, to enlarge the time for enrolment of a decree, and may require the costs of the application to be paid before the enrolment will be allowed; but it cannot put the party upon terms to pay the costs of a former appeal. *Butchart v. Dresser*, xxiii. 562.

90. The court directed a reference to appoint a guardian to an infant, and approve of proper maintenance, to be inserted in the decree, upon the hearing of a suit, without any petition. *Cross v. Brown*, vii. 58.

91. The court will not, on petition or motion, without suit, declare the heir of a deceased partner, whose interest has been purchased according to the partnership articles by the surviving partner, a trustee for the survivor. *In re Burt*, xii. 219.

92. As to infant under 13 & 14 Vict. c. 35, see *Ex parte Craig*, iii. 85.

93. *Sick witness.* Where a witness is too ill to attend at the examiner's office, the court will appoint a private examiner to attend at the house of the sick witness; and permission will not be given to make a necessary change in an appointment for such examination on giving short notice to the other side, without applying again to the court. *Pillan v. Thompson*, xxi. 110.

94. *Vesting order.* Where estates are sold under an order of court directing all proper parties to join in surrendering the property, the refusal of the person entitled to the legal estate will enable the court to make an absolute order that such person execute the deed, or may make an order vesting the estate in the purchasers. But in case of no absolute refusal, the court will not make the order without due notice to such holder of the legal estate. *Rowley v. Adams*, vi. 124.

95. *Opening account.* Held, that the persons entitled in remainder under the settlements of certain estates could not open an account taken in 1830, on the ground that they were not permitted to be present at the taking of it, for they ought to have appealed against the refusal of leave to attend. *Morison v. Morison*, xxxi. 440.

96. *Repudiation of suit by infant plaintiff.* Where a suit, instituted on behalf of an infant by his next friend, is repudiated before the hearing, by the infant, on his attaining his majority, the repudiation has relation to the commencement of the suit, and deeds deposited in court for inspection, by an order in the suit, will be ordered to be returned to the party by whom they were deposited, notwithstanding the existence of a claim of lien for costs incurred for the infant plaintiff in the suit, put in by the next friend and his solicitor. *Dunn v. Dunn*, xxxi. 212.

97. An objection as to the validity of certain leases was overruled, on the ground that there was no one who, under the circumstances of the case, could challenge their validity. *Dixon v. Wilkinson*, xxi. 450.

98. *Pauper plaintiff.* A pauper plaintiff, after answer put in and proceedings in the suit, cannot dismiss the bill *ex parte* without costs; nor can a pauper plaintiff, to whom counsel has been assigned, appear in person to support a motion. *Parkinson v. Hanbury*, xxi. 445.

99. The clerk of records and writs is bound to furnish certified copies of chancery pleadings on application, under the 14th section of the 14 & 15 Vict. c. 99. *Reeve v. Hodson*, xxi. 336.

100. *Appeal*. A party dissatisfied with the decision of the chief clerk, has the option of appealing to the judge in chambers or in open court, but having taken the opinion of the judge in chambers, he cannot afterwards bring the same question before the judge in court. If the party be desirous of appealing to the lords justices against the order made in chambers, an application to the judge in court to set aside or vary, is necessary, on which an order *pro formâ*, and simply in conformity with the order in chambers, will be made for the purpose of enabling the party to appeal. *The York and North Midland Railway Co v. Hudson*, xxiii. 569.

101. *Bill taken pro confesso*. If a defendant has never been in the country, and it is not certain that he has had proper information in regard to the case, a bill cannot be taken against him *pro confesso*, as if he had absconded. *Zulueta v. Vinent*, xi. 78.

102. *New petition*. See *Maude v. Maude*, xiii. 402.

103. *Fraud—Setting aside conveyance*. *Semble*, when a bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree, by establishing some one or more of the facts quite independent of fraud, but which might of themselves create a case under a distinct head of equity. The court refused to set aside a conveyance, twenty-seven years after the transaction, where the plaintiff failed to prove fraud which he alleged, though he established the lunacy of the vendor. *Price v. Berrington*, vii. 254.

104. *Substituted service—Successive orders*. To obtain the successive orders (in a matter, and not in a cause) upon a person to pay a sum of money to a party, personal service of the preceding order, and a demand and refusal must be proved; but where the party avoids service, the court will direct substituted service, and dispense with the necessity of a demand and refusal. *In re Mourilyan*, vii. 163.

See EQUITABLE MORTGAGE, COSTS, INJUNCTION, INFANT, RECEIVER, PARTIES, PAYMENT INTO AND OUT OF COURT, PRODUCTION OF DOCUMENTS, SERVICE, VENUE.

PRECEDENTS.

1. The House of Lords, being a court of justice, is bound by its own decision in any particular case, yet it is not bound, any more than other courts, by any general rule of law which it may have laid down, if, upon a subsequent occasion, it should differ from that rule. Per the Lord Chancellor, Lord Campbell *dubitante*. *Bright v. Hutton*, xii. 1.

2. Although an old decision, which has long been followed as having settled the law, may be shown to have proceeded upon a wrong view of what the case was, it cannot be disregarded. *Baker v. Tucker*, ii. 1.

PRESCRIPTION.

1. Twenty years user will not establish a right by prescription, unless the owner of the tenement is capable of giving by express grant such a right as is claimed by prescription. *The Proprietors of Rochdale Canal v. Radcliffe*, xii. 409.

2. *Right of common of turbary—Evidence*. Trespass for breaking and entering a close of the plaintiff, and breaking down a wall. Pleas, justifying under a right of common of turbary throughout Gidley Common, whereof the said close was parcel, and from which it had been wrongfully enclosed. Replications traversing the "said common of turbary in the said close in which, &c., *modo et formâ*." Common of turbary had existed and had been exercised over Gidley Common generally; but with respect to the spot in question, before it was enclosed, the jury found that within living memory it had not been capable of growing turf. *Held*, that under the issues raised, the exercise of the right over the common generally was admissible evidence, from which it might have been inferred that the original presumed grant extended to the

locus in quo, but that such inference could not be made, when it appeared in effect that from time immemorial it had been impossible to exercise the right over the *locus in quo*. *Peardon v. Underhill*, ii. 228.

3. *Non-user of right of entry*. Where the owner of the fee of a close with a stratum of coal under it, conveyed the surface to A, reserving the coal and a right of entry to get it to B, that right of entry is not barred by simple non-user for more than forty years, no other person having worked or been in possession of the mines. *Smith v. Lloyd*, xxv. 492.

4. An interruption of a right acquired by user within the meaning of 2 & 3 Will. IV. c. 71, s. 4, may be caused by the act of a stranger, and not the owner of the servient tenement. *Davies v. Williams*, v. 269.

5. See also *Bunbury v. Fuller*, xxiv. 425.

PRIZE.

1. *What a claim should state*. A claim in admiralty prize court should merely state the grounds on which it is founded. *The Aina*, xxviii. 600.

2. *Bills of lading—Lien—Colorable papers*. H., of Rio, indorsed bills of lading, and drew bills on B., of Hamburg, on account of goods shipped on board a Russian ship going to a Russian port, the goods being ordered by and insured in the names of Russian subjects. The correspondence disclosed the fact of two sets of papers, bills of lading and charter-party having been made out. Held, that B. had merely a lien on the property, which affords no sufficient ground for restitution, and that the fact of there being simulated papers shut out further proof. Property condemned. *The Ida*, xxix. 574.

3. *Residence in enemy's country—Neutral mortgagee of enemy's ship—Private adventure*. Residence in enemy's country for purposes of trade, disqualifies from claiming as a neutral. A neutral cannot claim as mortgagee of an enemy's ship. The private adventure of an enemy master is restored only on the consent of the captors. *The Aina*, xxviii. 600.

4. *Neutral's share in belligerent ship*. A neutral's share in a belligerent ship is subject to condemnation. *The Primus*, xxix. 589.

5. *Costs*. Where neutral property is on board a belligerent ship, which is seized and condemned, the neutral is not entitled to costs on the restoration of his property. *Ib.*

6. *Neutral property—Bill of lading*. Where neutral property is shipped before the declaration of war on board a belligerent's ship, the bill of lading need not describe such property as shipped on account or at the risk of the neutral. *Secus*, if the neutral property is shipped *flagrante bello*. *The Abo*, xxix. 591.

7. The court of prize looks to the equitable title as well as the legal title to property. *Ib.*

8. The unavoidable absence of the master's evidence opens the door to further proof. *Ib.*

9. The claim and affidavit are all the court of prize looks to in the first instance. *Ib.*

10. *Enemy's property*. It is competent for any person to take possession of enemy's property, coming to or found in any part of the kingdom. *The Johanna Emilie*, xxix. 562.

11. *Transfer—Change of colors—Sea-pass—Spoliation of papers*. A vessel, built in Hanover, and officered and manned by Hanoverians, sailed under Russian colors, and was owned by the Hanoverian consul at Riga, a Russian port, who, from his long domicile there, must be taken to be a Russian. She sailed from Portugal to England, on her last voyage, under Hanoverian colors, and was there seized, war having been declared between Russia and England, as a Russian prize. She was claimed from the

captors on the ground of a sale to the claimant, a neutral, under the following circumstances. The master received a power of attorney to sell the vessel, and did sell her to the present claimant. The bill of sale spoke of the vessel as voyaging under Russian colors, and the purchase-money is therein stated to "have been carried into account between the contracting parties." The vessel continued under Russian colors for some time after the sale, for which no reason is given. The sea-pass bears date November 29, 1853, and is not to come into force till February 4, 1854. No explanation of this is given. The power of attorney is dated December 14. The transfer takes place January 23. A spoliation of papers on the voyage from Lisbon was proved, but denied by the captain to have been of papers relating to the vessel or cargo. Dr. Lushington was of opinion that her change from Russian to Hanoverian colors might have been owing to the master's then first having the sea-pass; that the mere destruction of papers is not, under all circumstances, a spoliation; that there was a want of satisfactory evidence as to the payment for the vessel and the manner in which the sea-pass was obtained, but that there were no such circumstances of grave suspicion as would justify condemnation. The court was ready to open the case of the claimant, but not of the captors; but before restoring the ship, it would require proof that the price of the vessel was adequate, and that it was *bonâ fide* paid—the production of the correspondence between the master and the former owner at Riga, and evidence from the claimant of all the facts within his knowledge. *1b.*

PROCESS.

See SERVICE, PRACTICE.

PRODUCTION OF DOCUMENTS.

I. APPLICATION FOR PRODUCTION; NOTICE TO PRODUCE.

II. WHAT DOCUMENTS MAY BE INSPECTED; PRIVILEGED COMMUNICATIONS.

III. MISCELLANEOUS CASES; REFUSAL TO PRODUCE; COSTS.

I. *Application for Production; Notice to produce.*

1. *Document must be shown in possession of party called on.* A party cannot be called on to produce a document for the purpose of evidence unless it is shown that he is bound to do so; that is, that it is in his possession. *Lazton v. Reynolds*, xxviii. 553.

2. *Motion to produce against surviving joint defendant.* Two defendants admitted the possession of documents. One died. *Held*, that a motion for production against the survivor, in the absence of the representatives of the deceased defendant, could not be maintained. *Robertson v. Shewell*, xix. 295.

3. *Affidavit in support of application.* No affidavit is necessary to support an application for production on oath of documents under the 15 & 16 Vict. c. 86, s. 20. A party is entitled of right to an order for production, when the other party does not object by his affidavit to produce them, and then the court will decide upon the validity of the objection; a delay in making the application does not deprive a party of the right to it. *The Rochdale Canal Co. v. King*, xv. 61.

4. *Reading affidavit to show possession of documents.* The 18th section of the Chancery Amendment Act does not entitle a plaintiff to read an affidavit on a motion to produce documents, to establish the possession of documents not specifically admitted by the answer to be in the defendant's possession. *Lamb v. Orton*, xxi. 259.

5. *Sufficiency of affidavit to obtain inspection of joint-stock company's books.* In an action against a director of a joint-stock company, for money due for services to the company, plaintiff made affidavit that there was, as he believed, in the possession of the

company a book containing minutes of the proceedings, &c., of the directors and committees of the company, and that he was advised that it might be necessary that the said minutes or some parts thereof should be adduced on the trial of the cause, as evidence on his part; that without an inspection and copy thereof he could not safely proceed to trial; and that he had no copy thereof in his possession or control, or any certain information as to the contents. *Held*, that this affidavit was insufficient to obtain an inspection of those documents under the 14 & 15 Vict. c. 99, s. 6. *Quære*, whether inspection under the 14 & 15 Vict. c. 99, s. 6, will only be granted of documents tending to establish the applicant's original case. *Pepper v. Chambers*, vii. 589.

6. *Suit by claim—Affidavit.* The plaintiff, in a suit by claim, moved for the production of certain documents described in the summons against the defendant, upon an affidavit by the plaintiff's solicitor, that he believed that the documents were in the defendant's possession. The defendant's affidavits not containing a very distinct admission of the possession of the required documents, the order for production was refused. *Semble*, that in a suit by claim, the plaintiff ought to file an affidavit, with interrogatories, to obtain the necessary admissions on which to move for production. *Wing v. Harvey*, xix. 62.

7. A party calling for the production of documents must give evidence that the other party has some, and specify them. *Fiott v. Mullins*, xv. 350.

8. *Production of case and opinion of counsel.* A party is not entitled to have a case and the opinion of counsel thereon, in the possession of the other party, produced on motion. *Enthoven v. Cobb*, xv. 277.

9. *Notice to produce.* A notice to produce documents need not be re-served for a new trial. *Hope v. Beadon*, viii. 326.

10. Such a notice gives the party notified the option of producing the documents, or being bound by such satisfactory evidence thereof as may be offered. *Ib.*

11. *Application to be made at chambers.* Application for production of documents is to be made, in the first instance, by summons at the chambers of the judge. Questions of difficulty as to the production are to be adjourned to and argued in court, (Masters in Chancery Abolition Act, 15 & 16 Vict. c. 80, s. 26.) *Thompson v. Teulon*, xv. 320; *Thornton v. Tenlow*, xiii. 455.

12. An unopposed motion by the defendant for the production of documents under the 15 & 16 Vict. c. 86, s. 70, should be made in chambers according to the mode prescribed by the 15 & 16 Vict. c. 80, s. 26. So of a motion to enlarge the publication. *Sergison v. Livingstone*, xvii. 53.

13. *Notice to produce immediately sufficient if document is in court at time of trial.* The object of a notice to produce a document is merely to give the opposite party sufficient opportunity to produce it, if he pleases, and not that he may be enabled to prepare evidence to explain, modify, or confirm it; and therefore when the document is in court at the time of the trial, a notice to produce immediately is sufficient. *Dwyer v. Collins*, xii. 532.

14. *Under Common-law Procedure Act, 1854.* Where upon an examination on interrogatories under sect. 51 of the Common-law Procedure Act, 1854, a party admits that documents material to the issues, are in his possession, but declines to set forth copies or the contents of them, the opposite party cannot compel an inspection and delivery of copies of such documents under the same section, but must for this purpose apply to the court or a judge under the 50th section. *Scott v. Zygomalas*, xxx. 155.

15. *Application under Bankrupt Law, 1849.* An application for the inspection of documents, under the Bankrupt-law Consolidation Act, 1849, must disclose the use intended to be made of the evidence obtained by such inspection. *Ex parte Rimell*, x. 128.

16. *Before plea.* An application for an order for the discovery of documents, under 17 & 18 Vict. c. 125, s. 50, may be made by a defendant before filing his plea. *Forshaw v. Lewis*, xxix. 488.

17. In order to support an application to inspect, it is sufficient if the party applying shows that the documents sought to be inspected are in the possession, custody, or control of the other party, and are material to substantiate his own case; the effect of the evidence to prove that case being a matter to be decided upon the trial, and forming no ground for determining whether the inspection should or should not be ordered. *Riccard v. The Inclosure Commissioners*, 5c. xxviii. 260.

18. Where an application is made for inspection of documents under the 14 & 15 Vict. c. 99, s. 6, issue need not be joined before the order is applied for. On application to make absolute a rule *nisi* for such inspection, no one appeared to show cause. Counsel asked the court to make it part of the rule that a place should be named for the inspection. *Held*, that the rule could only be made absolute in the terms prayed. *Rogers v. Turner*, vii. 545.

19. For a case where an order to produce was varied so as to require the plaintiff to make affidavit of all documents in his possession, see *Macintosh v. The Great Western Railway Co.* xv. 428.

II. What Documents may be inspected; Privileged Communications.

1. *Inspection of documents—Right of reversioner to inspect lease*—In action to recover leaseholds. In an action to recover leasehold premises, the reversioner is entitled to inspect the lease in the hands of the defendant, assignee thereof, if he has no counterpart, and also the assignment, but not the conveyance to defendant of the freehold adjoining, (on an allegation that the defendant has obliterated the boundaries) as that deed does not prove any part of the plaintiff's title to the land he seeks to recover. *Doe d. Avery v. Langford*, x. 406.

2. Where it reasonably appears upon affidavit that a document in the possession of one party, is material in support of the case of the other party, or to contradict the case set up in answer, an inspection of such documents will be granted. *Scott v. Walker*, xxii. 134.

3. Where it was to be assumed that there were entries in books from which the bill of particulars had been made out, which might be good evidence for the plaintiff to rebut the defendant's case, it was *held*, that the plaintiff was entitled, under the 14 & 15 Vict. c. 99, to an inspection of the entries in the defendant's books relating to the bill of particulars. *Ib.*

4. *Land-agent's documents.* Documents made by a land-agent in the course of his employment, being demanded by the owner of the estate, were ordered to be produced for inspection, though it was claimed that they were made for private use, and were not paid for by the principal. *Beresford v. Driver*, vii. 25.

5. *Production of mortgage deeds in administration suit.* The fact that by the production of mortgage deeds in an administration suit the mortgagors would be injured, is no valid objection to their production when properly called for. *Gough v. Offley*, xv. 275.

6. Where plaintiffs, suing as assignees of a bankrupt firm, demand documents of the defendants, the insolvents, relating to the matters in dispute, they are entitled to see them. *Goodall v. Little*, iii. 79.

7. *Lien of solicitors on documents.* Where documents belonging to a trust are in the hands of the solicitor to the trust, who claims a lien upon them, a trustee defendant cannot by answer refuse to disclose the deeds on the ground that the solicitor claims his lien, and will not produce them. The course is for the trustee to obtain an extension of time to put in his answer, which extension of time will be from time to time prolonged, until the trustee can pay off, or procure a waiver of the lien. *Goodchap v. Weaving*, xii. 280.

8. *Production of documents which might subject party to penalty in foreign country.* A foreign king filed a bill claiming a ship purchased out of the royal revenues by the

defendants as agents for an insurgent government, which plaintiff had since put down; and moved for a discovery. Two of the defendants, foreigners, by their answer, defended the acts of the insurgent government, and alleged that in this matter they were the agents of many thousand persons, and that the production of documents might subject these persons and themselves to penalties in a foreign country. *Held*, that these persons could not be represented in this court, nor were represented by the plaintiff; and that the liability of either of them or of defendants to penalties in a foreign country was no defence against production; which was accordingly ordered. *Quære*, whether the admission of rebellion in defendants' answer would deprive them of their right to decline production. *The King of The Two Sicilies v. Willcox*, ii. 122.

9. *Pledged documents*. Where a party has pledged documents relating to matters in question in a suit previous to the institution of the suit, he cannot be compelled to redeem them for the purpose of production. *Liddell v. Norton*, xxiii. 241.

10. *Privilege of client*. If a client forbid his attorney to produce a deed which is called for, it is no violation of the privilege of the client if the court orders the attorney to show the endorsement on the deed. *Phelps v. Prew*, xxiv. 96.

11. *Letters between one party and solicitor of both*. H. advanced money to G. on the security of certain property recently purchased by G., D. being solicitor to both parties. H. afterwards filed his bill, alleging that the property was insufficient, and that there had been fraud and collusion between G. and D. *Held*, that letters which had passed between G. and D. with reference to the purchase and to the mortgage were not privileged. *Hawkins v. Gathercole*, ii. 109.

12. *Title deeds—Privilege—Exceptions*. There is an exception to the rule by which the plaintiff's title deeds are privileged from production, and this is in a case where the party applying for their inspection has himself an interest in them. Per Wightman, J. *Riccard v. The Inclosure Commissioners, &c.* xxviii. 260.

13. *Privileged documents—Affidavit*. It is no answer to an application for an order for a discovery of documents under the 17 and 18 Vict. c. 125, s. 50, that they are privileged from production; that must be shown in the affidavit made in obedience to the order. *Forshaw v. Lewis*, xxix. 488.

14. *Part privileged*. Per Parke, B. Under such an order for discovery, if a portion of a document is privileged and the rest not, it can be produced with the privileged portion covered up. *Ib.*

15. *Retainer of counsel*. Per Parke, B. The fact of the retainer of counsel or attorney is not a privileged communication. *Ib.*

16. *Attorney bound to disclose as to possession of document*. The attorney of a party to a suit may be asked, and is bound to answer, whether a document which he has received from his client in the course of his professional employment, is in his possession or elsewhere in court. *Dwyer v. Collins*, xii. 532.

III. Miscellaneous Cases; Refusal to produce; Costs.

1. A party declining to produce a document, ought simply to answer that he does not produce it, and should not enter into a statement of the reasons why he does not produce it. *Laxton v. Reynolds*, xxviii. 553.

2. *Inspection of documents at chambers—Solicitor of both parties may inspect*. Documents produced at chambers in an administration suit, by a claimant, in support of his claim as a creditor of the testator, ordered to be produced before the chief clerk for the inspection of witnesses on the part of the plaintiff, in order to test their authenticity, solicitors for both parties being permitted to be present at the production and inspection. *Groves v. Groves*, xxiii. 350.

3. *Who may inspect*. A plaintiff, under an order for himself, his solicitors and agents, will not be allowed to take with him a relation to assist in the inspection of documents admitted by the defendants to be in their custody. *Summerfield v. Prichard*, xvii. 492.

4. *Vivâ voce examination—Chancery Procedure Amendment Act, Section 31—Inspection of documents.* Upon the examination of a witness for one defendant before a special examiner, documents were placed in his hands to be proved as exhibits by proof of handwriting, and no more; the plaintiff then required to inspect the documents. *Held*, that the counsel or solicitor for the plaintiff in such a case, had no right to inspect the documents placed in the hands of the witness. *Lord v. Colvin*, xxiii. 418.

5. *Production of will from a consistory court.* The court will order the registrar of the consistory court to attend with the will in court at the hearing. *Wigan v. Rowland*, xxi. 50.

6. *Contingent estate.* Where an estate has been given to a defendant, till the happening of a certain event, he cannot object to the production of certain deeds on the ground that they might prove the event to have happened, and thus produce what was called in this case "forfeiture." *Hambrook v. Smith*, ix. 226.

7. A party, upon motion, must produce the documents called for, even if it cause much inconvenience and expense. *Macintosh v. The Great Western Railway Co.* xv. 351.

8. *Refusal to produce by mortgagee.* Where a prior mortgagee, who also claims a judgment debt, refuses to produce a deed because he is a mortgagee, and the mortgage is then paid by a subsequent mortgagee, the prior mortgagee cannot appropriate the funds first to the payment of the judgment debt, and then to the mortgage, but the mortgage must be considered paid, and then the deed must be produced, that being important evidence for some parties in the cause. *Cannock v. Jauncey*, xxi. 279.

9. *Document in hands of solicitor—Admission.* A defendant admitted that certain documents were in the possession of himself and W. C., his co-executor, and that others were in the possession of their solicitor, W. C. not being a party to the suit. *Held*, that an order for production could not be made against the defendant on such an admission. *Morrell v. Wooten*, ii. 28.

10. *Production of concealed passages of documents—Denial of relevancy.* Under an order for production of documents, the denial upon oath of the relevancy of concealed passages will not be sufficient; and upon the court itself ascertaining that they might possibly refer to the questions at issue, an order was made upon the defendant for the production of the concealed passages, with costs. *Caton v. Lewis*, xix. 603.

11. Counsel will be heard by the court in opposition to a summons for production of documents. *Dipple v. Cortes*, xv. 324.

12. *Reasonable notice to produce deed—Secondary evidence.* In case of the refusal of a party through his attorney to produce a deed, the party calling for it is not obliged to subpoena the party refusing into court. The particular circumstances of each case must determine what is reasonable for the party calling for the deed to do, and after what is reasonable has been done, secondary evidence of the contents of the deed may be given. *Phelps v. Prew*, xxiv. 96.

13. *Answer not admitting possession of documents—Fraud.* Where an answer, admitted to be sufficient, does not admit the possession, &c., of certain documents, no allegation of falsehood or fraud will, at a subsequent stage of the suit, entitle the plaintiff, on motion, to obtain the production of such documents; the remedy under such circumstances must be either by criminal proceedings, or by a new bill. *Reynell v. Sprye*, viii. 35.

14. On a bill to set aside a deed filed by one plaintiff only, praying that, if necessary, it might be taken as on behalf of creditors generally, it appeared that A, claiming under the deed, had a power of appointment, and that she had appointed under her power; the plaintiff moved for production of documents in the hands of the trustees of the deed, offering to confirm the appointment of A. The appointees

were not parties. *Held*, that the production could not be enforced in the absence of those persons. *Ford v. Dolphin*, xix. 116.

15. *Costs of inspection.* Where inspection is granted, under the 14 & 15 Vict. c. 99, s. 6, of documents in the custody or under the control of an opposite party, the costs of such inspection must be paid by the party seeking it. *Hull v. Philp*, vii. 591.

16. In an action against the licensed keeper of a private lunatic asylum, under the 8 & 9 Vict. c. 100, by a person who had been confined in it as a lunatic, for improper treatment of him while a patient there; the court, on application by the plaintiff, under the 14 & 15 Vict. c. 99, s. 6, directed inspection of certain books, &c., required by the first-mentioned statute to be kept. The inspection, however, was ordered to be conducted before the Master, who should seal up, uninspected, all parts of the books not relating to the plaintiff's case. Inspection was also granted of certain letters to the defendant, which gave information as to the state of the plaintiff, or suggestions as to the mode of treatment; the Master to determine which of those produced were to be so considered. *Ib.*

17. If A, suspecting that B has not produced all of the documents which a judge has ordered him to produce, makes by an affidavit the judge's order a rule of court, thus subjecting B to costs, if B can satisfy the court that he has no more documents he is entitled to have the order for the payment of costs rescinded. *In re Farrant*, xi. 392.

PROHIBITION.

1. *Against commissioners proceeding to enforce penalty.* A prohibition was refused against commissioners proceeding to enforce a penalty incurred under a local act, when it was doubtful if they had jurisdiction. A clear case only will justify a prohibition. *In re Birch*, xxx. 519.

2. *Irregularity of practice.* When a decree was made by the consistorial court against a party without notice to and without the knowledge of the party against whom the decree was made, it was *held*, no ground for a prohibition. It was but an irregularity of practice, and of this the temporal courts will not take notice. *Ex parte Story*, xvi. 420, 462.

3. *Action for freight—Fraud.* After an action for freight had been commenced, a monition issued from the court of admiralty requiring the defendant to bring the freight into that court, in a suit there. The defendant pleaded to that suit, paid in the money, and the cause stood for hearing; the court of exchequer refused a prohibition; though it was suggested that the suit in the admiralty was brought by collusion. *Place, in re*, xviii. 525.

4. *Plaint against Queen of Portugal.* A plaint was entered in the lord mayor's court against the Queen of Portugal "as reigning sovereign and supreme head of the nation of Portugal," to recover a debt alleged to be due from the Portuguese government, and a foreign attachment had issued. *Held*, that as the court had no jurisdiction over the person of the defendant, the awarding of foreign attachment against her property, as a means of compelling an appearance, was an excess of jurisdiction; and the court made absolute a rule for a prohibition to restrain proceedings in the action, and in the attachment. *De Haber v. The Queen of Portugal*, vii. 340.

5. The same principle was applied to a case where a plaint was entered in the lord mayor's court against the Queen of Spain, not expressly as reigning sovereign, but where an affidavit showed that the plaintiff's sole cause of action arose against her as head of the Spanish nation. *Ib.*

6. The writ of prohibition may in such cases be granted on the application of the queen (the defendant) before she has appeared to the action in the lord mayor's court; or on the application of the garnishee, either before or after he has pleaded *nil habet*. *Ib.*

7. Where an inferior court has no jurisdiction to entertain a suit, it is not necessary to entitle a party to a prohibition that he should have there pleaded to the jurisdiction, and that the plea should have been overruled. *Ib.*

8. The court is bound to grant a prohibition where a court has no jurisdiction, upon the application of a stranger as well as of a party to the proceedings. *Ib.*

9. The process of foreign attachment can only be resorted to where the cause of action against the original defendant arises within the jurisdiction of the court from which the attachment issues. *Ib.*

As to prohibitions to county courts, see COUNTY COURT.

QUESTIONS OF LAW AND FACT.

See JURY.

QUO WARRANTO.

1. *Application for, to contest election—Continuing contract—Stat. 7 Will. IV. &c.* By 7 Will. IV. and 1 Vict. c. 78, s. 23, all applications for a *quo warranto* to question the elections of corporate officers are to be made before the end of twelve calendar months "after the election, or the time when the person against whom application is made shall have become disqualified." *Held*, that where a party had entered into a continuing contract with the council, the disqualification continued during the existence of the contract, and that a *quo warranto* might be applied for, notwithstanding more than twelve months had elapsed from the time of the election, or from the time when the disqualification first attached. *Regina v. Francis*, xii. 419.

2. *Information in the nature of a quo warranto.* Sec. 146 *et seq.* of the Common-law Procedure Act, 1852, as to error in "any cause," do not extend to informations in the nature of a *quo warranto*, in respect of which the *fiat* of the attorney-general must still be obtained and a writ of error sued out, according to former practice. *Regina v. Seale*, *Regina v. Alford*, xxx. 350.

3. *Office of clerk to board of guardians.* The office of clerk to a board of guardians, appointed by order of the poor-law board, under the 4 & 5 Will. IV. c. 76, s. 46, is an office for the usurpation of which an information in the nature of a *quo warranto* will lie. *Regina v. The Guardians of St. Martins-in-the-Fields*, v. 361.

4. *Resignation of seat—Liability for costs.* The candidate elected to a public office by an invalid election, although he resign his seat, is liable to the costs of an information in the nature of a *quo warranto* on behalf of a rival candidate. *Regina v. Sidney*, iv. 234.

RAILWAYS.

I. POWERS OF RAILWAY COMPANIES.

II. SHAREHOLDERS; CALLS; ASSESSMENTS.

III. POWERS, DUTIES, AND LIABILITIES OF OFFICERS OF RAILWAY COMPANIES.

IV. TAKING LAND AND PROCEEDINGS THEREFOR; SPECIAL CONTRACTS.

V. CONTRACTS WITH OTHER ROADS, &c.; AMALGAMATION OF COMPANIES.

VI. LIABILITY FOR INJURIES TO LAND AND CATTLE; LOSS OF GOODS.

VII. CASES WHEREIN A MANDAMUS WILL BE ISSUED.

VIII. CONSTRUCTION OF PARTICULAR STATUTES.

IX. MISCELLANEOUS CASES.

I. Powers of Railway Companies.

1. *Powers as to disposition of income.* By their acts of incorporation, a company

was empowered to make a new railway, with branches, and to improve their existing railways, and to adapt them to the use of locomotive engines, which the company were required to provide, and a time was limited for the completion of the works. The works were not completed in pursuance of the requisitions of the act of parliament, in consequence, as was alleged, of want of funds. *Held*, that the court had not jurisdiction, at the suit of a shareholder, to restrain the company from declaring a dividend until the works were all completed, there being no provision in the acts to that effect, and the disposition of the company's income being a proper subject for its own internal regulation. *The Brown v. Monmouthshire Railway and Canal Co.* iv. 113.

2. *Road constructed in part—Company cannot be required to complete.* Where an act of parliament authorizes a railroad company to construct a road between certain limits, and the company construct the road in part, they cannot be required to go on and complete the road. *The Great Western Railway Co. v. Regina*, xviii. 211; *The York, &c. Railway Co. v. Regina*, xviii. 199, reversing the judgment of Lord Campbell, C. J., and Crompton, J., Coleridge, J., and Wightman, J., in the same cases in the queen's bench, xvi. 299 and 341, and the judgment of Campbell, C. J., and Coleridge, J., and Crompton, J., in *Regina v. The Lancashire, &c. Railway Co.* xvi. 327, and sustaining the judgment of Erle, J. in those cases.

3. *Application of capital.* A railway company must not apply its capital to any purpose not authorized by its acts of parliament. A railway company was enjoined from using its funds to get a bill through parliament for improving the navigation of a river upon which it was merely authorized to build wharves and warehouses. *Munt v. The Shrewsbury, &c. Railway Co.* iii. 144.

4. *Application of funds.* A railway company, incorporated by act of parliament, is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever. *The East Anglian Railways Co. v. The Eastern Counties Railway Co.* vii. 505.

5. *Division of profits—Powers of majority.* The principles which apply to partnerships composed of a limited number of persons apply to railway companies; and a majority of the partners in a partnership of a limited number, who have agreed to bring in capital by instalments, can overrule the minority, upon the question, whether profits shall be divided while debts are unprovided for. The manner in which profits are to be ascertained and divided is a question of internal management. *Stevens v. The South Devon Railway Co.* xii. 229.

6. *Broad and narrow gauge.* Where a railway company is authorized by act of parliament to construct a railway on the broad gauge, they are not prevented from laying down rails on the narrow gauge also. *Beman v. Rufford*, vi. 106.

7. *By-laws—Liability for luggage.* By sect. 169, of 5 & 6 Will. IV. c. 107, every passenger travelling upon the Great Western Railway may take with him, without extra charge, his articles of clothing, not exceeding certain weight and dimensions; and the company are not to be liable for the safe carriage of any article carried with a passenger, except his articles of clothing, not exceeding the given weight and dimensions. By sect. 144, the company are authorized to make by-laws for the government of their affairs, for regulating the proceedings of, and remunerating the directors, and for the management of the undertaking, and of their officers; provided that the by-laws are not repugnant to the laws of England or the directions in the act. *Held*, that a by-law made under sect. 144, and declaring that the company would not be responsible for the care of a passenger's luggage, unless booked and the carriage paid for, was bad. *Williams v. The Great Western Railway Co.* xxviii. 439.

8. The term, articles of clothing, ought to include all things necessary to the toilet. *Per Pollock, C. B.* *Ib.*

II. Shareholders ; Calls ; Assessments.

1. *Eastern Union Railway Act, 1853—Preference shares, on what terms redeemable under—Priority of arrears.* Preference shareholders, whose shares are redeemed under the powers of the stat. 16 & 17 Vict. c. 221, intituled, "An act to enable the Eastern Union Railway Company to redeem their preference shares, and for other purposes," are entitled to be paid the arrears of interest or dividends upon such shares from the time when such interest or dividends ceased to be paid up to the time of passing of the said act, out of any money of or belonging to the company applicable to such payment, before any payment is made by the company to the ordinary shareholders in respect of dividends or interest. *Sturge v. The Eastern Union Railway Co.* xxxi. 406.

2. *Action for calls, who liable to—Inference that defendant was a shareholder rebutted—Forfeiture of deposit.* A railway company proved due notice of calls, and that the defendant's name was on the sealed register of the company. The defendant put in his application for shares and the letter of allotment, by the former of which it appeared that he applied for one hundred shares in the company, undertaking to pay the deposit and sign the necessary deeds. The letter acquainted him that fifty shares had been allotted to him, and that they would be forfeited if the deposit were not paid within the specified time, and the parliamentary contract and subscribers' agreement signed before a certain other day. The defendant had never done any other act with regard to the company. *Held*, that this evidence rebutted the *prima facie* inference from the register that the defendant was a shareholder in the company. Per Pollock, C. B., the action would be maintainable if the defendant had paid the whole sum subscribed for, though he had not executed the parliamentary contract and subscribers' agreement. *Semble*, that the defendant was entitled to abandon his contract and forfeit his deposit. *Semble*, also, that the company might accept the subscription of the defendant to the parliamentary contract and subscribers' agreement after the time specified in the letter of allotment. *The Waterford, &c. Railway Co. v. Pidcock*, xviii. 517.

3. *Liability for assessments—Change of terminus—Reduction of capital stock—Authority of directors.* Suit was brought against an alleged subscriber to railroad stock for part of his subscription on the following state of facts;—The plaintiffs were an incorporated company for the construction of a road between two points. It was proposed to build another road which should be a continuation of the first from its place of termination, the capital stock in which was put at 800,000*l.* in 32,000 shares of 25*l.* each. It was afterwards agreed by the parties in interest that the two roads should be consolidated upon certain terms, and with this understanding the defendant became a subscriber for 200 shares of the consolidated stock, paid the calls upon him, and received the scrip certificates for the stock. He also signed the parliamentary subscription contract, and the shareholders' agreement. But when the bill for incorporation was before parliament, they reduced the length of the line of the proposed extension, changing one of the *termini* of the road; and also reduced the capital stock from 800,000*l.* to 400,000*l.* The directors passed a vote in favor of the consolidation and assessed the defendant on the 200 shares. *Held*, that they had no authority to do this, that the defendant was not a shareholder and not liable to the assessment. *The Midland Great Western Railway Company of Ireland v. Leech*, xxviii. 17.

4. *Suit by two shareholders to restrain application of funds to complete branch—Acquiescence.* Two shareholders in an incorporated railway company, suing on behalf of themselves and all others, sought to restrain the company from applying their funds in completing a branch railway, for the construction of which their parliamentary powers had expired. An interlocutory application for an injunction was refused, on the grounds that one of the plaintiffs named had acquiesced in the acts complained of, that the injunction would cause considerable inconvenience; that as all

the land had been purchased, it was not clear that it was illegal to complete the line, and that the suit was not properly framed, being on behalf of all the shareholders, which would include those who had sanctioned the acts sought to be restrained. *Ffooks v. The London and Southwestern Railway Co.* xix. 7.

5. *Registered holder of shares, a trustee.* The registered holder of shares in a railway company, though a mere trustee, is, in the absence of any special contract to the contrary, alone liable to the company for calls on such shares; and the company have no remedy in equity for calls against the real or beneficial owner of such shares. *The Newry, &c. Railway Co. v. Moss*, iv. 34.

6. *Effect of executing subscribers' agreement—Agreement by directors to return deposit if act not obtained.* An allottee of shares in a projected railway company paid on them; he also executed the subscribers' agreement, a deed under seal; but he did so on the faith of a letter written by the provisional directors before the execution of the deed, by which they undertook to return the whole deposit if the act should not pass. The deed was in the usual form, between all the shareholders with trustees, to perform the covenants, and contained a covenant to indemnify the provisional directors whether the act should or should not pass. *Held*, that the deed, being a contract by each shareholder, with all the others, its effect could not be destroyed in favor of any shareholder, by a contract between him and a certain number of shareholders; and consequently, the allottee who had signed it, was not protected by the letter of the provisional directors, against a call. *Mowatt, ex parte*, xix. 127.

7. *Call payable by instalments.* *Held*, on error, that a call upon the shareholders in a railway company, payable by instalments, is valid. *The London and Northwestern Railway Co. v. M^rMichael*, iv. 459.

III. Powers, Duties, and Liabilities of Officers of Railway Companies.

1. *Shares placed at discretion of directors—Duty to account—Acquiescence—General liabilities of directors.* The shareholders of a railway company, at a general meeting passed a resolution, by which they placed a large number of shares at the disposal of the directors, who, as a body, did not interfere with the management of the company, but allowed G. H., their chairman, to exercise a supreme control over the company and its affairs. The shares were then placed in the share register in the name of G. H. at the end of the names of the shareholders, and he caused numbers of these shares to be transferred into the names of divers persons, and through different brokers sold them in the market at considerable premiums. Upon a bill filed by the company, it was *held*, that the office of directors is a place of trust; that unambiguous expressions alone could confer upon them any special power; that a resolution to place shares at the disposal of the directors, without more, did not render them irresponsible; that they were bound to give explanations to the shareholders, and could not derive any personal or pecuniary advantage from the mode of dealing with the shares; that a suggestion of the application of money for secret purposes will not exonerate the directors from accounting, nor can any person in a fiduciary position retain any remuneration for his services; that an acquiescence in the acts of the directors cannot be raised by a production of the share register books at the meetings of the company, and consequently that G. H. must account for the shares disposed of, and pay the costs up to the hearing, of resisting the account. *The York and North Midland Railway Co. v. Hudson*, xix. 361.

2. *As to raising capital under subscription contract.* An allottee of shares in a railway company provisionally registered, signed the subscription contract, which stated that the capital was to consist of a certain sum; that the provisional directors should carry on the undertaking, apply to parliament for necessary powers, apply the moneys which came into their hands, &c. The whole amount of stock was not subscribed for and the scheme was ultimately abandoned, after much expense had been incurred.

Held, that the agreement authorizing the directors to raise a capital of the sum stated did not compel them to raise all of such sum before taking any steps to carry the undertaking into effect. *Watts v. Salter*, xii. 482.

3. *Contract by directors with another company.* The directors of a railway company, being only trustees for their shareholders, cannot enter into such a contract with another company as to vary the rights of their shareholders, or diminish the profits of the company; and such a contract is against public policy. A court of equity cannot lend its assistance to enforce such a contract, whether it be valid or invalid in law. *The Shrewsbury, &c. Railway Co. v. The London, &c. Railway Co.* xxi. 319.

4. *Return of deposits to allottees by a part of directors.* If some of the directors of a company return to allottees of shares the deposits paid by them, and this is approved by the managing board and by a general assembly of the shareholders, an action cannot be brought against those directors for the repayment of the returned deposits. *Kent v. Jackson*, xi. 95.

5. *Bills introduced into parliament by directors to vary rights of shareholders.* The shareholders of a railway company consisted of two classes, viz: the proprietors of whole shares and the proprietors of half or guaranteed shares, and the directors introduced two bills into parliament to vary the rights and privileges of the respective classes. *Held*, that the proposed scheme could not be considered as such a breach of trust or duty to the company as would induce the court to restrain the directors from using the name and seal and credit of the company in prosecuting the bill, they entering into a similar undertaking to that imposed on the defendants in *Parker v. The Dunn Navigation Company*. But an injunction was granted to restrain the application of the funds of the company in prosecuting the bill, so far as it proposed to affect the privileges attached to the half shares. *Stevens v. The South Devon Railway Co.* ii. 138.

6. *Improper conduct of directors—Undue influence of another company—Winding-up—Injunction—Enforcing calls.* It appeared that the directors of a railway company had acted very improperly, and that the directors of another company had an undue influence in the management of affairs, yet, the directors having resolved to wind up the company, there was no necessity of an injunction to prevent the directors from completing a part of the road only, nor was it proper to grant an injunction to forbid the directors of the other company from interfering in the matter, they having sums at stake in the same. Also the court *held*, that it would not restrain the directors from enforcing calls on the contributories. *Logan v. Courtown*, v. 171.

7. *Managing committee.* The constitution of a railway company, as it related to the powers of the managing committee, and the resignation of a member of said committee, commented upon. *Re The Gloucester, Aberystwith, &c. Railway Co.* xxiii. 157.

8. *Misapplication of capital—Injunction—Acquiescence.* Though a shareholder in a railway company has an equity to have an injunction to restrain the directors from applying the funds of the company in the completion of a part only of the line with a view to the abandonment of the remainder, yet where the shareholder, with the knowledge of the intention to abandon the greater part of the line, remained passive for eighteen months, while the directors were expending large sums in the completion of the remainder, the court refused to interfere by injunction. *Graham v. The Birkenhead, Lancashire, &c. Railway Co.* vi. 132.

9. *Contract of doubtful validity—Injunction.* Where the directors of a company had entered into a contract, the legality of which was doubtful, to expend money in laying down rails, they were restrained, at the suit of some of the shareholders, from laying down the rails till the validity of the contract had been decided upon at law. *Beman v. Rufford*, vi. 106.

10. *Duty of company as to having servants—Refusal to deliver goods—Conversion.*

In an action of trover brought for the recovery of some quicks which were planted by the plaintiff, by the permission of the general superintendent of the railway company, on the land of the company adjoining their station, for the purpose of keeping them alive; both the superintendent and the managing director of the company having refused to allow him to remove them, and the plaintiff offering no evidence in regard to the respective duties of the superintendent and director aforesaid, it was held, that it was the duty of a railway company trading largely as carriers on their line, to have some servants authorized to give directions, and act for the company on all occasions as the exigency of the traffic might require; that the jury might therefore infer that the general superintendent and managing director had authority to act for the company in all matters in the course of the ordinary business of the company as carriers. And also, one of the judges dissenting, that the jury might also infer that it was within the power of the general superintendent, to grant permission to the plaintiff to put the quicks into the company's land, and that his refusal to deliver them, was an act within his ordinary business, and bound the company, and amounted to an act of conversion by them. *The Taff-Vale Railway Co. v. Giles*, xxii. 202.

11. As to the authority of a secretary of a railway company to bind the company by an admission, see *Bell v. The London and Northwestern Railway Co.* xxi. 566.

IV. Taking Land and Proceedings therefor; Special Contracts.

1. *Purchase of land by company—Application of purchase-money—Payment into court.* The Northwestern Railway Company contracted with the corporation of L., for the purchase of a piece of the corporation lands, for the purposes of their railway, and the title was approved; but before a conveyance was executed and the purchase-money paid, disputes arose between the company and corporation respecting the subject of the purchase, and the corporation brought an action of ejectment against the company, and obtained a verdict. In order to recover possession of their works, which were seized by the sheriff on behalf of the corporation, the company paid the purchase-money, and subsequently they filed their bill, alleging that the corporation were about to misapply the money, and praying that it might be paid into the bank, pursuant to the provisions of the Lands Clauses Consolidation Act. The corporation admitted that they had got 3,400*l.* part of the money, in their hands, and that 1,000*l.*, other part thereof, had been lent to the Local Board of Health, on mortgage of the rates made by them. On motion for the payment of these two sums into court, the defendants were ordered to pay in the 3,400*l.* but not the 1,000*l.* *The Northwestern Railway Co. v. The Corporation of Lancaster*, xii. 371.

2. *Right of landowner to compel company to complete purchase.* Where within the prescribed period a railway company gave notice to a landowner on the intended line, that they required to purchase his lands, and the landowner served them with a notice to treat, and demanded that the compensation should be settled by a jury, and no further steps were taken to complete the purchase until after the expiration of the period prescribed for the exercise of the compulsory powers of the company; it was held, that the landowner might compel the company to complete the purchase. *The Birmingham and Oxford Junction Railway Co. v. Regina*, iv. 276.

3. *Notice by company requiring part of field, and by owner that they must take the whole—Question for jury.* A was the owner of a field, contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The company served a notice upon A, requiring part of the field for the purpose of the railway. A gave notice to the company that if they took part they must take the whole, to which they agreed. A afterwards receded from his notice. The company then entered upon the whole under sect. 85 of the Lands Clauses Consolidation Act. Held, that the question, whether the fifteen perches were necessary for the works, was for the jury, and that A, having required the company

to take the whole, could not object that their entry on that portion was unlawful. *Doe d. Armistead v. The North Staffordshire Railway Co.* iv. 216.

4. By the 92d section of the Lands Clauses Consolidation Act, the owners of a manufactory have the option, a notice being served upon them by a railway company for a part of the manufactory, to sell the said part, or the whole. *Sparrow v. The Oxford, Worcester, &c. Railway Co.* xiii. 33.

5. *Right to take land for branch railway.* A railway company having opened their main line for traffic, but not having completed the stations and works, are entitled under the Railways Clauses Act, 8 Vict. c. 20, s. 16, to take compulsorily, within the time for completing the railway and works, any lands situate within the limits of deviation, for the purpose of making a branch railway. *Sadd v. The Maldon, &c. Railway Co.* ii. 410.

6. *Effect of counter-notice—Injunction.* A railway company gave notice to the owners of premises that they intended to take sufficient thereof to widen their road. The proprietors then gave a counter-notice requiring the company to take the whole premises, and filed a bill to restrain the company from summoning a jury to assess the value of the easement, unless they would purchase the whole, the plaintiffs undertaking to sell the same; and an injunction was granted. The company then gave notice of their intention to summon a jury to assess the value of the whole. A second bill having been filed to restrain the company from proceeding on this notice, it was *held*, that the plaintiffs, by giving the counter-notice, had established an equity against themselves, disentitling them to an injunction, and that the first injunction was properly granted upon terms. *Pinchin v. The London and Blackwall Railway Co.* xxxi. 249.

7. *Right to enter upon lands to effect junction.* A railway company had power "to make and maintain the railway and works on the line, and upon the lands delineated in the parliamentary plan, and described in the books of reference, and to enter upon, take, and use the said lands or such of them as should be necessary for that purpose;" but they were not to enter upon, take, or use any of the land or property of a certain preëxisting railway company, or in any manner to alter, vary, or interfere with that railway or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorized in manner in the said act authorized, and not otherwise; one of the clauses of the act, giving certain powers to the company for effecting a junction with the preëxisting railway. *Held*, that there being nothing to show that it was absolutely necessary for the company, in order to effect the junction, it had no power to take as owners certain lands over which the line of the preëxisting railway actually passed; but there was a right to enter upon such lands, by way of easement, for the purpose of effecting the junction. *The Oxford, &c. Railway Co. v. The South Staffordshire Railway Co.* xix. 131.

8. *Powers to purchase and to enter, when gone—Right to perfect title.* Where a railway company have given due notice of their intention to purchase lands, deposited the purchase-money and delivered the bond before the expiration of the period prescribed for the exercise of compulsory powers, neither their power to purchase land nor their power to enter is gone by a subsequent expiration of that period; and whenever they are entitled to retain possession of lands which they have taken, they have also a right to perfect their title. *Sparrow v. The Oxford, Worcester, &c. Railway Co.* xii. 249.

9. *Contract to take land before passage of bill authorizing construction of line.* A railway company who had projected a line of railway, being opposed by a landholder on the line, arranged, through a third party, who professed to be the agent of the company, to purchase his land at a certain price. The landowner withdrew his opposition, and the bill passed authorizing the construction of the new line. No steps, however, were taken to carry out the scheme; the landholder filed his bill against the company for specific performance of the contract to purchase his land. *Held*, that there was no

contract between the plaintiff and the company, for before they obtained their new act they could not enter into a contract. *Gooday v. The Colchester and Stour Valley Railway Co.* xv. 596.

10. A railway company paid for and took a conveyance of a piece of land from D. W. afterwards claimed the land, and moved to restrain the company from taking it, their compulsory powers having expired. The evidence of title was conflicting between D. and W. *Held*, that W. had his remedy by ejectment; and an injunction was therefore refused. *Webster v. The Southeastern Railway Co.* i. 204.

11. *Application to company by land owners to complete line—Laches.* A railway act and an additional special act gave a company five years for the exercise of the compulsory powers to purchase lands and to complete the road; a few months previous to the termination of the five years an application was made to the company to complete the line, and a *mandamus* directed to the company was obtained by the landowners. The company showed no want of power to obey the writ. *Held*, that the landowners had not been guilty of laches in making the application. So ruled also where, at a general meeting of the shareholders of the company, it had been resolved that the making of the branch line should be abandoned, and it was not shown by the affidavits on which the rule was obtained that the company had funds for completing the line. *Regina v. The York, Newcastle, &c. Railway Co., and Regina v. The Lancashire and Yorkshire Railway Co.* vi. 259.

12. *Taking land before compensation made—Trespass—Ejectment.* If a railway company take possession of land before compensation be made, with the consent of the owner, a subsequent demand for possession upon the company by the owner does not make the company trespassers, and ejectment cannot be maintained against them. *Doe d. Hudson v. The Leeds and Bradford Railway Co.* vi. 283.

13. *Notice by landowner for jury to assess damages.* In 1848, a landowner gave a railway company notice for a jury to assess damages which he alleged he had suffered. In 1849, he made a claim for further subsequent damages; and in 1850, gave notice for an arbitrator to assess the whole damages. *Held*, that this was not irregular, and that the first notice had not exhausted all the statutory powers. *The Lancashire, &c. Railway Co. v. Evans*, xix. 295.

14. Damages done by a railway for which compensation may be obtained under the statutory powers, and those for which a common action at law is the proper remedy, are distinct. *Ib.*

15. *Notice to treat for purchase of land—Particulars of claim—Apportionment of rent—Specific performance.* A railway company served a landowner with a notice to treat for the purchase of a portion of his land. The landowner, in the particulars of his claim, stated that he was seised in fee simple of the land required by the company, subject to an unexpired term therein, and a reserved rent of 32*l.* 13*s.*, and that he claimed 1,500*l.* for the purchase of his interest. The company, by their agent, agreed to pay the sum claimed. An abstract of title was then delivered to the solicitor of the company, who was also informed that the rent of 32*l.* 13*s.* was payable in respect of other land belonging to the plaintiff, as well as of that required by the company, and that it must be apportioned. The company claimed the whole rent, 32*l.* 13*s.*, and refused to complete their contract on any other terms. On a bill filed by the landowner against the company, the court, affirming the decision of the court below, decreed specific performance of the contract. *Inge v. The Birmingham, &c. Railway Co.* xxiii. 601.

16. *Purchase-money of land belongs to real representatives of owner.* Where a railway company agreed to pay a stipulated price per acre for so much land, within their limits of deviation, as they should take, and subsequently took a certain number of acres, and paid into court the purchase-money at the rate contracted for, the purchase money will belong to the real and not to the personal representatives of the owner. *In re Walker's Estate*, xxi. 85.

17. *Payment of purchase-money into court by vendors for interim protection.* A railway company, under pressure, paid the purchase-money for lands bought of a corporation to the vendors, instead of paying it into court under the 8 & 9 Vict. c. 18, s. 69. Upon a bill filed by the former, the latter were, on motion, ordered to pay into court the purchase-money in their hands for the purpose of interim protection. *London and Northwestern Railway Co. v. The Corporation of Lancaster*, xv. 58.

18. *As to compensation for a reversionary interest in land taken for a public purpose*, see *Beaufort v. Patrick*, xvii. 28.

19. *Petition by executor of mortgagee in fee—Costs.* An executor of a mortgagee in fee, having contracted with a railway company for the sale of a part of the mortgaged lands, presented a petition that the legal estate might be vested in him for the purposes of the sale, and that the railway company might be ordered to pay the costs of the petition. *Held*, that the court could make no order for or against the company. *In the matter of Rees's Devises*, xiii. 137.

20. *Company not liable to pay for lands unless they enter.* A railway company covenanted with the plaintiff, "that in the event of the proposed bill passing in the then session of parliament, the company should, before they should enter upon any part of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion not exceeding forty-three acres, which the company might, under the powers of their act, require and take for the purposes of their undertaking." *Held*, that the company were not liable, unless they entered upon some part of the plaintiff's lands. *Gage v. The Newmarket Railway Co.* xiv. 57.

21. *Agreement as to mode of constructing railway—Obligation to perform.* Lessees of premises, occupied by them as a ropery, agreed to withdraw their opposition to a bill in parliament, for a railway which would intersect the ropery. The agreement, among other stipulations, provided that the railway should be so constructed, as that when finished the level of the ropery should not be altered, nor the surface of the ropery be in the least respect diminished. *Held*, that the railway company were bound to restore the surface so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only. *Harby v. The East and West India Docks, &c. Railway Co.* xii. 135.

22. *Obligation to purchase—Expiration of powers.* The expiration, by lapse of time, of the powers given to a railway company by their act of parliament, does not affect their obligation to take lands, to the purchase of which they have previously bound themselves by contract. *Webb v. The Direct London and Portsmouth Railway Co.* v. 151. Decree for specific performance refused in this case, on appeal. ix. 249. That a company, before their compulsory powers have expired, are bound specifically to perform a contract for purchase of land, although they have totally abandoned their line, see *Hawkes v. The Eastern Counties Railway Co.* xv. 358. See also *Stuart v. The London and Northwestern Railway Co.* x. 57; s. c. overruled, xi. 112; *Gooday v. The Colchester and Stour Valley Railway Co.* xv. 596; *Gage v. The Newmarket Railway Co.* xiv. 57; *Regina v. The London and Northwestern Railway Co.* vi. 220.

23. *Failure of funds.* An existing railway corporation, duly authorized, promoted a bill in parliament for extending their line, and entered into an onerous contract with a landowner in furtherance of the objects to be carried out by their bill. The act passed, but no money was raised under it, and the scheme utterly failed. *Held*, that it was no objection to enforcing specific performance that it would involve the payment of the purchase-money out of the general funds of the company, and thus work a hardship upon the shareholders who had no notice of the arrangement; for the court could not recognize the rights of individual members as distinct from the rights and liabilities of the corporation itself. *Hawkes v. The Eastern Counties Railway Co.* xv. 358.

24. *Compensation for damage done, when to be made.* The defendants were pro-

visional directors of a company and promoters of a bill for making a railway. By agreement between them and the plaintiff, the plaintiff covenanted that he would accede to the bill, and the defendants covenanted that, in the event of the bill passing into a law, the company should pay him for so much of his land as should be intersected by the railway, 120*l.* per acre, and 3,000*l.* in full compensation for the general damage which the railway might do to his mansion, park, and estate, &c., &c. Averment, that the plaintiff did assent to the bill, and the same passed into a law; that the company entered on the plaintiff's lands and cut down trees, &c., and although seven acres were intersected and severed by the railway, and the park and mansion deteriorated, yet neither the company nor the defendants had paid the plaintiff 120*l.* per acre, nor the 3,000*l.* Fourth plea, that the company did not enter on the plaintiff's land. Fifth, that the plaintiff's land intersected by the railway was not required for the purposes of the railway, nor severed from the remainder of the fields. *Held*, per Parke and Platt, BB., that the defendants were bound to pay the plaintiff the 3,000*l.* immediately after the passing of the act, although the railway had not been constructed nor any damage done to his land; *dissentiente* Pollock, C. B., who held that the plaintiff was not entitled to the 3,000*l.* until his land should have been taken or some damage done. *Bland v. Crowley*, iv. 441. See also *Preston v. The Liverpool, Manchester, &c. Railway Co.* vii. 124.

25. *Landowner desisting from opposition to bill for railway—Agreement to purchase land—Effect of amalgamation on agreement.* H. and Y., and several other persons, calling themselves the L. and N. Y. Railway Company, introduced a bill into parliament for incorporating the company and making their railway, which was intended to pass through the plaintiff's estate, and near his residence. The plaintiff desisted from opposition to the bill, in consequence of H. and Y. having agreed with him, on behalf of the company, that, in case the company should obtain an act of incorporation, they would pay the plaintiff 1,000*l.* for all lands required by them for making the railway, and 4,000*l.* for residential injury, and 25*l.* for his personal expenses, and also that they would pay the expenses of his solicitor in the business. Afterwards, that company agreed to join with a rival company, calling itself the L. M. & N. Company, in applying for an act for making a railway, the line of which, so far as the plaintiff's estate was concerned, was the same as the line of the L. & N. Y. Company, and the two companies agreed to adopt the agreement with the plaintiff. The act passed, and by it the two companies were incorporated by the name of the L. M. & N. Railway Company. *Held*, that the incorporated company must be taken to be the parties on whose behalf H. and Y. entered into the agreement with the plaintiff. *Preston v. The Liverpool, Manchester, &c. Railway Co.* vii. 124.

26. *Agreement to pay different sums to landowner on happening of different events—Notice to put an end to agreement—Amalgamation.* A, a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill, and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that, if the bill of these projectors should not be passed within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A declared in covenant against these projectors on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defend-

ants pleaded that their bill had never passed into a law; that at the end of six months they had given notice to put an end to the agreement, and that they had not taken the plaintiff's land. *Held*, that this plea was no answer to the action. *Capper v. The Earl of Lindsey*, xiv. 9.

V. *Contracts with other Roads, &c.; Amalgamation of Companies.*

1. *Railway company—Agreement—Agreement to stop trains—Subsequent lease of line.* In 1836, a company (afterwards called the West London Railway Company) was incorporated by act of parliament, for the making of a railway from the Kensington Canal to join the London and Birmingham (afterwards called the London and Northwestern) and the Great Western Railways, at a place called Holsden Green; and certain duties were by the act cast upon the company; and, amongst other things, it was provided, that, if the railway should be abandoned, or should, after its completion, cease for the space of three years to be used as a railway, the land taken by the company for the purposes of the act, should revert to the owners of the adjoining land. In February, 1837, the West London Railway Company entered into an agreement with the Great Western Railway Company, under which the last-mentioned company bound themselves to stop certain of their trains at a point where their railway intersected the West London Railway, for the purpose of transferring passengers and goods from one railway to the other, and to stop their trains for the purpose of meeting corresponding trains of that company, in the manner particularly detailed in the deed. In 1840, another act, 3 & 4 Vict. c. 105, passed, giving further powers to the West London Railway Company; the 34th section, reciting the agreement of February, 1837, regulated the mode of crossing until the plaintiffs' railway should be completed; the 36th section saved the plaintiffs' right under that agreement; and the 37th section provided, that, if the plaintiffs' line was abandoned, or ceased to be used as a railway for three years after its completion, then, on payment or tender to them by the Great Western Railway Company of the purchase-money of the piece of land where the railways crossed, the said land should vest in the Great Western Railway Company. By a subsequent act (8 & 9 Vict. c. 156,)—reciting, that "it had been found that the said West London Railway [which it appeared in evidence had been worked with passenger trains as well as with goods trains] could not be worked as a separate and independent undertaking, with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connection with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned railways belonged; that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies,"—the West London Railway Company was authorized to lease to the London and Northwestern Railway Company their railway, and all their rights, powers, and privileges in relation thereto,—subject to the provisions of the act, and to the performance of the conditions to be mentioned in such lease. By the lease, which was afterwards executed in pursuance of this act, the London and Northwestern Railway Company covenanted, amongst other things, that they would, "at their own expense, during the continuance of the lease, efficiently work and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway or works, but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham (Northwestern) Railway Company of the West London Railway or works."

Held, that, in order to perform their covenant to work efficiently, the defendants were not bound under all circumstances to work the line for passenger traffic; but that, if as much gross proceeds could be obtained by efficiently working the railway for goods only as for passengers only, or for both passengers and goods, the covenant was well performed,—Platt, B., and Martin, B., not concurring. That the agreement of February, 1837, with the Great Western Railway Company, was, by virtue of the provisions in the leasing act, and the lease itself, transferred to the defendants, the lessees; and, consequently, that they had power to compel the Great Western Railway Company to stop trains on their line pursuant to the provisions of that agreement. That, although the defendants had power to stop the Great Western trains, they were not bound to exercise it necessarily as a part of the efficient working of the line demised; and that they were not bound necessarily to work the demised line in connection with the trains on the Great Western Railway. That there was no covenant in the lease to bind the defendants to work the demised line in connection with either or both their own or the Great Western Railway; but that it would be for the jury to say whether or not they could practically work the line efficiently, without some connection with one or other of those railways. That, for the purpose of considering the liability of the defendants, they were not to be treated by the jury as if they were lessees of a separate and independent line, having no control over the other two railways; but that the covenant to work the demised line efficiently, must be construed with a reference to the subject-matter, and the character of the defendants. *Held*, also, that the obligation of the defendants under their covenant was not limited—as decided by the court below—to the indemnification of the plaintiffs from the obligations cast upon them by their acts of incorporation; and that the defendants were bound to work the railway efficiently, so as to secure the stipulated benefits to the plaintiffs in the share of gross proceeds; but were not compelled to work it so as to produce the largest quantity of gross proceeds. *The West London Railway Co. v. The London and Northwestern Railway Co.* xviii. 481.

2. *Agreement between companies and subsequent lease of one road.* Parliament authorized the R. company to build a road connecting plaintiffs' road with a branch of defendants' road, and thereby with defendants' main road, and to lease their road to plaintiffs. In 1847, defendants agreed that the R. company should use the required part of defendants' branch forever, on certain terms. In 1850, the R. company leased their road to plaintiffs, together with their privileges under the agreement, for 1000 years. *Held*, that by virtue of the special acts and the Railways Clauses Consolidation Act, 1845, incorporated therewith, and the lease, the plaintiffs were entitled, as against the defendants, to the benefit of the agreement of 1847, and to stand in respect of it in the place of the R. company. *The London and Southwestern Railway Co. v. The Southeastern Railway Co.* xx. 417.

3. *Agreement by one company to bear harmless another against guarantees to canals, &c.* An agreement by one company to bear harmless another company against all their guarantees to canals, or otherwise, and to work their traffic and pay them such tolls as should make the stock of the latter company pay a certain percentage; and that the first company would also pay necessary expenses in order to obtain an act of parliament to ratify this agreement, is not an arrangement within the purview of the Railways Clauses Consolidation Act, 1845, s. 87; and the payments mentioned in the agreement are not tolls in the meaning of the act. *Simpson v. Denison*, xiii. 359.

4. *Extension of line of one company after agreement made.* The M. & B. Railway Company agreed with the B. & R. Railway Company, that the latter should have the use of a certain part of the former line for its traffic, on terms fixed by the agreement. The latter line was afterwards greatly extended at both ends, so as to serve a much wider extent of country, and its name was changed accordingly. After this the M. & B. Company confirmed the agreement by a subsequent deed. *Held*, that the agreement applied not only to traffic beginning and ending upon the original line, but embraced traffic over all or any portion of the extended line. *The East Lancashire Railway Co. v. The Lancashire and Yorkshire Railway Co.* xxv. 465.

5. *Agreement that one company may pass over road of another—Tolls.* Two railway companies entered into a *bonâ fide* contract by deed, by which it was provided that the defendants might, for twenty-one years, pass over the railways of the plaintiffs, and have free use of their works and conveniences for the purpose of carrying coal, upon payment of certain tolls and under certain conditions, which tolls and conditions were to be regulated by the quantity of the coal conveyed. It was *held*, in an action to recover the sum payable under the contract, per Parke, B., and Platt, B., (Pollock, C. B., *dubitante*, and Martin, B., *dissentiente*,) that this was a legal contract, and not beyond the powers of the respective companies, the payments to be made being within the meaning of the word "tolls," in the 87th section of the Railways Clauses Consolidation Act, 8 Vict. c. 20. *The South Yorkshire Railway and River Dun Co. v. Great Northern Railway Co.* xxii. 531; s. c. affirmed on error, xxv. 482.

6. *One company to use another line at stated tolls—Impounding tolls and dues for non-payment—Injunction—Mortgages of undertaking.* A railway company contracted with another that the first should have the use of the line of the latter for a term certain at stated tolls, according to the tonnage carried; and it was agreed that these tolls should be charged on the tolls and dues of the company who had the use of the line, and that upon non-payment the other company might take and impound such tolls and dues, and deal with the same in the same way as with distresses for rent. On a bill filed to restrain the company who had the use of the line from dividing their funds among the shareholders, by way of dividend, until the debts alleged to be due to the other company were paid, it was *held*, that the court would not interfere by way of injunction, but left the plaintiffs to proceed by action or distress as they might be advised, the remedy of the plaintiffs being at law. *The South Yorkshire Railway and River Dun Co. v. The Great Northern Railway Co.* xix. 513.

7. *Seemle*, that a railway company cannot legally or equitably mortgage its undertaking without the authority of parliament. *Ib.*

8. *Seemle*, that such an agreement is not a contract for the use of a line, nor for an apportionment of tolls within the 87th section of the Railways Clauses Consolidation Act, 8 Vict. c. 20. *Ib.*

9. *Rights of companies determined by agreement and not by Railways Clauses Consolidation Act.* When an agreement has been entered into between railway companies as to terms of passing over each other's lines, their rights in respect of such passing must depend wholly upon the terms of the agreement and not upon the provisions of the Railways Clauses Consolidation Act. *The Great Northern Railway Co. v. The Eastern Counties Railway Co.* xii. 224.

10. *Agreement that one company shall work line of another.* An agreement that another railway company shall work a particular line of railway, and that the property and plant shall be handed over for that purpose, implies a delegation of the powers conferred by statute on the particular company, which cannot be made by them, nor accepted by the other company, without the authority of parliament, and equity will grant an injunction to prevent the performance of such an agreement. *Winch v. The Birkenhead, Lancashire, &c. Railway Co.* xiii. 506.

11. Though a railway company are not bound to be carriers on their own railway, they are bound to work the line; and the 87th section of the Railways Clauses Consolidation Act does not authorize one company to do more than carry part of their traffic, where that is necessary, upon the line of another company. *Ib.*

12. *Agreement to apply to parliament.* An agreement between two companies for an application to parliament for the necessary powers to enable one company to work the line of the other is innocent, and equity will not interfere to prevent a company from putting its seal to such an agreement. *Ib.*

13. *Right of shareholder to file bill to restrain illegal agreement.* Where there is an agreement between two railway companies, which is beyond the powers of both, and against the policy of their acts of parliament, a shareholder in one of the companies

may file a bill, on behalf of himself and all the other shareholders therein, against his own company and the other company, for an injunction to restrain the execution of the agreement, and without making either the directors of the former company, or the shareholders therein who promoted the agreement, or any of them, defendants to the suit. *Ib.*

14. *Traffic to be carried on at expense of one company—Pro ratâ proportion of proceeds for use of railway.* An agreement was made between the M. & B. Railway Company, (A,) and the B. and R. Railway Company, (B,) to the effect, among other things, that the traffic of A, i. e., using both lines, should be carried on at the expense of B, who should pay to A a proportion *pro ratâ*, of the proceeds of such traffic, for the use of their railway. It was provided, however, that A was not to receive from B for the use aforesaid for more than half the distance between the junction of the two lines and the terminus of A, at Salford. Nevertheless, A might charge for two miles at least. A subsequently became the L. & Y. Railway Company, and B was extended, and became the E. L. Railway Company. A special verdict having found that the length of A from the station at Salford to its point of junction with B, is four miles, and no more, it was *held*, first, that on the true construction of the above agreement, the Lancashire and Yorkshire Railway Company were not entitled to charge the East Lancashire Railway Company that proportion for the whole amount received as tolls which that whole distance of two miles to be charged for on their part bears to the whole distance travelled on the line of the East Lancashire Company alone; but that the rate per mile for the charge was first to be settled by the relative distances actually travelled on each, and when so settled a distance of two miles was to be paid for at that rate. Secondly, that the agreement itself did not extend beyond the traffic along the Bury and Rossendale Railway alone to the traffic along the whole railway of the East Lancashire Railway Company. *The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.* viii. 564.

15. *Agreement not void as fraud on legislature—Monopoly—Stipulation to divide profits—Carriage of passengers.* By certain articles of agreement made between the S. and B. Railway Company, the L. and N. W. Railway Company, and the S. U. Railway Company, reciting, that the S. and B. Railway Company had agreed to withdraw their opposition to a bill before parliament for authorizing a lease of the S. U. Railway Company to the L. and N. W. Railway Company, and that it had been mutually agreed by the three companies that the covenants thereafter contained should be mutually entered into by them, on an act being obtained for authorizing such lease, it was witnessed (*inter alia*) that during the continuance of such lease separate accounts should be kept of all passengers, &c., conveyed on the S. and B. and S. U. Railway lines; and that the money received in respect of such traffic should be divided between the three companies in certain proportions; and further, that during the continuance of such lease the L. and N. W. and S. U. Railway Companies would not carry any passengers, goods, &c., or other matters and things between certain points, nor would use a certain portion of the S. U. Railway line, to compete for any traffic which properly belonged to the S. and B. Railway. *Held*, first, that this agreement was not void as a fraud upon the legislature. Secondly, that it was not illegal as giving a monopoly, and depriving the public of the benefit of competition. Thirdly, that the stipulation to divide the profits was not a fraud upon the shareholders of the respective companies. Fourthly, that the clause restraining the carriage of passengers, &c., on the S. U. Railway line was not contrary to the 1 & 2 Vict. c. 98, and the 7 & 8 Vict. c. 85, providing for the conveyance of mails and troops on railways; and *semble*, that such traffic was impliedly excepted out of the restraining clause. *The Shrewsbury and Birmingham Railway Co. v. The London and Northwestern Railway Co.* ix. 394.

16. A further clause of the articles provided, "that the agreement thereby come to should not in any manner be evaded or eluded by either of the contracting parties, nor

should any arrangement, scheme, device, or contrivance be resorted to or attempted for that purpose." *Held*, that this clause was independent of the existence of a lease, and that a breach was well assigned upon it, without averring the granting of any such lease. *Ib.*

17. An agreement between two railway companies, made without the authority of the legislature, whereby one company delegates to another all the powers which have been conferred upon it by parliament, is an unlawful attempt to effect that which parliament alone can authorize, and is against public policy; and in such a case, the court will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement. *The Great Northern Railway Co. v. The Eastern Counties Railway Co.* xii. 224.

18. *Grant of lines and conveniences.* One railway company having granted to another the use of their lines, and of all conveniences upon the lines, cannot object to their grantees using the conveniences so granted for any purposes to which they may be able to apply them, even if the grantors themselves were not entitled to use them for such purposes—*semble*. *Ib.*

19. *Each company to use part of the road of the other—Permanent agreement.* Where there was a contract between two railway companies that each might use a part of the road of the other, each paying its share of the expenses for that part, &c., and disputes arising between the two parties, the one sought to break the contract, it was *held*, that the agreement was permanent, and could not be determined without the consent of both parties, and was not a mere license revocable at the will of either. *The Great Northern Railway Co. v. The Manchester, Sheffield, &c. Railway Co.* x. 11.

20. A railway company is not authorized to give up the management of its line to another company. *Beman v. Rufford*, vi. 106.

21. *Agreement with contractors to work line, illegality of—Mutual rights and remedies.* A railway company agreed with contractors that the latter should work the line, keep the engines and rolling plant in repair, and do certain other acts, for seven years, at stipulated amounts of remuneration; if the contractors did not repair, within forty-eight hours after notice, the company might by another notice determine the contract, and resume possession of the plant, sheds, buildings, &c. The company gave a notice to repair, and the repairs could not be completed within the forty-eight hours. The contractors filed a bill, praying a declaration that the true construction of the agreement was that only such repairs were to be done within forty-eight hours as could reasonably be completed within that time, and for an injunction against giving the second notice to determine the contract. *Held*, that, although not in form, the suit was in effect for specific performance, and must be so treated; and, assuming the plaintiff's case to be true, as it did not fall within any of the classes in which the interference of the court had been accustomed to be exercised, there being no mutuality, for if the contractors failed to perform their duty the court could not compel them, and as for any breach of the contract by the company the contractors had a right to sue at law, if the agreement were legal, the motion must be refused. *Semble*, that as by the working of a line by other parties than a company itself, the public loses the benefit of the guarantee thereby afforded for care and attention, such an agreement is illegal, as contrary to public policy. *Johnson v. The Shrewsbury, &c. Railway Co.* xix. 584.

22. *Agreement to withdraw opposition to one line and oppose rival line—Amalgamation.* In 1846, two competing lines of railway, the D. N. and the L. and Y., being before parliament, L. agreed with eleven persons, (the promoters of the D. N. Railway,) to give them certain portions of land, at different prices, to withdraw all parliamentary opposition from them, and offer every description of opposition to the L. and Y. Railway; and that if an amalgamation took place on any grounds, he would

not oppose the amalgamated company. In case of the amalgamated company obtaining their bill, they were to adopt this agreement and all the covenants, &c., one of which was, that the D. N. Railway Company were to build a station near T., at a point to be approved by L., at which station all trains should stop. The two companies did amalgamate by the name of "The G. N. Railway Company." Litigation took place, both in equity and at law, upon the construction of the agreement, the validity of which was never impeached in such litigation. The G. N. Company now refused to stop their express trains at the T. station. *Held*, first, that the agreement was legal in itself was now decided by authority; but, *semble*, that if such authority had been wanting, it would not have been open to the defendants now to impeach it, after having brought it forward as a defence in former litigation. Secondly, that the balance of inconvenience on stopping such trains, was in favor of a specific performance of the agreement, and that the court would not hesitate to interfere to restrain a breach of it on interlocutory application. Thirdly, that the amalgamated company's act having been passed without opposition by L., which might reasonably be supposed to be in consequence of the agreement, acts done by the company under their act were to be looked at as if done under the agreement. *Lindsay v. The Great Northern Railway Co.* xix. 87.

23. *What is amalgamation.* A railway company, associating, allying, and connecting itself with another, does not thereby become equitably "amalgamated" with it. *The Shrewsbury, &c. Railway Co. v. The Stour Valley Railway Co.* xxi. 628.

24. An agreement to amalgamate as from a time past may possibly, in equity, amount to amalgamation; but an agreement to do so at a future period will not, until that period arrives. *Ib.*

25. *Joint use of part of line and station, effect of on agreement to amalgamate.* Pending the progress of a bill through parliament, authorizing the S. V. Company to lease their line to the N. W. Company, the bill was opposed by the S. B. Company, and, upon a compromise, a clause was inserted, securing to the S. B. Company the use of part of the line and the joint use of a station, subject to the cesser of these rights in the event of the S. B. Company being leased to or amalgamated with a fourth company, viz: the G. W. who were rivals to the N. W. Company. At this time the S. B. Company was under no engagements to the G. W. Company. Subsequently, however, those two companies entered into agreements, giving facilities and preference to each other's traffic, and agreed to amalgamate at a future time, if the sanction of parliament could be obtained. *Held*, that this was not such a change of circumstances, produced by the conduct of the S. B. Company, as to exclude them from equitable relief by injunction, for the enforcement of the rights of user conferred on them by the act. *Ib.*

26. A company for making a railway from Dublin to Mullingar was incorporated by an act of parliament passed in July, 1845, 8 & 9 Vict. c. 119, under the name of "The Midland Great Western Railway Company of Ireland." Some of its directors provisionally registered another company for making a railway from Mullingar to Galway, to be called "The Galway and Mullingar Junction Railway Company." Three months afterwards this name was altered at the registration office to "The Midland Great Western Railway Company of Ireland, (extension from Mullingar to Galway.)" Most of the directors of the two companies were the same. On petition of the Midland Great Western for a railway from Mullingar to Galway, an act was passed in July, 1846, giving authority to make the road to Athlone, a part of the distance. The expression, "The Company," in the new act, was declared to mean the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western Company, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting, the seal of the Midland Great Western Company was affixed to the

shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one of them, that of the defendant, was inserted. Three calls were made; the first was dated previous to the insertion of the extension subscribers in the shareholders' book, the two others after that insertion. An action was brought for these calls. *Held*, that the act did not amalgamate the two companies; and that, even if the directors possessed a power of amalgamation, the resolution of September, 1846, was not an exercise of that power so as to render the defendant liable to an action for any one of the calls, at the suit of the Midland Great Western Company. *The Midland Great Western Railway Co. of Ireland v. Leech*, xxii. 45.

27. See also as to effect of amalgamation or agreements to purchase land, *Preston v. The Liverpool, Manchester, &c. Railway Co.* vii. 124; *Capper v. The Earl of Lindsey*, xiv. 9.

VI. Liability for Injuries to Land and Cattle; Loss of Goods.

1. *Injury to lands.* Where a railway company do that which would be an actionable injury to land, unless done under the powers conferred by their act, the owner or occupier is entitled to compensation, under sect. 68 of stat. 8 & 9 Vict. c. 18. *Glover v. The North Staffordshire Railway Co.* v. 335.

2. *Compensation.* A special verdict found that the only approach to the house of the plaintiff was by a private road; that a railway, constructed under the powers of a special act, crossed the road on a level, in an oblique direction, so that, at the point where the railway intersected the road, a train coming along the railway at ordinary speed could not be seen for more than seventeen seconds before it reached that point; that there were gates on each side of the railway across the road, which were kept locked, under the provisions of the act, a key being kept by a servant of the company, whose business it was to unlock the gates when any person had occasion to pass through them, and the plaintiff also having a key; and that by reason of the above facts, and of the execution of the works by the company, the property of the plaintiff was depreciated in value. *Held*, that the lands of the plaintiff were "injuriously affected," within sect. 68 of stat. 8 & 9 Vict. c. 18, by the erection of the gates, and, per Lord Campbell, C. J., by the passage of trains along the railway. *Ib.*

3. *Injury to land from flood waters penned up by railway.* A railway was constructed across low lands, over which the flood waters of a river used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the railway without sufficient openings the flood waters could not spread themselves as formerly, but were penned up and flowed over upon the plaintiff's lands. There was no express clause in their act obliging the railway company to make openings for flood waters in that district, but there was a general provision that they should make openings when the railway crossed any public drains, embankments, or works in any drainage district. *Held*, that although they might not be compellable by *mandamus* to make openings for the flood waters, an action would lie against the company for the injury to the plaintiff's lands. *Lawrence v. The Great Northern Railway Co.* iv. 265.

4. *Interference with private right of way.* By the Railways Clauses Consolidation Act, the remedy by action for an interference with a private right of way is taken away, except where special damage has been suffered. *Walkins v. The Great Northern Railway Co.* vi. 179.

5. *Horses killed by train—Gates at crossing not closed.* Case for killing two horses by a railway train, from not keeping a closed gate where the railway crossed a highway on a level. Plea, that the horses were not lawfully on the highway at the time when, &c. It appeared that the horses, which were grazing in plaintiff's field,

had leaped over the hedge into a turnpike road, and had strayed thence into a new road formed by the company leading across the railway on a level into an old highway, and, one of the gates at the crossing being open, had got upon the railway. *Held*, first, that the road formed by the company was a highway, though the parish might not be bound to repair it. Secondly, that defendants being required by their railway act, and by sect. 9 of stat. 5 & 6 Vict. c. 55, to keep the gates at the crossings constantly closed, the horses were, as against defendants, lawfully on the highway, and therefore plaintiff was entitled to recover. *Fawcett v. The York, &c. Railway Co.* ii. 289.

6. *Sheep trespassing on close and straying upon railway.* If the plaintiff's sheep, trespassing on the close of A, stray upon the adjoining railway of the defendants, through a defect of fences which the defendants are bound, as against A, to make and maintain, the plaintiff has no remedy either at common law or by statute against the defendants, if his sheep suffer injury. *Ricketts v. The East and West India Docks, &c. Railway Co.* xii. 520.

7. *Sheep killed by train—Trespass—Case.* A railway train driven at the rate of forty miles an hour, according to the general directions of the railway company to the driver, ran over and killed some sheep which had strayed on the line in consequence of the defective fences of the company. *Held*, that the train being under the direction and control of a rational agent, the company were not liable in trespass for the injury, but that the proper form of action was by action on the case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway. *Sharrod v. The London and Northwestern Railway Co.* iv. 401.

8. *Action against company for loss of bag—Delivery by company—Question for jury.* The plaintiff was a passenger by railway, bringing a bag. On the arrival of the train the plaintiff got out upon the platform, with the bag in his hand, and it was taken by a railway porter to be placed in one of the cabs in the station. In an action against the company for the loss of the bag, it was proved that the plaintiff never saw the bag again, and that the porter was unable to find it. It was also proved to be the practice of the company for their porters to assist in carrying the passengers' luggage, on the arrival of a train, to the cabs in the station. *Held*, that there was evidence of the railway company having contracted to deliver the plaintiff's bag to a cab in the station, and of their not having performed such contract. *Held*, also, that whether the plaintiff had accepted a delivery of the bag on the platform, or elsewhere, in lieu of such delivery to a cab, was a question of fact for a jury to determine. *Butcher v. The London and Southwestern Railway Co.* xxix. 347.

9. *Loss of goods on another line.* Where a railway company receive goods at one terminus to carry them to another, they are answerable for any loss that may occur between them, although it may be on a line of railway that does not belong to such company; and the receipt of goods so to be carried is *prima facie* evidence of such liability. *Watson v. The Ambergate, &c. Railway Co.* iii. 497.

VII. Cases wherein a Mandamus will be issued.

1. *Mandamus to take up award of land damages, return to.* It is no good return to a *mandamus* under the Lands Clauses Act, for taking up an award of land damages, and furnishing a copy to the landowner, that the company were prevented by reason of the arbitrator's refusal to deliver it up to them without the payment of his fees; there being nothing in the act to affect the arbitrator's common-law right of lien. *Regina v. The South Devon Railway Co.* iii. 282.

2. *To carry cross road over railway—Railways Clauses Act.* *Mandamus* to a railway company to carry a cross road over the railway at certain rates of inclination, under the obligations of the Railways Clauses Act, and the company's special act. *Held*,

that the Railways Clauses Act applied to the construction of the railway, and not to cross roads, and that the section of the special act, providing that it should be lawful for the company to construct the bridges for carrying the railways thereby authorized over any roads, of the heights and spans and in the manner shown on the sections deposited, applied only to the heights and spans, and not to the rates of inclination delineated in the sections deposited; and therefore that the *mandamus* could not be supported. *Regina v. The Caledonian Railway Co.* iii. 285.

3. *To compel company to purchase shares in canal—To direct company to proceed with road.* By the act of parliament establishing a railway company, it was enacted, that "from and immediately after the opening of the railway" between two given places, the railway company should purchase the shares in two canals, with whose business they would compete. *Held*, that the railway company could not be compelled to purchase the shares in either of the canals before the completion of the road between the two places, although the delay was the fault of the company. But a *mandamus* could be issued directing the company to proceed with the road. *Regina v. The Ambergate, Nottingham, &c. Railway Co.* vi. 328.

4. *Commanding company to proceed with purchase of lands after expiration of powers.* A writ of *mandamus* cannot be issued commanding a railway company to proceed with the purchase of lands, &c., after the powers of the company for the compulsory purchase of lands have expired. *Regina v. The London and North-western Railway Co.* vi. 220.

5. *Quære*, whether there lay upon the company an obligation to make and complete the railway, which might have been enforced by *mandamus*; and whether want of funds for the purpose would be an answer. *Ib.*

6. *Directing company to build bridge over railway—Option of company.* A writ of *mandamus* directing a railway company to build a bridge for a highway over their railroad was quashed, the company having, by statute, the option to carry their road either over or under the highway, and that option not being terminated by the defendants having cut through the highway by a deep trench, as if intending to carry their road under the highway. *Regina v. The Southeastern Railway Co.* vi. 214.

7. *Alternative mandamus commanding completion of line—Inability of company.* Where an alternative *mandamus* was issued commanding a railway company to complete their line, and they showed by their return, that, without any default on their part, they had never been and were not in a situation lawfully to exercise the powers necessary to its completion, a peremptory *mandamus* will not be granted. In this case the inability proceeded from the fact that the company had never been able to get the whole of their capital stock subscribed for. *Regina v. The Ambergate, &c. Railway Co.* xviii. 222.

8. *Information to compel completion of road.* To an information to compel a railway company to complete one road simultaneously with another, a general demurrer was allowed, the vice-chancellor guarding himself from expressing any opinion as to what he should have done if this had been a bill by a shareholder or landowner, or an information and bill instead of an information only. If the public interests represented by the attorney-general were entitled to have the second line of railway made, they should proceed by *mandamus*. The fact that the writ of *mandamus* could not be obtained till after the long vacation, did not give any equity that could support the information. *The Attorney General v. The Birmingham, &c. Railway Co.* vii. 283.

VIII. Construction of particular Statutes.

1. *Right of company to construct works on bed of navigable river.* Case against a railway company for constructing a portion of their works upon a part of the bed of the navigable River Ouse, so as to prevent its flowing in its usual and accustomed

channel, and to hinder the plaintiffs from passing and navigating their barges, as they otherwise might and would have done. The defendants pleaded that they had acted under their special act, the Lands Clauses Consolidation Act, &c. *Held*, that the defendants by their plea were not required to prove that they had taken all the preliminary steps necessary to vest in them the ownership in the bed of the part of the river in question, as in the ordinary case of lands purchased. Secondly, that the first clause in the 16th section of the Railways Clauses Consolidation Act, applies to navigable rivers as well as rivers not navigable, and empowered the defendants to do the act complained of. *Abraham v. The Great Northern Railway Co. v. 258.*

2. *Conflicting rights of companies granted by acts of parliament.* As to the effect of two acts of parliament, conferring on different companies the right of purchasing compulsorily the same plot of land, *quære*. In this case an injunction was granted to restrain the second company, the first having already constructed their road, from exercising their power pending the trial of the legal question of the effect of their conflicting powers. *The Manchester, Sheffield, &c. Railway Co. v. The Great Northern Railway Co. xii. 216.*

3. *Interference with county road—Mandamus to repair.* A railway company, in pursuance of the powers of their act, pulled down a county bridge and erected another, at the same time entering into an agreement with the trustees of the road to repair such portions of the approaches to the bridge as had previously been repaired by the county. *Held*, that the company had not interfered with the road so as to bring the case within the 58th section of the 8 & 9 Vict. c. 20, and consequently a *mandamus* to the company commanding them to repair the road, would not be granted. *Ex parte The Exeter Road Trustees, xi. 441.*

4. *Interference with roadway—Liability to penalties—Person entitled to proceed.* To entitle a person to proceed against a railway company for penalties for interfering with an existing public road, under the 8 & 9 Vict. c. 20, s. 57, as "a person having the management of the road," he must be clothed with some duty in respect of the public, *ejusdem generis* with that of "trustees, commissioners, or surveyor." *Regina v. Wilson, vi. 403.*

5. *Embankment—Opinion of board of trade.* A railway company were building an embankment more than five feet above the level, according to the 11th and 12th sections of the Railways Clauses Consolidation Act. They had not given the notice required by the 12th section, but had obtained the consent required by the 11th. The court put them on terms to take the opinion of the Board of Trade, submitting to such order as this court should thereafter make; otherwise, an injunction would go to restrain the company from proceeding with the embankment. *Pearce v. The Wycombe Railway Co. xix. 122.*

6. *Subscription of certain amount a condition precedent to exercise of powers.* A railway act enacted that when 1,500,000*l.* should have been subscribed, it should be lawful for the company to put in force all the powers of the act and of the acts therein recited, as regarded that portion of the said railway, situate, &c. *Held*, that the raising of this sum was not a condition precedent to the power of the company to make calls, but only to their exercising the compulsory powers of taking lands, &c. *The Waterford, &c. Railway Co. v. Dalbiac, iv. 455.*

7. *Creation of new shares—Commutation of guarantee.* After the creation of the original shares in a railway company, an additional number of shares was created, upon which a resolution of the directors guaranteed a certain interest for ten years. A bill was filed by an original shareholder to restrain such preference, and the company undertook not to make such payments, unless under an act of parliament or on further order of the court. Subsequently, an act of parliament authorized the company to commute the guarantee made on the new shares. A bill having been filed to restrain the company from carrying into effect such commutation, it was *held*, that the act of parliament authorizing the commutation, did not take the case out of

the undertaking; and that, therefore, the undertaking was binding until the hearing of the cause, or the further order of the court. That the undertaking was not an agreement which bound the defendants to do nothing in the matter, the subject of the injunction, except under the order of the court, or unless the court should be of opinion that what they proposed to do was proper to be done; but was in the nature of an injunction obtained without argument, and which the defendants might apply to discharge. That, independently of the construction of the resolution, the act of parliament having authorized a commutation of the guarantee, and the commutation having received the consent required by the act, the company might lawfully carry it into effect. *Stevens v. The South Devon Railway Co.* xii. 229.

8. *Lien of bond creditors on tolls, &c.* Sect. 44 of the Companies Clauses Consolidation Act does not create a specific lien in favor of bond creditors upon the tolls or other property or effects of the company, and this construction is not altered by the 32d and 33d sections of the Special Act. *Russell v. The East Anglian Railway Co.* vi. 137.

9. *Tunnel—Deviation.* The effect of the 13th, 14th, and 15th sections of the Railways Clauses Consolidation Act, 1845, 8 Vict. c. 20, taken together, is, in the case of a tunnel, marked in the deposited plans, that the tunnel must be made in the exact position indicated, and that the line cannot deviate at all at that portion of it without the consent required by the 13th section, or special powers in the local act. And a company having wrongfully deviated cannot be compelled to construct the tunnel on the deviating line. *Little v. The Newport, &c. Railway Co.* xiv. 309.

10. *Act obliging broad gauge—Narrow and mixed gauge—Single and double line.* The O., W., and W. Railway Company were by their special act under an obligation to make a broad gauge railway from Wolvercot to Wolverhampton, with additional narrow gauge rails from an intermediate point, namely, Abbotswood, where the line would intersect the Birmingham and Bristol to Wolverhampton, at which point it would join the London and Northwestern Railway. The company, commencing at Wolverhampton, proceeded to construct a single line of narrow gauge railway, which they prepared in such a manner that it might readily be converted, by the addition of one rail, into a mixed gauge single line; and this they completed from Wolverhampton to a point at some distance south of Abbotswood. An injunction to restrain this mode of constructing the railway being prayed for, and it being proved that the O., W., and W. Company intended to make a single mixed gauge line from Wolvercot to Abbotswood, and a double mixed gauge line from that point to Wolverhampton, and that they had power to raise sufficient funds for that purpose; it was held, that the company were at liberty to lay down the narrow gauge throughout; that they were not bound to lay down a double line throughout, and might lay it down on a mixed gauge; and the restraint on the opening of the railway, as illegal, was refused. *The Great Western Railway Co. v. The Oxford, &c. Railway Co.* x. 297.

11. *Mortgage by company—Repayment of principal—Pledge of tolls and property—Receiver.* A railway act, 7 & 8 Vict. c. 85, s. 51, enacted, that a mortgagee might sue for interest due on a mortgage of the company, or require the appointment of a receiver; section 52 gave a like right of action for principal and interest. This act was repealed, but section 52 was substantially reenacted, so far as regarded interest. Another act, under which the money hereinafter mentioned was borrowed, enacted that certain recited acts, amongst which was the repealed act, should apply to moneys "by this act authorized to be borrowed." The Companies Clauses Consolidation Act enacts, in section 50, that "the company may fix a period for the repayment of the principal money so borrowed, with the interest thereon, and in such case the company shall cause such period to be inserted in the mortgage deed or bond, and upon the expiration of such period the principal sum, together with the arrears of interest thereon, shall, on demand, be paid to the party entitled to such mortgage or bond." The defendants, a railway company, having borrowed 1,000*l.* of the plaintiffs, exe-

cuted to them a mortgage deed. The deed contained the following stipulation: "The principal sum to be paid on the 1st day of January, 1851." An action having been brought by the plaintiffs to recover the principal sum lent, it was *held*, first, that the stipulation in the mortgage deed, that the principal sum was to be repaid on the 1st of January, 1851, imported a covenant by the defendants for the repayment of that sum on that day; that by virtue of that clause and of the Companies Clauses Act, section 50, if that sum were not repaid on the day fixed, the plaintiffs had a right of action for the recovery thereof, and that such right was not taken away, or affected by any other part of the Companies Clauses Act, or by the special acts. Secondly, that the effect of the deed was to pledge the tolls and property of the company as proprietors, but not their stock or property as carriers. Thirdly, that section 52 of the 7 & 8 Vict. c. 85, did not give a right of action for the principal money, but recognized it as already existing, and in addition to, or instead of that right, gave a right of having a receiver appointed; that, therefore, the repeal of that section would not take away such right of action. Lastly, that the existence of such right of action was also recognized by the 53d section of the Companies Clauses Act. *Hart v. The Eastern Union Railway Co.* viii. 544.

12. *Power of arbitrators chosen to settle differences between companies, under Companies Clauses Consolidation Act.* Where differences had arisen between two railway companies whose roads united at Colchester, as to the proper mutual facilities and accommodation for the interchange and transmission of traffic from one road to the other; and according to statute in the manner provided by the Companies Clauses Consolidation Act of 1845, these differences were submitted to arbitration; it was *held*, that the arbitrators had power to order: 1. That the defendants should run every day, except Sundays, an express train from the Colchester Junction to their London station, departing at 10 A. M., and arriving at half-past 11 A. M., stopping at three intermediate stations; which was admitted to be a speed of thirty-six miles per hour;—for that the times of departure and arrival were circumstances which properly made part of the arrangement, and the court could not intend that the speed was improper, in the absence of any allegation to that effect; and that it was no objection that the award did not limit the time during which the arrangement was to continue, as new regulations might be made, under the arbitration clause, from time to time. 2. That the defendants should run an express train, with specified times of departure and arrival, from their London station to the Colchester Junction. 3. That the defendants should convey, from the U. Railway, on the C. Railway, the carriages and luggage vans, which had been used on the U. Railway for the passengers brought thereon to Colchester, to London, for the conveyance of such passengers and their luggage. *The Eastern Union Railway Co. v. The Eastern Counties Railway Co.* xxii. 225.

13. *Act requiring railway company to pay for canal shares.* It being proposed to form a railway from A. through N. and G. to B., and it being known that the line, when open from A. to N. would compete with and injure the N. canal, and when open from N. to G. would, in like manner, compete with and injure the G. canal, a private act of parliament (9 & 10 Vict. c. 160) was obtained, which authorized the formation of the whole railway from A. to B., and which stated that it was intended that the canals and railway should be worked in connection, and that the canal companies should be incorporated with the railway company. Section 73 provided that the railway company should be liable to pay to the canal companies a specified price per share for all their shares, "from and immediately after the opening of the railway between A. and G. for public use." The railway was afterwards made and opened for a portion only of the space from A. to G., namely from N. to G. *Held*, (Williams, J., *dissentiente*) that the opening for public use of any portion of the line between A. and G. rendered the railway company liable to pay for the canal shares. *The Grantham Canal Company v. The Ambergate, &c. Junction Railway Company*, xii. 439.

14. *Buildings to be used for purposes of railway.* A local railway act enacted that

the whole of certain ground in a seaport town, conveyed to the company, should be used solely for the purposes of the railway and the buildings connected therewith, except for coke ovens or any purposes (other than the necessary purposes of the railway), which might cause nuisance or damage to the vendors' other property. *Held*, not to restrain the company from allowing part of the building to be used as the custom house, for passing the luggage of passengers and travellers and other custom-house duties. Whether part of the buildings could be used as sleeping-rooms in connection with a hotel built by the company on the adjoining ground, *quære*. *The Warden, &c. of Harbor of Dover v. The Southeastern Railway Co.* xiii. 240.

15. A railway act passed in 1844, under which certain lands were taken. Afterwards, in 1845, the Lands Clauses Act passed; and in 1847, a second railway act was passed, extending the first. *Held*, that the Lands Clauses Act, applied to the whole undertaking, became consolidated both with the acts of 1844 and 1847, and that the owner of lands taken under the first act of 1844 became entitled to the benefit of its provisions. *The Lancashire &c. Railway Co. v. Evans*, xix. 295.

16. The 68th section of the Lands Clauses Consolidation Act incorporates all previous sections which are applicable. *Richardson v. The Southeastern Railway Co.* vi. 426.

IX. Miscellaneous Cases.

1. *Contract to furnish sleepers, construction of—Implied covenant to take—Condition precedent—Varying times of delivery.* An indenture between the plaintiffs below and the defendants below, (a railway company,) after reciting that the defendants were desirous of being supplied with 350,000 railway sleepers, and that the plaintiffs were willing to supply them according to the terms of a specification and tender, contained a covenant by the plaintiffs that they would supply the sleepers within the time specified, "as, when, and in such quantities, and in such manner" as the engineer of the company, by order in writing, "from time to time, or at any time within the period limited by the specification, should require." The specification stated that the number of sleepers required was 350,000, that one half would have to be delivered in 1847, and the remainder by midsummer, 1848. The deed also contained provisos that the engineer might vary the times of delivery; that the company should retain 2,000*l.* in their hands as security for the performance of the contract, and should pay it over within two months after all the sleepers had been delivered; and that the contract might be put an end to upon default made by the plaintiffs, or upon their bankruptcy or insolvency. *Held*, first, that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers. Secondly, that an order by the engineer was a condition precedent to any delivery of the sleepers by the plaintiffs. Thirdly, that the company were bound to cause such order to be given within the time limited by the specification. Fourthly, that although the engineer had power to alter the time for the delivery of the sleepers, such power was to be exercised within the period limited by the specification. Fifthly, that the engineer, as to matters in which he had a discretion, *e. g.* as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties, but as to giving the order for the delivery he was a mere agent for the company. *The Great Northern Railway Co. v. Harrison*, xiv. 189.

2. The only legitimate rule of construction is, to ascertain the meaning from the language used in the instrument, coupled with such facts as are admissible in evidence to aid its explanation. *Per Parke, B.* *Ib.*

3. In an action upon the above deed, on the ground that the company had not given any order for the delivery of sleepers within the specified period, it was *held*, that it was unnecessary to aver readiness and willingness to deliver them, as the plaintiffs were not bound to be ready and willing until the order was given. *Ib.*

4. *Railway contractor—Penalties—Account—Engineer's certificates—Engineer a shareholder—Company taking possession of the works and plant.* In a contract between R. and a railway company, for the construction by R. of a portion of the line of railway, after reciting that R. agreed to secure the due performance of his contract by his bond in the penal sum of 4,000*l.*, conditioned for the payment to the company of certain fixed sums for every week in which the work should not be completed according to the contract, the penalty in each successive week to increase in a fixed proportion, it was witnessed, amongst other things, that in case R. should become insolvent, &c., or should from any cause whatsoever (not the act of the company) not proceed in the works to the satisfaction of the company, the company might give to R. a notice in writing requiring him to proceed with the said works, and in case R. should for seven days after such notice make default in commencing or regularly proceeding with the said works, it should be lawful for the company to employ other persons to complete the works, and pay them out of the money which should be then remaining due to R. on account of this contract; and that the moneys previously paid to R. on account of any works should be considered as the full value, and be taken by him as in full payment and satisfaction, for all works done by him; and that all moneys which either then or thereafter would have been payable to R., together with all the tools and materials then being upon the works, should, upon such default as aforesaid, become and be in all respects considered as the absolute property of the company; and that if such money, tools, and materials should not be sufficient to pay for the completion of the works, then R. should make good such deficiency on demand. It was then further witnessed, and the company covenanted to pay to R. for the completion of the works the sum of 63,028*l.* 16*s.*, in the following manner, namely, every fourteen days four fifth parts of the whole value of the said works which shall have been actually performed during the preceding fourteen days, until there should be a reserved fund of 4,000*l.*, and then every fourteen days to pay the full value of such works, such value to be estimated by the principal engineer or his assistant, having reference as well to the prices in the schedule (as to extra work) as to the entire cost of the whole works; and at the expiration of one calendar month after the completion of the entire works, to pay one moiety of the 4,000*l.* so retained in the hands of the company, and at the expiration of one year and a month the remaining moiety of the 4,000*l.* And it was lastly agreed, that during the progress of the works the decision of the principal engineer for the time being of the company, with respect to the amount, state, condition, &c., or any other matter or thing whatsoever relating to the same, shall be final, and without appeal; but in case of dispute, after the completion of the contract, as to any matter of charge or account between the company and R., such dispute shall be finally settled by the arbitration of the said engineer on the part of the company, and an engineer appointed by R. on his part, or, if they disagree, by an arbitrator to be named by them. After R. had proceeded to a very considerable extent towards the completion of his contract, the company, being dissatisfied with the progress of the works, gave the notice to R. mentioned in the contract, and after seven days they took possession of the works, and of all the tools and materials thereon, and completed the works by other parties. R. filed his bill, setting up a case of fraud against the company in concealing the nature of the strata through which cuttings and tunnels were to be made, and insisting that he was entitled to be paid for those works at fair prices, regardless of the contract; that the fortnightly certificates of the value of the works given by B. the engineer of the company, were void, and not binding upon him, in consequence of B. being a shareholder in the company; that he was entitled to be relieved against certain money penalties which had been charged against him in the engineer's certificates; that the company were not justified in taking possession of the works, tools, and materials; and that he was entitled to have an account taken of the value of the works done, on the footing that there were no contracts, or that they were abandoned; and that the company might be debited with

the value of the engines, tools, materials, articles, and things of which the company took possession. *Held*, first, that no case of fraud had been made out. But *semble*, that although a corporation cannot be guilty of fraud, yet if their agents employed in carrying out a trading speculation be guilty of fraud, the corporation will be liable. Secondly, that the principle which prevents a person being a judge in his own cause, (*Dimes v. The Grand Junction Canal Company*, 17 Jur. 73, s. c. 16 Eng. Rep. 63.) does not apply to the case of the engineer of a railway company holding shares in that company, who, according to the terms of a contract between the company and a contractor, was during the progress of the works to give periodical certificates of the value of the works done, but which on the completion of the contract were not final. *Semble*, it is not necessary to institute minute inquiries as to how far the engineer's calculations, in making out his certificates during the progress of the works, were accurate; it is enough if they were made *bonâ fide*, and with the intention of acting according to the exigency of the contract. Thirdly, that the money penalties had been properly charged against R., they being, upon the proper construction of the contract, not penalties, but liquidated damages. Fourthly, that even assuming that the company were not justified in taking possession of the works, tools, and materials after the notice given, R. was not entitled to treat the contract as not existing, or as abandoned. R.'s right would have been by action for damages, and the seizure by the company formed no ground for such equitable relief as was asked. Fifthly, that, upon the true construction of the contract, the company did not, according to their contention, upon taking possession of the works and plant after notice, become absolute owners of the tools and materials, &c.; this whole provision is to be regarded, not in the nature of a penalty, but as mere machinery for enabling the company to complete the works at the cost of R., and the company are bound to account for the value of the tools and materials in settling their accounts with him, which accounts were decreed to be taken on the footing of the contract. *Ranger v. The Great Western Railway Co.* xxvii. 35.

5. As to one of the contracts, the company altered their intentions as to the direction which the line should take, and diverged, with the sanction of the landowners, to a greater extent than was permitted by their act of parliament; but the contractor never objected to the deviation, and continued to receive certificates and payment, in precisely the same mode as he would had the deviation not taken place. *Held*, that these circumstances did not vary this contract from the preceding contracts. *Ib.*

6. *Right to inspect register of shareholders.* The holder of a judgment against a railway company for which its shareholders are liable, is entitled to an inspection of the register of shareholders. *Regina v. The Derbyshire, &c. Railway Co.* xxvi. 101.

7. *Right to seize engine of another company running without certificate.* A railway company has a right to seize the engine of another company having running powers upon their railway, if the engine of that company be run upon their railway without a certificate first obtained, because the penalty inflicted for such a wrongful act, by sect. 116 of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, does not take away the common-law right of the owners of the railway trespassed on to seize the engine damage feasant. *The Ambergate, &c. Railway Co. v. The Midland Railway Co.* xxii. 289.

8. *Demand for return of engine.* Where it was expressly made part of the demand for the return of such an engine, after it had been removed off the defendants' line, that it should be returned for the purpose of being again used on the line without a certificate, it was *held*, in an action for converting the engine to the defendants' use, that such a demand was illegal, and it being so, the defendants were right in not acceding to it. *Ib.*

9. *Company not bound to fence.* A railway company are not bound to fence against cattle straying on a highway running alongside of the railway. If, by reason of a defect in the fences, such cattle get upon the railway and are injured, the company

are not liable, though the cattle got upon the highway without any fault of their owners. *The Manchester, &c. Railway Co. v. Wallis*, xxv. 373.

10. *Ratable value of road.* A sum of money guaranteed to a railway company sufficient to raise its dividends to 3 per cent. is not to be taken into account in estimating the ratable value of the road. *L. Campbell, C. J., dissent. Regina v. The Newmarket Railway Co.* xxv. 138.

11. *By-law requiring payment of fare before entering carriage—Buying ticket for more distant station at lower rate.* F. being at Colchester, and intending to travel as far as Diss, purposely obtained at the Colchester station, within the borough of Colchester, a ticket for Norwich, and paid the fare demanded. The proper fare to Diss was 7s., and the fare to Norwich, though further, was 5s. only. At Diss, F. got out of the train and delivered his ticket to the collector, and refused to pay the difference of fare to Diss, though demanded. By one of the company's by-laws, it was provided that every passenger should pay his fare previously to entering a carriage; and that any passenger who should enter a carriage without having paid his fare, was thereby subjected to a penalty. Under this by-law F. was convicted, for having within the said borough, unlawfully and wilfully entered a carriage of the said company, for the purpose of travelling upon the said railway from Colchester to Diss, not having previously paid his fare for so travelling. *Held*, that, supposing F. to have committed the alleged offence against the by-law, it was committed within the borough of Colchester; but that no such offence had been committed by him, and that the conviction, therefore, was bad. *Regina v. Frere*, xxix. 143.

12. *Usage—Receipts for pigs taken for transportation.* By the usual course of business of a railway company, receipts, &c., were given on taking pigs for transportation. A, being familiar with this usage, and having notice that the company held themselves responsible only when they had given the receipts, &c., sent pigs without taking a receipt. *Held*, that he had no remedy against the company for not delivering the pigs. *Slim v. The Great Northern Railway Co.* xxvi. 297.

13. *Projected railway—Right to recover back deposits.* The provisional directors of a projected railway company, after the subscribers' agreement had been prepared, issued a circular letter, stating that they had made arrangements with the S. Railway Company, by which the proprietary would be insured against loss, and that "in the event of the act not being obtained, the directors undertake to return the whole of the deposits without deduction." Plaintiff, having seen this circular, applied, in writing, for shares. The directors, in a written answer, inclosing the circular letter, stated that shares were allotted to him, and that the bankers' receipt for the deposits would be exchanged for scrip on his executing the parliamentary contract and subscribers' agreement. He paid the deposits, obtained the receipt, executed the contract and subscribers' agreement, and obtained scrip certificates. The subscribers' agreement, which was a deed between the subscribing shareholders of the first part, and two trustees of the second part, gave to the provisional directors the powers necessary for obtaining an act, and contained a clause indemnifying them in respect of all contracts and things made and done in pursuance of the powers given to them, and authorized them to reimburse themselves, out of the funds of the company, all costs and charges incurred by them in the execution of their powers. The directors failed in obtaining an act; and the S. Railway Company made no payment. Part of the fund raised by the deposits was spent in defraying the preliminary and parliamentary expenses. In an action for money had and received, brought by plaintiff against a provisional director who was a party to the circular and subsequent proceedings, it was *held*, by the exchequer chamber, affirming the judgment of the queen's bench: First, that there was no merger of the contract to return the deposits by the execution of the subscribers' agreement, which was between different parties. Secondly, that the circular letter accompanying the letter of allotment amounted to a promise on the part of defendant, to return the whole of the deposits to plaintiff in the event of the act

not being obtained, and that that promise was in no way affected by the execution of the parliamentary contract and the subscribers' agreement: and, Thirdly, that an action for money had and received would lie. *Londesborough v. Mowatt*, xxviii. 119.

14. *Jurisdiction of court of chancery—Joint use of station—Receiver—Arbitration.* The court of chancery may interfere between two railway companies entitled to the joint use of a station, by prescribing regulations for its management; but such interference ought not to take place without grave occasion. The court may also direct a partition of the station, and appoint a receiver if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitration, the court will withhold its interposition until the remedy thus provided has been resorted to. *The Shrewsbury, &c. Railway Co. v. The Stour Valley Railway Co.* xxi. 628.

15. *Receiver.* As to the appointment of a receiver of the property of a railway company, who will be appointed, on whose application, and how, see, *Fripp v. The Chard Railway Co.* xxi. 53.

16. As to rating of railways, see RATING.

RAPE.

1. A medical practitioner had sexual connection with a female patient of the age of fourteen years, who had for some time been receiving medical treatment from him for illness arising from suppressed menstruation. The jury found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bonâ fide* belief that he was (as he represented to her) treating her medically, with a view to her cure. *Semble*, that the prisoner might be indicted for rape. *Regina v. Case*, i. 544.

2. The prisoner got into the bed of a married woman, intending to have connection with her by passing for her husband, but not by force. She, supposing him to be her husband, allowed him to have connection with her. *Held*, that the prisoner was not guilty of rape. *Regina v. Clark*, xxix. 542.

RATING.

I. POOR RATES.

II. BOROUGH AND CHURCH RATES.

III. HIGHWAY AND OTHER RATES; LAND-TAX; MISCELLANEOUS CASES.

I. Poor Rates.

1. *Manchester concert society.* The Manchester concert society being regarded only as a musical club, the primary object of which was the gratification and amusement of the members and their families, it was *held* not entitled to an exemption from poor rates, as a society instituted for the purposes of the fine arts exclusively, within the 6 & 7 Vict. c. 36. *Held*, also, that had the society been otherwise entitled to the exemption, the accidental use of the hall for the benefit of an Infirmary, in 1848, would not have affected the right of exemption. *Regina v. Brandt*, iii. 323.

2. *Normal and model school.* Certain lands, buildings, and premises purchased by the lords commissioners of the treasury, on behalf of the lords of the committee of council on education, were fitted up and used as a normal and model school for the training of masters of schools for pauper and criminal children, and all the expenses of the institution were defrayed by the said committee out of the money voted by parliament for the promotion of public education. The officers of the institution were a principal, vice-principal, and masters, appointed and paid by the said committee of council, and who held their offices at the pleasure of the crown. These officers were entitled to their meals at a common table, and were provided with sitting and sleeping

apartments in the institution, and the principal had the privilege of supplying himself with fruit and vegetables from the garden. The pasturage of a portion of the land was let, and the proceeds carried towards the expenses of the institution. The students were required to pay 30*l.* per annum, with the exception of those who obtained the highest exhibitions, and the money so received was applied to the general expenses of the institution. In one of the rooms, a school was held for practice in elementary instruction, which was attended by poor children in the neighborhood, who were required to pay a weekly sum for their education, and were allowed to purchase books from the principal. The funds derived from the same were entirely expended in the maintenance and improvement of the school. *Held*, that there was no substantial difference between this institution and any other establishment in which cheap education was offered through the bounty of the founder, and that the premises generally were ratable to the relief of the poor. *Regina v. Temple*, xviii. 321.

3. *Huddersfield waterworks—Commissioners and consumers.* The commissioners of the Huddersfield waterworks were bound to furnish water to the consumers at certain specified rates, so calculated that the water rents were not, in any one year, after payment of the expenses, to exceed 7*l.* 10*s.* per cent. on the amount which should be owing by the commissioners in respect of the loan which they were empowered to raise on mortgage of the works and water rents, and after the discharge of the whole of the said loan, the water rents were to be reduced so as merely to cover current expenses. The commissioners were rated to the relief of the poor on the sum of 490*l.*, the sessions finding that sum to be the estimated net ratable value of all the reservoirs, pipes, and other apparatus in Longwood, taken in connection with, and as part of the entire works in Longwood and Huddersfield, being made up of 300*l.* the estimated net annual value of all the reservoirs, and 190*l.*, the net annual value of the pipes and other apparatus in Longwood. The sessions also found that a tenant of the entire waterworks, if released from the restrictions in the acts of parliament, and able to exercise his discretion as to the amount of water rents and rates, might calculate with reasonable certainty on a gross revenue of 2,000*l.*, and that, after deducting 800*l.*, the fair average of the current annual expenses, and the sum of 1,100*l.*, proved and admitted to be a proper annual deduction for repairs, renovations, and tenant profits, the residue of 1,100*l.* represented the net ratable value of the entire works; but that if such tenant was to be considered as subject to the restrictions in the acts, he could make no profit at all. *Held*, by Coleridge, J., that substantially the consumers, and not the commissioners, as a separate body, were the occupiers and the parties rated, and that the use and enjoyment of the water, and not merely the water rents, constituted the value of the occupation. That the restriction imposed by the acts amounted to no more than an arrangement between the commissioners and consumers as one body, of the terms upon which the benefits of the occupation were to be enjoyed, and could have no bearing on the question of the amount of ratable value as between the consumers and the inhabitants of Longwood. That, therefore, assuming the sum of 490*l.* to be the proper proportion of the 1,100*l.*, which, according to the above finding of the sessions had been arrived at on a right principle, as the net ratable value of the entire works, the commissioners were properly rated on that amount for the township of Longwood. *Regina v. The Churchwardens, &c. of Longwood*, xiv. 137.

4. *Commissioners under local act—Reservoir.* Commissioners under a local act of parliament had constructed a reservoir in the township of K., for the purpose of improving a mill stream, and affording a more regular supply of water to mills in other townships lower down the stream, upon which mills they were empowered to levy rates. *Held*, that the commissioners were liable to be rated to the relief of the poor of K. in respect of the reservoir, and that the amount should be such a sum as would be a proper assessment on persons engaged in a private undertaking of a similar nature. *Regina v. Kentmere*, vii. 435.

5. *Real property, how rated.* Real property ought to be rated according to its

actual value, as combined with the machinery attached to it, without considering whether the machinery be real or personal property. *Quære*, whether large lead chambers resting on the ground and movable, used for chemical purposes, were annexed to the freehold. *Regina v. Haslam*, vi. 321.

6. *Railway company, how assessed.* A railway company, like any other company or individual, occupying, in different parishes, land forming one property, is assessed according to the actual ratable value of the land occupied in each parish, which value is deduced from the net earnings in that parish. Expenses, wherever arising, necessary for preserving the property in the parish at such value, may be considered. Apart from the working expenses a deduction will be allowed for depreciation and expense of restoration, even though no annual charge has been made to meet this; and, *semble*, that no greater deduction will be allowed when the time for making the restoration comes. Where two companies exchange tolls over certain portions of their lines, the rates on those portions are affected by subjecting the earnings to the same deductions as if they had been received in money. Parish officers are to base their rates on the latest reliable information reasonably procurable. *Regina v. The London, Brighton, &c. Railway Co.*; *Regina v. The Southeastern Railway Co.*; *Regina v. The Midland Railway Co.* iii. 329.

7. *Great Western Railway.* In order to ascertain the net ratable value of the Great Western Railway, the company was allowed, in addition to annual allowances for the repairs of the road and movable stock, to deduct specific sums for their ultimate renewal and reproduction. In order to ascertain the net ratable value of the two miles and a half of railway in a certain parish, the deductions from the total gross revenue ought to be distributed on the parochial principle, by ascertaining what expenses are incurred in earning the gross receipts on the two miles and a half. This principle does not preclude a consideration of expenses wherever arising locally, which are necessary for keeping the subject of rate at the value which is the measure of the assessment. Wherever such expenses in fact apply equally to every mile of a railway, it is a convenient and allowable mode to arrive, by a mileage division, at the proportional part to be assigned to the miles in any particular parish. *Regina v. The Great Western Railway Co.* ix. 292.

8. *Premises not occupied exclusively for purposes of science, literature, or fine arts.* A society was established for the promotion of philosophy and natural history, and occupied a house in the respondent parish, divided into rooms, used as a museum, lecture-room, library, and reading-room respectively. In the reading-room were magazines, some of which only were of a purely scientific character; and also the newspapers. Every fellow of the society paid for the use of the reading-room, and it was generally used by all. *Held*, that the society was not entitled to be exempted from ratability, under the 6 & 7 Vict. c. 36, as the premises rated were not occupied, at the time when the rate was imposed, for the purposes of science, literature, or the fine arts exclusively. *Held*, further, that, under the circumstances, the society was liable to be rated in respect of the whole building, and not merely in respect of the reading-room. *Purchas v. The Overseers of the Parish of the Holy Sepulchre*, xxix. 170.

9. *Russell Institution.* The "Russell Institution" held not to be "a society instituted for the purpose of science, literature, or the fine arts exclusively," and therefore liable to parochial rates. *Russell Institution v. St Giles-in-the-Fields*, xxiv. 126.

10. *United Service Institution.* If a society may use its buildings for other purposes than those of science, the exemption given by 6 & 7 Vict. c. 36, cannot be claimed. Hence the "United Service Institution" is liable to be rated. *Regina v. The Churchwardens, &c. of St. Martin-in-the-Fields*, ix. 278.

11. *Zoological Society of London.* The Zoological Society of London is not exempted from the poor-rates under the 6 & 7 Vict. c. 36, either as a society for the purposes of science exclusively, or as supported by voluntary contributions within the meaning of the act. *Regina v. The Zoological Society of London*, xxviii. 186.

12. *Society supported by contributions, &c.* The Linnean Society, incorporated by royal charter, and instituted for the purpose of science exclusively, was supported in part by annual contributions of the fellows, who, before their admission, signed an obligation for the payment of such contributions; and, in case of default in payment, the obligation might be put in suit. The society were lessees of contiguous premises, 32 Soho-square, and 17 Dean-street, which had formerly been one house, and underlet 17 Dean-street, and five rooms in Soho-square to B. The other part of the premises in Soho-square was occupied for the purposes of the society, the librarian and house-keeper occupying as his dwelling, two rooms, and the porter also dwelling in the house, the permissive use of their rooms being taken into account, in fixing their salary. On appeal against a poor-rate, assessed on the society in respect of 32 Soho-square, the rate was quashed, the court holding, first, that it was "a society supported in part by annual voluntary contributions," within statute 6 & 7 Vict. c. 36, s. 1, and therefore exempt. Secondly, that the occupation of rooms by the keeper and porter was subsidiary to the purpose of the society, and did not take away the society's exemption. Thirdly, that B was liable to be rated for the rooms in 32 Soho-square underlet to him. *The Linnean Society of London v. The Churchwardens, &c. of St. Ann, &c.* xxvi. 212.

13. A society of which the primary object was the information and convenience of the shareholders only, was held not to be exempted from liability to be rated under stat. 6 & 7 Vict. c. 36. *Regina v. Gaskell*, viii. 298.

14. *District treated as a reputed parish.* Upon an appeal from a poor-rate for the parish of M., a case was stated for the opinion of the court, setting forth these facts. In the district of M. St. M. and M. St. P., there had always been one rate for maintaining the poor and repairing the roads, one set of overseers and of surveyors of the highways, and one constable; but there was evidence that there had formerly been two churches and two rectories, and that, for some ecclesiastical purposes, the district had been treated as two parishes. And it was held that the evidence showed that the district was a reputed parish at the time of the passing of stat. 43 Eliz. c. 2, and therefore was to be treated as one parish, as respects the maintenance of its poor. *Regina v. Sharpley*, xxvi. 206.

15. *Docks.* The ratable value of the docks of the Hull Dock Co. ought to be apportioned among the several parishes within which the docks, &c., are situate, in proportion to the areas of the docks, &c. *Regina v. The Dock Co. at Kingston-upon-Hull*, xi. 357.

16. *Docks—Steam-tug—Machinery.* The Southampton Dock Company's premises were in part rented by certain lessees. The company had in use a steam-tug, for the advantage of the dock business. Attached to the freehold was certain machinery, which could be detached with as little injury to the freehold as tenants' trade-fixtures. Held, that 13 Geo. III. c. 50, s. 25, which makes the lessor ratable for certain tenements, did not apply to the part of the company's premises not occupied by them. That the steam-tug was a part of the floating capital, and its expenses should be deducted in estimating the company's rate. That another proper deduction was an allowance for remuneration to one managing the affairs of the docks, independently of the profit on capital employed by him. That the machinery was properly included in estimating the ratable value of the premises. That no deduction could be made for income tax, in respect of the estimated profit of a supposed tenant of the docks. *Regina v. The Southampton Dock Co.* iii. 464.

17. *Commissioners of Harrogate.* Under 4 Vict. c. 16, commissioners were appointed for the improvement of H., within certain limits; and the property in all the public wells or springs of mineral waters, within the said limits, was vested in them, and they were empowered to add to or alter the existing erections over the said springs, and to erect a pump-room over the sulphur water springs. The act also gave them special powers for the maintaining of footways, the cleansing and lighting the

streets, the removal of dirt and rubbish, the preventing nuisances, providing a market, and further to make annual rates upon owners of property within the limits of the act; all moneys received under the act to be applied entirely in paying off moneys borrowed on the rates, and the expenses incurred in carrying out the purposes of the act. A pump-room was built, under the power given by the act, which was open to, and used by, the public generally, subject only to a small payment to the commissioners, and certain other regulations imposed by the act. *Held*, that the commissioners were properly rated as occupiers and owners of such pump-room, to the relief of the poor of one of the townships in part within the limits of the act, their appointment not being for the public advantage only. *Regina v. The Commissioners of Harrogate*, i. 281.

18. *Trustees incorporated for public purposes.* It is not of itself a ground for exemption from poor-rates, that the occupiers of land are trustees incorporated under acts of parliament for public purposes. It must appear from the provisions of the acts to have been the intention of the legislature that the funds derivable from their occupation should not be applied to the payment of poor-rates. *Regina v. The Trustees of Birkenhead Docks*, xiv. 128.

19. *Ferry-landing and tolls.* A ferry company constructed landing-places in two townships, on opposite sides of the river, with a toll-house and gate on each; their boats passed from one to the other, across the river, the bed of which was not in either township; the tolls were collected entirely on the south side. No tolls could have been earned for the transit on the river without use of the landing-places, nor for such use without the transit. The company were rated to the poor of the township on the north side, as occupiers of a "ferry, landing, and tolls," in a sum including half the net value of the tolls. *Held*, that the tolls could not be rated, either directly as being connected with real property, occupied in the township, and as thus ceasing to be incorporeal, or indirectly by taking them into account as profit of the lands; but that the land should be rated on an estimate of the rent which might be obtainable for it, in consideration of its being available for the purpose of earning the tolls. Also, that the ratable value of the land in question could not be ascertained by dividing the profits in the proportion of the land occupied in the two townships and the length of the transit. *Regina v. The North and South Shields Ferry Co.* xvi. 293.

20. *Manchester Institute.* The Manchester Institute being *prima facie* a society exempted from rates within 6 & 7 Vict. c. 36, *held*, that it was no objection to the exemption that part of their building, not sought to be exempted, was let, and the rents went into the general funds, nor that 5l. per cent. was deducted on the price of paintings from a distance exhibited and sold, the percentage being applied to their carriage; nor that strangers admitted to see the paintings paid a small fee, which was applied to the purposes of the society; nor that the settlement declared that the building was to be used "for the imparting of knowledge consistent with the general purposes of the institution," because such declaration did not authorize any other purposes than those of science, literature, and the fine arts; nor that the settlement declared, that upon a dissolution of the society the property belonging to it was to be sold, and the proceeds, after payment of debts, to be divided among the members, because such declaration only expressed a power which impliedly belonged to the members, and it did not appear to have been inserted with any view of profit. *Regina v. The Overseers of Manchester*, iii. 314.

21. *Museum on crown lands.* A museum was erected on crown lands, out of public moneys, for the purpose of the practical application of science. The professors were paid partly by government, and partly by fees, but neither they nor any one else had any further occupation of the premises than was necessary for the purposes of the institution. *Held*, that no part of the premises was ratable, on the ground that the whole were in the exclusive possession of the crown for public purposes. *De la Beche v. The Rector, &c. of Westminster*, xxix. 149.

22. *Grounds occupied for public use by surveyors of highways to be rated.* The corporation of H. as surveyors of highways within a district, rented and occupied a yard as a place of deposit for stones, &c., for repairing the highways. This yard was in the parish of S., a parish partly within and partly without the district. *Held*, that they occupied the yard as trustees for the inhabitants of the district, who were obliged by law to repair the highways, and that they were ratable in respect of it to the relief of the parish of S. *Regina v. Cooper*, xxvi. 181.

23. *Aylesbury market and fairs—Stallage and market tolls.* Certain persons, under a lease for years from the lord of the manor, were in the occupation and receipt of the tolls and duties payable at the market and fairs of Aylesbury, in respect of things sold at the said market and fairs; and also, of the stallage, pittance, and all other profits incident to the said market and fairs, together with the market-house and premises used for the purpose of the market and fairs. Tolls were paid and collected in the market-house, and throughout the market in respect of horses, cattle, corn, and other articles brought into the market and fairs and actually sold. Over part of the Market Square, and at the sides of some streets, stalls were placed, but not in any way affixed to the soil, upon which goods were exposed for sale; and in respect of these stallage dues were paid. The lessees were rated to the relief of the poor as occupiers in respect of the market-house, and the land upon which the market and fairs were held, and of the stallage and all the tolls received by them, from the sale of goods at the market and fairs. *Held*, that stallage was a payment made in respect of the exclusive use and occupation of the soil, for a time, and was, therefore, properly included in the rate; but that the market tolls on things sold in the market and fairs, having no connection with the exclusive use of the soil, were not ratable. *Roberts v. Aylesbury*, xvi. 368.

24. *Farm with privilege of shooting.* Where the tenant of a farm pays an increased rent for the privilege of killing game on the farm, he is liable to be rated in respect of that increased value; and where the tenant originally took the farm without such privilege, but afterwards rented the privilege of shooting over a larger area, including the farm, at a certain rent, it was *held*, that he was in the same position as if he had originally taken the farm with the privilege; and that his rate was properly increased by the sum which the sessions had found as the value of so much of the privilege as related to the farm. *Regina v. Williams*, xxviii. 172.

25. *Brewery and public-houses, ratable value of—Good-will.* A brewery, &c., together with the good-will and trade of certain public-houses, subject to the rents theretofore received for said public-houses, were leased for seventeen years to A, yielding and paying for the brewery and premises, the yearly rent of 300*l.*, and for the fixtures, implements, and utensils specified in a schedule, the further yearly rent of 50*l.*, and for the good-will and trade of all and every the public-houses, &c., mentioned in another schedule, the further yearly rent of 150*l.* A occupied the brewery; and the public-houses, thirty-three in number, which were situate in different streets and places, and quite apart from the brewery, were let by A, to separate tenants, at rents about equal to the amount paid by A to his landlord. The tenants of the public-houses, as they were bound to do under an agreement, purchased from A, at the brewery, all the malt liquors, &c., consumed in their houses, and each tenant was separately rated to the poor-rate. Without the restriction as regards the purchase of malt liquors, &c., a higher rental would have been given for the public-houses. *Held*, (Erle, J. differing in opinion,) that the 150*l.* paid for the good-will of the public-houses, was to be taken into account in estimating the ratable value of A's occupation of the brewery and premises. *Alison v. The Churchwardens, &c. of Monkwearmouth Shore*, xxvi. 172.

26. *Prison, officers' residences, &c.* A building leased and occupied as a prison is not ratable. The following premises, held under the same lease, held to be ratable: (within the walls,) a coach-house, &c., occupied by the governor, and not necessary for

his public duty—(without,) two shops, kept for supplying the officers; a farm, on which the convicts worked, and the proceeds of which served for the prison; also, *dissent*. Coleridge, J., the residences of the officers, for which they paid rent, or received less pay in consequence. *Gambier v. The Overseers of Lydford*, xxv. 141.

27. *What property exempt, under Public Health Act.* The proviso in sect. 88 of the Public Health Act, 1848, (11 & 12 Vict. c. 63, that, if any kind of property before the passing of the act has been exempt from rating by any local act, in respect of purposes for which district rates may be levied under the Public Health Act, 1848, the same kind of property, in respect of the same purposes, and to the same extent, shall be exempt from district rates under the last-mentioned act,) applies only to exemptions in respect of the nature of the property: not, therefore, to property exempt, under a local act, in respect merely of its locality; although the property so locally situate was exempt from poor rate. *Tait v. The Local Board of Health of the City of Carlisle*, xxii. 213.

28. *County court-house.* The treasurer of the county court, under 9 & 10 Vict. c. 95, is not liable to be rated to the relief of the poor in respect of the occupation of a building used exclusively for transacting the business of the county court. *Regina v. The Overseers of Manchester*, xxv. 145.

29. Trustees who are directed by statute to apply their funds in certain specified ways, and to no other purpose, are not justified in refusing to pay a poor rate levied on them in respect of such funds. *Regina v. The Trustees of the River Lea*, xxx. 363.

30. It is as competent to vestry men *de facto* to join in making a rate for the relief of the poor as vestry men *de jure*. *Scadding v. Lorant*, v. 16.

31. On an appeal against a rate under the Sanitary Act of Liverpool, the poor rate of the preceding year was held to be conclusive as to the value of the property assessed. *Regina v. The Recorder of Liverpool*, i. 291.

II. Borough and Church Rates.

1. *Borough rates.* An estimate for a borough rate included an item as to which there was an undecided appeal, and a sum in respect of unascertained law costs. The borough rate was ordered at a meeting that was not public. The mayor ordered the treasurer to demand the rate within 100 days, from the overseers of parishes, and on the same day the treasurer issued his precept to them, to pay within one hundred days from the receipt thereof. This was not served on them for ten days. The plaintiff, one of the overseers, went out of office, and his goods were afterwards taken on a distress for the rate, the distress being signed by both defendants, as justices, and by one as mayor. He brought replevin. *Held*, that a borough rate need not be made in public. *Jones v. Johnson*, x. 532.

2. *Held*, also, that the items could not be considered as bygone expenses so as to make the rate retrospective in respect of them, as the question relating to the first sum was still under appeal; and with regard to the second, that the council were justified in treating the costs of litigation as expenses not actually incurred before the delivery of the attorney's bill; and that at all events as the plaintiff had not appealed against the rate, it must be taken as good as regards the defendants. *Ib.*

3. *Quere*, whether a borough rate, made for the payment of expenses already incurred under the stat. 5 & 6 Will. IV. c. 76, would be bad though retrospective, and whether *Woods v. Reed*, 2 Mee. & W. 777, s. c. 6 Law J. Rep. (N. S.) M. C. 105, can be supported. *Ib.*

4. *Held*, next, that the variance between the times for payment was immaterial, and that the plaintiff could not complain of it, as the precept gave him a longer time for payment than the mayor's warrant directed. *Ib.*

5. *Held*, further, that the plaintiff was liable to the distress, although he had gone out of office before the distress warrant was executed, as he was an offender under the

act, which provides that the goods of the offender should be seized, and the existing overseers had power to make a rate to reimburse him. *Ib.*

6. *Held*, lastly, that the signature by J., as justice, to the distress warrant, did not prevent the warrant from being his warrant as mayor also. *Ib.*

7. A borough rate need not be made in public. If the rate is valid upon the face of it, although it may be retrospective in fact, no advantage can be taken of that circumstance as against the defendants, (the magistrates enforcing the rate by distress;) and the warrant is not bad by reason of a certain variance in the treasurer's precept; nor from its not fixing the time at which the sale of the plaintiff's goods was to terminate. An action of replevin may be maintained against magistrates alone who issue a warrant of distress against the goods of a party. *Jones v. Johnson*, i. 418.

8. *Church rates.* Where the churchwardens of a parish made a single rate for providing necessary additional burial-ground for the parish, which could only be done (if at all) under the powers given by the Church Building Acts, and also for draining and spouting a chapel in the parish, as at common law, it was *held*, that the rate could not be enforced. *Regina v. Abney*, xxvi. 160.

9. *Quære*, whether there is any power to make a rate for enlarging or for purchasing a burial-ground. *Ib.*

10. Where the majority refuse to make a rate for the necessary repairs of a church, the minority, in vestry, may make that rate, and the items, if objected to at all, must be objected to in vestry. *Cordy v. Bentley*, v. 590.

III. Highway and other Rates; Land Tax; Miscellaneous Cases.

1. *Validity of rate.* A majority of the rate payers of the parish of S. M., at a meeting held for that purpose, had resolved to adopt the provisions of the 3 & 4 Will. IV. c. 90, and at a subsequent meeting a rate was made for the purposes of the act, both these meetings being presided over by a chairman who was not a rate payer of the parish. *Held*, that although, by the 5th and 6th sections of the act, only rate payers had a right to be present at the meetings, and consequently, that the chairman should, in strictness, have been a rate payer, yet that the resolutions of the requisite majority of the rate payers were not rendered inoperative by reason of the chairman of the meeting not being a rate payer. *Held*, also, that persons who had not paid the rate of the previous year were properly excluded from voting at the subsequent meeting. *Regina v. The Justices of Middlesex*, xvi. 118.

2. *Highway rates—Urban streets and rural ways.* By the Ashton-under-Lyne Improvement Act, 12 & 13 Vict. c. 35, s. 25, power is given to the mayor, aldermen, and burgesses to make and levy a highway rate upon the occupiers of all messuages, houses, &c., within the borough, for maintaining and repairing "the present highways, within the borough, when completed to the satisfaction of the mayor, &c., and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewers under the same." The borough of Ashton-under-Lyne consists of a part of one of the four divisions of the parish of Ashton-under-Lyne, and the whole of another of such divisions, the latter being subdivided into two districts; and before the passing of the above act each of such districts separately maintained its own highways, and had its own surveyor. The greater part of one district was a country district. After the passing of the said act, the mayor, &c., acting as surveyors, laid a rate on the ratable property within each of the said districts, exclusively for the repair of such highways within them as had not been completed to the satisfaction of the mayor, &c. *Held*, that under the above section of the special act, taken in connection with sects. 48 and 49 of the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, the mayor, aldermen, and burgesses of the borough were empowered to make two general rates within the borough, one for the repair of the urban streets within the 25th section of the special act, and the other for the repair of the rural ways not

within that section, and, therefore, that the rate in question was bad. *Regina v. Slater*, xiv. 104.

3. *Allowance of rate.* The signature of the surveyor, and allowance by justices, was by inadvertence inserted in the middle of a highway rate, instead of at the end. *Held*, that this was no allowance of the rate in respect of matters which followed such signature and allowance, and therefore that the justices had no jurisdiction to enforce the rate by issuing a distress warrant for the amount of an assessment which appeared in a part of the rate, subsequent to the signature and allowance. *Ex parte The Surveyor of Shelton*, xxii. 259.

4. *Public health act—Local acts.* By a local act commissioners were empowered to pave, light, &c., the streets in the parishes within the city of N., and they had a general power to rate and assess the several landlords and occupiers of houses, &c. Until the passing of the Municipal Act the parish of M. was not within the corporate jurisdiction of N., but was situate within the county of the said city. By a subsequent local act so much only of the first act as regulated the assessment was repealed, all the powers of the said first act being by the first section extended to the second act, and the commissioners were empowered to raise a rate to a certain limited amount. By an order of the general board of health, confirmed by act of parliament, the Public Health Act, 1848, was applied to the city of N. and the county of the said city; and all the powers of rating and borrowing money at interest, conferred by the first local act, were repealed. Amongst the clauses of the same act left unrepealed by the said order were those vesting the pavements in the commissioners, and empowering them to new pave, purchase lands, &c. The said order also left unrepealed the first section of the second local act, and the section which gave the commissioners power to raise only a limited amount of rate. The local board of health was by the said order declared to be the commissioners for executing such of the powers of the local acts as were not repealed, and by it, also, all the property and estate of the said commissioners and all their liabilities were transferred to the said local board, it being provided that such liabilities should be paid out of such of the transferred property as would have been chargeable, and that, if such property were not sufficient, then out of the general district rates levied under the Public Health Act in the places which would have been chargeable, or out of any funds available for that purpose under any local act not repealed. The local board of health made a rate for the payment of interest upon money borrowed by the late paving commissioners; for the purchase-money of ground bought by the said commissioners or the said local board under the unrepealed clauses of the local acts; and for paving, repairing, &c., the streets, &c., within the said city, and the streets and roads in the hamlets outside the city. *Held*, first, that the order of the general board of health had the effect of repealing all the rating powers of both the local acts, and that, therefore, the money for the repairs of the streets within the city parishes was to be raised under the Public Health Act, and not under the said local acts by a rate on those parishes separate from the said parish of M. Secondly, that the unrepealed clauses of the second local act were not extended to any other parishes than those to which the act originally applied. Thirdly, that the money for the repairs of the highways in the district was to be raised under the powers given by the Public Health Act, and not by a rate made under the Highway Act. Fourthly, that the expense of widening the streets in the city parishes was to be defrayed by a general district rate, subject to the power of making a special district rate conferred by the 86th section of the Public Health Act. *Elmer v. The Norwich Local Board of Health*, and *Read v. The Same*, xxv. 58, 66.

5. *District church to be rated.* A church duly made a district church of St. Luke's parish, Middlesex, under the 6 & 7 Vict. c. 37, is liable to be rated in a paving rate made according to the 57 Geo. III. c. 29, by the trustees of the parish under a local act, (57 Geo. III. c. 149,) and the churchwardens are bound to pay it. *Mills v. Rydon*, xxvi. 517.

6. *London Library*. The "London Library" is a society for the purposes of literature, supported by voluntary contributions, and consequently exempt from local rates; but when it underlets a portion of its premises to scientific societies, it must pay the rates for the whole premises. *Clarendon v. The Rector, &c. of St. James's, Westminster*, v. 393.

7. *Local act for lighting hamlet—"Tenements and hereditaments."* A local act for lighting a hamlet, enacted, that rates should be laid upon all persons who should inhabit, use, occupy, or be in possession of, or enjoy any messuages, tenements, houses, warehouses, or other buildings, tenements, or hereditaments, situate or being in such of the streets, &c., or other public passages and places within the hamlet as should, from time to time, be lighted by virtue of the act. *Held*, that the general words, "tenements and hereditaments," included only things *ejusdem generis* with those before mentioned, and which were capable of being inhabited and benefited by the act; and that a water company was not ratable in respect of its pipes laid in the ground under the streets of the hamlet. *Regina v. The East London Waterworks Co.* ix. 271.

8. *Steamboat company—Floating pier*. Under a local act enabling trustees to lay rates upon persons holding any tenements, &c., in the district, a steamboat company were rated in respect of their floating pier, consisting of barges, chained to anchors, and connected to the shore by bridges leading to the ground floor of a building thereon. The ground floor, as well as the said pier and landing-places, were in the exclusive occupation of the steamboat company. *Held*, that the rate was laid not on the barges, &c., but upon the landing-place and premises, together with the floating barges, &c., by which the occupation of the land was rendered more profitable, and the rate was therefore valid. *Regina v. Leith*, x. 870.

9. The ground floor of the building was rented of one J. S. by the company, and the residue was occupied by J. S. In the rate in question, J. S. was assessed for "the premises, exclusive of the steamboat pier." *Held*, that this meant not to exclude the floating barges, &c., but the ground floor and landing-place occupied by the company, and therefore the latter were not twice rated. *Id.*

10. *Local Paving Act—Railway company's bridge and side walls*. By the Local Paving Act, 41 Geo. III. c. 131, s. 37, and by the 26th section of the 43 Geo. III. c. 139, and also by the 30th section of the General Metropolitan Paving Act, 57 Geo. III. c. 29, the commissioners are to assess certain buildings, walls, and void spaces of ground as in said acts more fully described, for the paving of the streets on which they abut. The London and Birmingham Railway Company, by one of their acts, (5 & 6 Will. IV. c. 56, s. 55,) were required to build, and keep in repair, a bridge over their railway, with a brick wall at each side, at a spot where their railway intersected a public street or road which was paved and repaired under the local acts. The land upon which that part of the railway was constructed, and the bridge erected, was conveyed to the company in fee by the former owner, with a reservation of "the use and enjoyment of the bridge." The surface of the bridge was paved by the local commissioners. It was *held*, that the company were liable to be assessed under the above acts; for that, although the bridge was not a "public building," within the meaning of the 57 Geo. III. c. 29, s. 30, the company were ratable in respect of the side walls, under the description of "dead walls," or, per Jervis, C. J., as the owners and occupiers of "void spaces of ground," abutting on the road. And by Maule, J., and Talfourd, J., that the fence walls came within the description of "public buildings," in the 57 Geo. III. c. 29, s. 30, being erected under the provisions of an act of parliament, and for the benefit of the public. *Arnell v. The London and Northwestern Railway Co.* xxii. 421.

11. *Public Health Act—Land used as railway*. By the 88th section of the Public Health Act, 1848, (11 & 12 Vict. c. 63,) rates are to be levied on all property assessable thereto, upon their full net annual value; provided that the occupier of land "used only as a railway" is to be assessed at one fourth only of such net annual value.

Held, that this partial exemption extends to the line of railway, and so much of any platform, &c., as constitutes the side of the railway, and to land used as sidings, turntables, &c.; but that stations, offices, and warehouses which are ancillary to the railway, ought to be assessed at their full net annual value. *The South Wales Railway Co. v. The Local Board of Health of Swansea*, xxix. 125.

12. A rent, or sum in nature of a rent, paid for the occupation of a railway, is not necessarily a criterion of its ratable value. The profits and advantages derived on a main line by the occupation of a branch may be taken into account in estimating the ratable value of the branch, and not the local profits only. *Dissentiente Erle, J. Regina v. The Southeastern Railway Co.* xxv. 176.

13. By an act for lighting a town with gas, rates were imposed on all buildings, works, &c.; but land was specially exempted. *Held*, that a line of railway within the limits of the act was liable to be rated as a work, although such a work was not contemplated at the passing of the act. *Regina v. The Midland Railway Co.* xxx. 399.

14. *Jails.* The 43 Geo. III. c. 128, enacts, that 1s. shall be assessed upon all jails, chapels, and other public buildings within the town, for every yard, running measure, of the length in front of such halls, jails, &c. The Jail Act, 4 Geo. IV. c. 64, s. 48, enacts that every jail for any county or town, &c., which shall be situate within the limits of any other county or town, shall be taken to be part of the county or town for which it shall be used as a jail, so long as it shall be so used. The county jail of Bedfordshire is situate within the town of Bedford, and the front and part of the sides and the back part, the latter consisting of a boundary wall, abut upon public roads of the town. The commissioners under the local act assessed the county justices for the frontage of the fore part, of the back part, and of the sides of the jail measured in running yards. *Held*, that the jail was not exempt from rating, under 4 Geo. IV. c. 64, s. 48, as that section relates merely to jurisdiction. *The Justices of Bedfordshire v. The Bedford Improvement Commissioners*, xiv. 424.

15. *Houses of governor of jail.* The houses of the governor and warders of a county jail were built outside a wall inclosing an area, within which the gaol stood. The front door of the governor's house opened into the public street. There was an outlet through the back wall of the house to the area. The houses of the warders were similarly situated, but did not communicate by the back wall with the area. The governor and warders had the occupation of three houses only in respect of their being such officers, and the accommodation of their houses was not more than was proper and convenient for persons having their duties to perform; and their constant residence in their houses was an important part of their duties. *Held*, that they were not liable to be rated. *The Justices of Bedfordshire v. The Overseers of St. Paul*, xiv. 424.

16. *Union workhouse.* A union workhouse was erected by an incorporation of guardians, under the 34 Geo. III. c. 98, the 19th section of which enacts "that all buildings to be erected by virtue of that act shall be free from all parliamentary and parochial taxes, except such and to such amount as they were assessed to, at the time they were first taken and applied." It was afterwards rented by the guardians of a poor-law union, formed under the 4 & 5 Will. IV. c. 76. *Held*, that the workhouse was a "public building" within the meaning of the above local act, and that it was liable to be rated under that act, the rate in question not being "a parliamentary or parochial tax," within the meaning of the 34 Geo. III. c. 98. *The Guardians of Bedford Union v. The Bedford Improvement Commissioners*, xiv. 424.

17. *Infirmary.* An infirmary is a "public building," within the meaning of the local act. *Ib.*

18. To render property locally situated within a parish exempt from rates, it must be shown to be exclusively applicable to public purposes. *Regina v. The Mayor, &c. of Manchester*, xi. 367.

19. *Assessments on land under local act—Distress.* A local act authorized assessments

on certain lands and their occupants. Interest was to be paid from twenty-eight days after any assessment. The rate was to be paid by the tenants and allowed them by the landlords, "provided that no occupier should be compelled to pay more than the rent which should from time to time become due from him to his landlord." On refusal to pay, a remedy was given by distress, after thirty days. In case any of the lands were unoccupied, then "all goods and chattels that should at any time thereafter be found thereon" might be distrained and sold until all the arrears were fully paid. *Held*, first, that distress might be made, though the tenant owed no rent, if the amount of the rate was covered by the rent due at the next pay day. Second, that a tenant who came in after the expiration of the twenty-eight days, was liable for interest only from the date of his holding. Third, that such tenant was liable to be distrained on for rent not paid by his predecessor. *Mattison v. Hart*, xxv. 363.

20. A rate may be made, under the provisions of the 58 Geo. III. c. 45, ss. 59, 60, for the purpose of paying the money borrowed in the manner provided by that act, at a meeting of which the notice required by the 25th section of the 59 Geo. III. c. 134, has not been given, the latter statute not repealing the former, but merely providing a further mode of raising the necessary funds. *Farnell v. Smith*, xxix. 359.

21. *Mines*. Where a rate was declared by statute to extend to "such mines, &c., as have heretofore been usually rated," it was *held*, that the proviso was not limited to the particular mines before rated, but extended to mines of the same class and description as those usually rated in the parish at the date of the act, though they did not then exist. *Regina v. Saunders*, xxx. 109.

22. *Ship-yard—Floating dock*. The occupier of a ship-building yard, on the shore of a tidal and navigable river, constructed a floating dock in the river opposite the yard, which was used in the following manner. When a vessel required repair, the dock was hauled into deep water, where, by taking out plugs, it was made to sink and ground; the gates were then opened and the vessel hauled into the dock, and allowed to settle down in it as the tide fell. At low tide, the dock gates were again closed and the plugs replaced, and any water that remained was pumped out. With the next tide, the dock, with the vessel in it, floated, and was hauled towards the shore, and moored by chains about thirteen feet from the building yard. To enable the workmen to get to their work, a plank was laid from the building yard to the floating dock. Two of the mooring chains were attached to anchors in the bed of the river, and two others were fastened to posts standing in the building yard. When the repairs were finished, the dock was again sunk in deep water, and the gates being then opened, the vessel was hauled out. *Held*, that as the floating dock had no necessary connection with the ship-building yard, it could not enhance its ratable value. *Regina v. Morrison*, xvi. 351.

23. *Bridge company—Tolls from passengers*. A bridge company, under their act of incorporation, constructed a bridge and its approaches, and received tolls from passengers thereon. A market company, under the same act, had by deed granted to the bridge company license to erect necessary fixtures, toll-houses, &c., on their premises, and had redeemed the land tax chargeable on said premises. There was another toll-house on a pier in the bed of the river, built to support the bridge. *Held*, that the tolls derived from passengers were to be considered a separate and distinct tenement, chargeable to the land tax, within the meaning of the 38 Geo. III. c. 5, s. 4, and, therefore, that the bridge company had been properly assessed, notwithstanding the redemption of the land tax by the market company. *The Charing Cross Bridge Co. v. Mitchell*, xxix. 73; xxx. 353.

24. The Vauxhall Bridge Company is liable, under the 38 Geo. III. c. 60, to be rated to the land tax in respect of their tolls. *The Vauxhall Bridge Co. v. Sawyer*, v. 521.

25. Though the assessments of the land tax upon counties are perpetual, the commissioners ought to assess the amount charged upon each ~~land~~ tax division by an

equal pound rate, according to the fluctuations in the value of property within the division. *Pym, ex parte*, ii. 278.

26. *Water company's pipes.* A water company which has laid pipes in a land tax division under a statutory power in that behalf, but which is the owner of no land within the division, is not assessable there to the land tax; the right in question being in the nature of an easement, and not "land" or "hereditament." *The Chelsea Waterworks v. Bowley*, vii. 376.

27. The mains, pipes, and other apparatus of a waterworks company are taxable as real estate, under a statute making the holder, occupier, &c., of "any land, house, shop, warehouse, cellar, vault, or other tenement, or hereditament," taxable therefor. *Regina v. The East London Waterworks Co.* xiv. 94.

28. *Land tax, how to be assessed.* Commissioners of land tax, acting under stat. 38 Geo. III. c. 5, are bound to assess the amount chargeable on the division for which they act, according to the real value of the assessable property for the year; and they are not justified in retaining an assessment which has been in use many years, and after changes in the value of property, merely because the making of a new estimate would be difficult, and require expenses for which they do not possess funds. But the court would not grant a *mandamus*, calling on the commissioners to meet and make an equal assessment for the year, according to the best of their judgment and discretion, on a suggestion that they had made their assessment on an old and disproportioned estimate, though requested by an inhabitant of the division, paying land tax, to reduce the assessment on his district to an equal pound rate; the commissioners deposing in answer to the rule *nisi* for a *mandamus*, that they had made the assessment for the year, and made it according to the best of their judgment and discretion. *Regina v. The Commissioners of Land Tax*, xii. 391.

29. The duty of the land tax commissioners in causing the several districts within their respective divisions to be assessed to the land tax, is regulated, not by the 38 Geo. III. c. 5, but by the 38 Geo. III. c. 60, reenacted by the 42 Geo. III. c. 116. These latter statutes create a fixed quota to be raised from the land in each district (parish or place) within the division, subject to redemption, such fixed quota being that which was laid upon the land in the district in the assessment for 1798, under the 38 Geo. III. c. 5. *Regina v. The Commissioners of Land Tax*, xxii. 120.

30. The representatives of a deceased incumbent of a rectory who has, out of his own estate, redeemed the land tax prior to 1799, are entitled to recover, from the succeeding incumbent, the interest of the purchase-money, at the rate of 3l. per cent. on such purchase-money. *Semble*, that the court of chancery would not interfere to enforce the charge on the benefice as to the principal stock. *Kilderbee v. Ambrose*, xxviii. 500.

31. A prebendary may sell, with due form, prebendal property for the redemption of the land tax, and he may purchase the property for himself, if there is no fraud. *Beadon v. King*, xv. 388.

32. *Validity of sewers rates.* A presentment was duly made that a drain was ruinous. The presentment was not appealed against, and a special law of sewers was made containing the said presentment, and rates were made from time to time up to 1837. In that year, a new commission of sewers was issued, and at the first court under it, it was ordered, that all laws and orders of sewers heretofore made should be confirmed and stand in full force. Rates were made by the dike-reeve, under the authority of the commissioners, in the years 1846, 1847, and 1848, without any new presentment. *Held*, that such rates were valid, the effect of the order under the new commission being to make the presentment of 1819 a continuing and valid presentment. *Taylor v. Loft*, xviii. 567.

33. *Sergeant's inn—Sewers and consolidated rates.* Sergeant's inn is an extra parochial place within the city of London, and adjoining one of its wards, but not within that or any other ward. *Held*, upon construction of 11 & 12 Vict. c. 163, that

the occupiers of houses in Sergeant's inn were liable to be rated to the sewers rates and consolidated rates under that act; and that for that purpose the commissioners should, by their warrant or precept, direct the ward officers to rate not only the occupiers of property within the ward, but also the occupiers of property in any place or precinct adjoining thereto. *Seem*, that unless so directed by the precept of the commissioners, the ward officers would have no jurisdiction to assess any property not within the ward. *Regina v. Moss*, xxx. 235.

REAL ESTATE.

When to be deemed money and e converso, see EQUITABLE CONVERSION OF PROPERTY.

RECEIPT.

A receipt signed by several persons, one of whom has authority to sign such receipts, is a valid receipt by that one. *Miller v. Priddon*, xi. 74.

RECEIVER.

1. *Railway mortgage—Appointment of receiver at option of borrower.* Money was borrowed by the Eastern Union Railway Company under the powers conferred by a local act, (7 & 8 Vict. c. 85,) whereby it was provided, that if the principal and interest were not paid within six months after they had become payable, and after demand thereof in writing, the mortgagee or bond creditor might sue for the same, or if his debt amounted to 5,000*l.*, he might require the appointment of a receiver, (sect. 52.) *Held*, that such section only recognized a preëxisting right of action, and added thereto another specific remedy, namely, the appointment of a receiver at the option of the borrower, after the expiration of the above period. *The Eastern Union Railway Co. v. Hart*, xiv. 535.

2. *Appointment of receiver—Suit defectively framed.* Where a case is made out on the merits for the appointment of a receiver, the court will not refuse to appoint one on the ground of formal defects in the constitution of the suit, which can be cured by amendment. *Evans v. Coventry*, xxxi. 436.

3. In a case, therefore, where the secretary of a society had absconded with a large part of the funds, and persons claiming a lien on those funds filed a bill against the trustees to have the remaining funds secured by the court, and the loss made good by the trustees, and made out against the trustees a *prima facie* case of gross negligence as to the custody of the funds, a receiver was appointed, though the bill was open to objection for misjoinder of plaintiffs, multifariousness, and want of parties, and there was no allegation of insolvency or of an intention to misapply the remaining funds. *Ib.*

4. A receiver of the rents of real estates descended on an infant appointed on petition, without suit. *Leeming, in re; Gascoyne, in re*, vii. 53.

5. *Of property of parliamentary corporation.* A receiver and manager may be appointed of the property of a parliamentary corporation, although by the act a committee was constituted, to whom all the powers of management were referred. *Fripp v. The Chard Railway Co. Same v. The Bridgewater and Taunton Canal and Railway Co.* xxi. 53.

6. A provision in the act, that any mortgagee whose interest was in arrear for twenty-one days, might have a receiver appointed on application to two justices, does not oust the jurisdiction of this court to appoint a receiver with the usual powers. *Ib.*

7. A corporation, put out of possession by a receiver under an order of this court, will be protected by the court against the consequences of such loss of possession, under the liberty to apply. *Ib.*

8. A receiver may be appointed, although the person applying has the legal estate, as against the person whose possession he seeks to oust, where the property is in the nature of a trade. *Ib.*

9. Although there may be nothing against the character or ability of a person, yet if he have a private interest in conflict with the management, he will not only not be selected to receive and manage, but will be removed from a situation which he already lawfully occupies. *Ib.*

10. The court will interfere on an interlocutory application to appoint a receiver, notwithstanding grave doubts as to the propriety of the frame of the suit, and the necessity of making additional parties. *Ib.*

11. *Against a party in possession.* After a verdict upon an issue *devisavit vel non*, the court appointed a receiver against the party to whom possession of estates had been given by the trustees of the legal estate under an order of this court, though an order *nisi* had been obtained for a new trial. *Bainbrigge v. Bainbrigge*, iii. 86.

12. *Against mortgagee in possession.* Receiver against a mortgagee in possession granted after decree, on the application of another mortgagee, a co-defendant. *Hiles v. Moore*, xv. 130.

13. A B, the third mortgagee, took possession, and then bought up the first mortgage. Having retained possession many years and received a considerable sum, a receiver was appointed against him, on the application of the second mortgagee, the affidavit of A B not satisfactorily showing that any thing remained due on the first mortgage. *Ib.*

14. As to the appointment of a receiver in cases of partnership, see *Blakeney v. Dufaur*, xv. 76; *Hall v. Hall*, iii. 191; *Freeland v. Stansfield*, xiii. 336; *Hoffman v. Duncan*, xxiii. 99; *Collins v. Young*, xxviii. 14; *Roberts v. Eberhardt*, xxiii. 245.

15. *lien of consignee and receiver.* A and B, successively consignees and receivers of some West India estates, large balances being due them for disbursements made, with the sanction of the court in managing the estates, were held entitled to be repaid out of money paid into court as compensation for slaves attached to the estate, even before the costs of the suit had been paid; and the fact that B became consignee after the money was paid into court made no difference. *Morison v. Morison*, xxxi. 440.

16. *Suits for receiver pendente lite.* Suits for a receiver *pendente lite* are never brought to a hearing; therefore a motion to dismiss for want of prosecution was refused, with costs. *Edwards v. Edwards*, xxi. 114. See also *Anderson v. Guichard*, xii. 210.

17. *Judgment creditors—Prior mortgagees.* Where judgment creditors had duly taken out writs of *elegit*, but possession could not be given by the sheriff because of prior outstanding mortgages, the mortgagees being alleged not to be in possession, and to refuse to take possession, the court appointed a receiver of the mortgaged premises, without prejudice to the rights of the mortgagees. *Rhodes v. Lord Mostyn*, xxi. 198.

18. *Receiver's accounts.* Where the expenses of passing a receiver's accounts are large, the court will direct the accounts to be passed once a year only. *Day v. Croft*, vi. 62.

19. *Putting recognizance in suit.* Where in the lifetime of a receiver an unascertained balance was found by the Master's report to be due from him, and he died without payment of such balance, the court ordered, upon petition, that his recognizance should be put in suit against his sureties. *Ludgater v. Channell*, vii. 1.

20. Where a creditor has obtained a judgment against an incumbent, the court can, on a case for a receiver being made, appoint a receiver of the profits of the living under the Imprisonment for Debt Act. *Hawkins v. Gathercole*, i. 135.

21. Upon a claim in the common form by a residuary legatee against the executors for an account, a receiver was ordered, upon application made at the hearing. *Bickford v. Chalker*, i. 113.

22. A defendant, who is the owner and occupier of an estate subject to a charge which is sought to be enforced, will be compelled to attorn to a receiver. *Everett v. Belding*, xv. 354.

23. A receiver ought not to present a petition to be discharged, to come on with the cause on further directions, as the court would make the order on further directions without any such petition. *Stilwell v. Mellersh*, v. 185.

RECEIVING STOLEN GOODS.

See LARCENY.

RECOGNIZANCE.

1. *Form of.* Upon removal of an indictment by *certiorari* from the sessions to the queen's bench, the sureties in the recognizance become bound as sureties for the payment of the costs in the event of a verdict being found for the crown, although there are no words to that effect in the conditions to the recognizance; the 3d section of the 5 & 6 Will. & M. c. 11, being, in effect, incorporated with the recognizance. The recognizance was stated to have been entered into before "J. T., Esq., one of the justices for the county of," &c. *Held*, good. *Regina v. Hodgson*, xiv. 456.

2. *Estreating.* The defendant removed an indictment by *certiorari*, and entered into the usual recognizances, with two sureties. He was convicted, and the judgment was respited upon his paying the costs. The defendant having become bankrupt, the prosecutor proved for costs under the bankruptcy. Judgment was afterwards signed against the defendant, and the ordinary side-bar rule issued, under which the costs of the prosecutor were taxed at 243l.; a demand of the costs having been made, and payment refused by the defendant and his bail, a rule *nisi* for an attachment against the defendant, and for estreating the recognizances against the defendant and his bail was obtained. The court discharged that part which was for an attachment, but estreated the recognizances. *Regina v. Hills*, xx. 100.

3. *Enlargement of—Shorthand writer.* A judge of the court of exchequer, sitting at *nisi prius*, acting under the provisions of the 14 & 15 Vict. c. 100, s. 19, compelled the defendant in a cause to enter into recognizances to appear and take his trial for perjury at the next session of the central criminal court, and bound the plaintiff in recognizances to prosecute. *Held*, that the court of exchequer had no power either to enlarge those recognizances to a subsequent session of the central criminal court, or to compel a shorthand writer, who was neither an officer nor attorney of the court, to furnish the plaintiff with a copy of his notes of the evidence given by the defendant. *Horridge v. Hawkins*, vii. 582.

REGISTRATION.

1. *Irish Registration Act—Equity in a grant.* Under the Irish Registration Act, (6 Anne, c. 2,) an equity in a grant which is registered, will prevail against the right even of a *bonâ fide* purchaser to whom the original grantor has subsequently sold part of the property comprised in the registered deed, and also as an equity against any subsequent grant by the same party inconsistent with it. *Mill v. Hill*, xxii. 20.

2. *Registration of judgment.* If a judgment be not re-registered within five years after its first registration, as against a purchaser with notice of re-registration made a little more than five years after the original registration, but less than five years before the execution of the conveyance to him, it is void under the provisions of the statute 2 & 3 Vict. c. 11, s. 4. *Freer v. Hesse*, xvii. 154.

3. A satisfied term, assigned in trust for a purchaser for value, without notice of a judgment before the 31st December, 1845, although extinguished on that day by the 8 & 9 Vict. c. 112, is, by the first section of that act, a protection to a subsequent pur-

chaser from him, without any fresh declaration of trust or assignment in favor of such subsequent purchaser. *Ib.*

RELEASE.

1. A creditor's deed, allowing the debtor to reside in England, without suit or molestation, does not operate as a release of the debt. *O'Brien v. Osborn*, xiii. 420.

2. As to a release by a composition deed, see *Squire v. Ford*, v. 32.

3. See *The Mayor, &c. of Berwick-upon-Tweed v. Oswald*, xvi. 236, and *Salmon v. Webb*, xvi. 37.

REPLEVIN.

1. *When it lies.* Replevin lies when goods have been unlawfully taken, though not as a distress. *Mellor v. Leather*, xviii. 230.

2. *Avowry—Distress for poor rate.* In replevin, the defendant avowed specially under a distress for poor rate assessed on the plaintiff in respect of his dwelling-house, and as a collector of such rate. *Held*, that the facts found as to the making the above rate sustained the avowry. *Scadding v. Lorant*, v. 16.

3. *Distress for rent.* Replevin. Avowry "that the plaintiff, for all the time during which the rent distrained for was accruing due, and from thence until and at the said time when, &c., held and enjoyed the said close in which, &c., as tenant thereof to the defendant, at the yearly rent of 80*l.*, and because the sum of 80*l.*, of the rent aforesaid, for one year, ending on the 29th of September, A. D. 1851, on the day and year last aforesaid, and from thence until and at the said time when, &c., was due and in arrear," the distress was taken. Plea in bar, *riens in arriere*. At the trial, it was proved that there was no rent due for the year ending the 29th of September, 1851, but that a portion of the previous year's rent was due. *Held*, that the plaintiff was entitled to the verdict. *Roskrige v. Caddy*, xiv. 452.

4. See also *Stansfeld v. Hellawell*, xi. 559, and *Meggison v. Bowes*, xiv. 364.

RIPARIAN PROPRIETORS.

See EASEMENT.

ROBBERY.

The prisoners were indicted for robbery, and, at the time of the robbery, beating the prosecutor. The jury found as their verdict, that the prisoners were guilty of assaulting the prosecutor with intent to rob him. *Held*, that the finding did not warrant a conviction for the felony of assaulting with intent to rob, as the indictment for robbery with violence did not include a charge of the minor felony of assaulting with intent to rob, although the word "rob" was used in the indictment. *Regina v. Reid*, i. 595.

SALE.

I. WHAT IS A SALE.

II. DELIVERY.

III. WARRANTY; SALE BY SAMPLE.

IV. CONSTRUCTION OF PARTICULAR CONTRACTS, &C.

V. STOPPAGE IN TRANSITU.

VI. MISCELLANEOUS CASES.

I. *What is a Sale.*

1. A. being indebted to the defendant in 48*l.* 13*s.*, the following document was drawn up and delivered to the plaintiff: "To A. I request you will supply B. (the plain-

tiff) with such parcels of cement as he shall require, to the value of 48l. 13s., and charge the same to the account standing with you to my credit (signed by defendant.)" "To Mr. B. (the plaintiff.) On the consideration above named we agree to supply to your order, when you shall require it, cement at 1s. per bushel, to the amount of 48l. 13s. (Signed) A." *Held*, that this was in effect a sale. *Chatfield v. Cox*, xi. 401.

2. *Fraud of first vendee—Subsequent sale to innocent vendee.* A sale of goods effected by the fraud of the buyer is not an absolutely void transaction, but the seller may elect to treat it as a contract. If he does not treat the sale as void before the buyer has resold the goods to an innocent vendee, the property will pass to that vendee. *White v. Garden*, v. 379.

3. *Payment of part of purchase-money.* Condition that money was to be paid for a ship on or before a certain day when a bill of sale was to be made. A part of the purchase-money was paid and possession taken, but with no bill of sale. *Held*, sale not completed. *Hughes v. Morris*, xv. 175.

4. *Sale of cargo of corn supposed to exist, but which had been sold.* A contract stated the sale of a cargo of corn on board — of fair quality when shipped, at — a quarter free on board, including freight and insurance, payment, &c., upon handing shipping documents. Prior to the date of the contract, the ship had put into a foreign port in distress; and the cargo was so much damaged that the master was forced to sell it. None of the parties knew of these facts. *Held*, that the contract was a contract for the sale of a cargo supposed to exist and to be capable of transfer at the time of the purchase, and that as the corn had been sold and delivered to others by the captain, before the contract was made, it consequently could not be enforced. *Hastie v. Couturier*, xx. 533.

5. On a contract for building a ship, it is a question of intention to be inferred from the circumstances whether the property passes before the completion of the ship or not. *Read v. Fairbanks*, xxiv. 220.

6. *Goods supplied on "sale or return."* When goods are supplied on "sale or return," the purchaser has an option to return them within a reasonable time. Unless he does so, it is a sale, and the price may be recovered in an action for goods sold and delivered. *Moss v. Sweet*, iii. 311.

II. Delivery.

1. *Delivery order—Usage.* Under a contract to sell and deliver goods in a warehouse in Liverpool, the giving a delivery order of "about" the quantity is a sufficient delivery, evidence of a known usage of warehouse-keepers not accepting delivery orders in any other form being admissible. *Moore v. Campbell*, xxvi. 522.

2. *Pretended sale—Possession gotten for ulterior purposes.* Where there is a pretended sale of goods between two persons, but a secret understanding between them that what appears on the instrument is not to operate as a sale, and the pretended vendee afterwards gets possession of the goods for another purpose, that is not a delivery in pursuance of the contract, and the property does not pass. *Lott v. Booth*, xxii. 438.

3. *Request for delivery.* To a declaration for non-delivery of iron sold by the defendant to the plaintiff, and agreed to be delivered to the plaintiff at his works as required, and to be paid for in bills at four months, the defendant pleaded that the plaintiff did not, within a reasonable time after the making of the contract, request the defendant to deliver the iron. *Held*, that the plea was no answer to the action. *Jones v. Gibbons*, xx. 559.

III. Warranty; Sale by Sample.

1. *Express warranty—Sale of copyright.* Defendant wrote to plaintiff: "You formerly made me an offer of 50*l.* for the exclusive right of publishing for ten years, Captain M.'s work, 'Monsieur Violet,' which offer I accepted. I possess but few of the copyrights of the earlier portions of Captain M.'s works. I will let you know in a few days those of the works that belong to me, that I feel disposed to offer to you. In the mean time, I shall be glad to know if you received my last letter, accepting your offer for 'Monsieur Violet,' and if not, whether you still hold the same proposal." The 50*l.* was afterwards paid, for which the defendant gave a receipt to the plaintiff, expressed to be "for permission to publish Captain M.'s work, 'Monsieur Violet,' so long as the copyright may endure, that right to be exclusively his own for ten years." *Held*, that this amounted to an express warranty by the defendant, that he had the title to the copyright in question. *Simms v. Marryatt*, vii. 330.

2. *Representation not connected with sale.* T. sent his horse to be sold by auction, and seeing H., an acquaintance, examining the horse the day before the sale, said to him in good faith: "You have nothing to look for, I assure you; he is sound in every respect." H. thereupon stopped his examination, and the next day bought the horse, which was put up at auction without warranty. *Held*, that T.'s representation not being made in the course of, or with reference to the sale, was not a warranty. *Hopkins v. Tanqueray*, xxvi. 254.

3. *Sale by auction. Quære*, whether a sale by auction without warranty is valid where the owner of the property sold has previously given a private warranty to one who buys or bids for the property. *Ib.*

4. *Breach of warranty—Action for, by whom maintainable.* A tradesman who sells an article which he, at the time, believes to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a third person, not a party to the contract of sale, in consequence of such unsoundness. *Longmeid v. Holliday*, vi. 562.

5. A declaration in case by a husband and wife alleged that the defendant, the maker and seller of a specified kind of lamps, sold to the husband one of these lamps, to be used by himself and his wife in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that in consequence of the insufficient materials with which it was constructed, it exploded and burnt her. The jury found that the accident was caused by the defective nature of the lamp, but that the defendant was ignorant of the unsoundness, and sold the article in good faith. *Held*, that there being no misfeasance towards the wife independently of the contract, she could not sue and join herself with her husband. *Ib.*

6. *Sale by samples.* The plaintiff having agreed to sell to the defendant a quantity of foreign refined rape oil, but warranted only equal to samples, and having delivered oil which was not foreign refined oil, but which corresponded with the samples, it was *held*, that the defendant was not bound to accept the same, as he was entitled to the delivery of foreign refined rape oil, and that the statement in the contract, as to samples, related only to the quality of the oil. *Nichol v. Gods*, xxvi. 527.

7. *Sale of specific goods warranted to correspond to sample.* *Semble*, that on a sale of specific goods, with a warranty that they correspond to a sample, the vendee cannot refuse to receive them on account of their not corresponding, without an express condition to that effect, but is left to bring his cross action, or to avail himself of the breach of warranty in reduction of damages in an action for the price. *Dawson v. Collis*, iv. 338.

IV. *Construction of particular Contracts of Sale, &c.*

1. *Sale of ship—Advertisement—Description—Warranty.* The defendant, being the owner of a ship, inserted the following advertisement in the Shipping Gazette: "The fine teak-built bark Intrepid, A 1, 286½ tons register, built under particular inspection at Coringa, in 1842, of the best material, shifts without ballast, carries a good cargo, has a poop, and excellent height between decks, and is well adapted for a passenger ship; length 91 5-10 feet, breadth 22 feet 8 inches, depth 16 feet 8 inches; now lying at the St. Katherine Docks. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street." The plaintiff, having seen the ship, entered into a written agreement to buy her, "as she now lays in the St. Katherine Docks, agreeable to the inventory annexed." This document commenced thus: "For sale by private contract the fine teak-built bark, Intrepid," &c., pursuing the terms of the advertisement down to the words "St. Katherine Docks." Then followed this statement: "Hull, masts, standing and running rigging, with all faults as they now lie." Under this was the word "inventory," which was followed by a list of the ship's stores and tackle; and the document concluded with these words: "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, height, quantity, quality, or any defect or error whatever. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street, London." The defendant signed his name to this inventory, opposite to the list of the ship's stores. The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger ship. *Held*, first, that the contract of sale incorporated the whole of the above document, and not merely the list of stores headed "inventory." Secondly, that there was no warranty, and (there being no fraud in the case) there was no recourse against the defendant. *Taylor v. Bullen*, i. 472.

2. The declaration stated that the defendants sold to the plaintiff a cargo of corn then shipped at Orfano on board the O., at a certain price, including freight to Cork, Liverpool, or London; that it was agreed that the quality should be of a certain average, and that the corn had been shipped on board in good and merchantable condition. Breach, that it was not shipped in good and merchantable condition for the performance of the said voyage. *Held*, that it was a misdirection to ask the jury whether the corn was good and merchantable for a foreign voyage. *Dickson v. Zizinia*, ii. 314.

3. *Jus disponendi—Bill of lading.* If A, in compliance with an order from B, places on board B's vessel a cargo of cotton, and, in order to secure the acceptance and payment of the bills drawn on B for the same, reserves to himself the *jus disponendi*, as an unpaid vendor, which right is acknowledged by the captain in the bill of lading, and in his correspondence with the vendee speaks as if he still retains the right to the disposition of the goods, he still retains the property in the goods, though the captain may have had no authority to sign such a bill of lading. The case is not altered by A's transferring the bill of lading to a bank to secure the payment of the bills thus drawn on B, which A has sold to the bank. *Turner v. The Trustees of Liverpool Docks*, vi. 507.

4. *Sale of future crops.* By bill of sale in January, 1848, S. assigned to the plaintiff all his household goods, and stock, crops, &c., about his farm, as a security for present and future advances, providing that the plaintiff might at any time seize the goods, stock, and crops, &c., about the farm, which should be substituted for those assigned, and sell them, and repay himself. On the 21st of February, 1849, the plaintiff seized growing crops sown by S. since the bill of sale. A writ of *fi. fa.* against S. was next delivered to the sheriff, upon which he seized the crops in the plaintiff's possession. March 5, 1849, S. presented his petition to the insolvent court; his official assignee at first claimed the crops, but afterwards withdrew his claim by agreement with the plaintiff. The crops were sold by the sheriff. *Held*, that as against the judgment creditor the plaintiff was entitled to the proceeds. *Congreve v. Evetts*, xxvi. 493.

5. *Whether sale be by weight or measure.* The hobbit is a term used in Wales to express a quantity consisting of four pecks, each peck weighing forty two pounds, and where wheat has been sold by the hobbit and delivered in sacks containing six pecks or two hundred and fifty-two pounds, according to a well-established custom, the sacks being weighed and the quantity in each reduced or increased to 252 pounds, it is sale by weight and not by measure. *Hughes v. Humphreys*, xxvi. 131.

6. *Sale by illegal weight.* A contract for the sale of a number of tons of goods by "long weight," that is, tons of 20 cwt. of 120 lbs. avoirdupois each, is not a sale by an illegal weight within the 5 & 6 Will. IV. c. 63. *Per curiam*; *multum dubitante Parke, B. Jones v. Giles*, xxvi. 447.

7. *Bill of sale—Specified articles.* If a bill of sale purports to assign "all the household goods and furniture in a certain house, more particularly mentioned and set forth in a certain inventory, or schedule, of even date," and the inventory does not specify all the furniture and goods in the house, the bill of sale operates only as an assignment of the goods specified. *Wood v. Rowcliffe*, v. 471.

8. *Sold note—Evidence.* A contracted by parol with the agent of B, for the purchase of flour of the same quality as that with which B had supplied C. B sent to A a sold note, which simply described the flour as "Whites XS," and delivered flour answering that description. A used half a sack, and finding it not so good as the flour supplied to C, which was "Whites XSS," complained of it to the agent, but afterwards used two more sacks, and sold a third, and then paid the contract price under protest. *Held*, that parol evidence was inadmissible to show that the plaintiff had bargained for flour other than that mentioned in the sold note, and that B had fulfilled his contract. *Harnor v. Groves*, xxix. 220.

V. Stoppage in Transitu.

1. *What will defeat—Transfer of bill of lading—Implied authority.* A merchant abroad sells a cargo to W., and sends the bill of lading, deliverable to order or assigns and indorsed to C. of London, advising him of his draft for the price, and directing him to follow W.'s instructions. C. delivers the bill of lading to W., who transfers it to A., who transfers it to the plaintiff. The draft on C. is dishonored. The vendor takes possession of the cargo on its arrival, C. and W. having both become insolvent. *Held*, that to defeat the vendor's right of stoppage some authority from him to C. to transfer the bill must be shown, beyond its form and the blank indorsement. That here there was such authority implied; and the plaintiff was the owner of the cargo. *Gurney v. Behrend*, xxv. 128.

2. *Delivery of goods on ship board and transmission of bill of lading.* In 1845, the defendants, commission agents in London, wrote to the plaintiffs, merchants at Madras, as follows: "At the request of Messrs. K. & L., of Glasgow, we beg to open a credit in your favor to the extent of 1,500l., to be applied to the execution of an order they have given you for Madras handkerchiefs, and for cost of which, as produced, you draw on us at the customary date, on forwarding bills of lading to our order." Two orders were subsequently given by K. & L., and executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills drawn on them in pursuance of the letter. In February, 1847, K. and L. wrote to the plaintiffs, with a third order: "You will draw for cost and consign goods as before." The plaintiffs accordingly shipped the goods on account of K. and L., and sent to the defendants the invoice and bill of lading, enclosed in a letter, saying, "We have, as usual, drawn upon you at six months, for the equivalent of the amount of invoice." The bill of lading stated the goods to have been "shipped by the plaintiffs, and to be deliverable to the defendants or their assigns on payment of freight." The invoice stated that the goods were "consigned to the defendants, on account and risk of K. and L." The defendants received the bill of lading and invoice together, on

the 26th of August, and the goods arrived in London on the 21st of October. On that day the plaintiffs' agent received a bill drawn upon the defendants against the goods, but, on presentment, the defendants refused to accept it. On the 27th of October K. and L. stopped payment. The defendants took possession of the goods under the bill of lading, and sold them, and retained the proceeds. On the 4th of March, 1848, the plaintiffs gave the defendants notice that they claimed to stop the goods *in transitu*, the bills not having been accepted. In an action to recover the proceeds of the sale as money received to the use of the plaintiffs, it was *held*, that the property in the goods vested absolutely in K. and L. upon the delivery on board the ship, and transmission of the bill of lading to the defendants; the acceptance of the bill not being a condition either precedent or subsequent. *Key v. Cotesworth*, xiv. 435.

VI. Miscellaneous Cases.

1. *Manufactured article to be delivered at a distant place—Deterioration on transit.* Where a manufacturer contracts to deliver a manufactured article at a distant place, and the article, when delivered to the carrier for the purpose of being conveyed, is of a merchantable quality, the purchaser is bound to accept it, if only deteriorated to the extent that that kind of goods is necessarily subject to in its course of transit from the one place to the other, unless there be an express warranty against deterioration from that cause. *Bull v. Robison*, xxviii. 586.

2. *Sale by solvent joint-owner.* After the bankruptcy of one of two joint-owners of goods, the solvent joint-owner may authorize the sale of the goods. *Morgan v. Marquis*, xxiv. 394.

3. *Sale of former husband's goods by a subsequent bigamist husband—Concurrence of widow.* Plaintiff, being a widow, but not executrix or administratrix of her former husband, was in possession of furniture which had formerly belonged to him. She afterwards married B., whom she supposed to be a single man. B. sold to the defendant the furniture. The plaintiff actively interfered in this transaction, believing herself to be the wife of B. Shortly afterwards B. was convicted of bigamy in marrying the plaintiff. The plaintiff then sued the defendant for the value of the furniture. *Held*, that she could not recover, as she had no title to the furniture. And that, even if it were her property, she was bound by her concurrence in the sale of it by B. to the defendant. *Waller v. Drakeford*, xviii. 367.

4. *Sale of reversion—Costs.* A reversion was sold for 20*l.* On a reference, the Master found that it was worth 350*l.* The sale was set aside, but the purchaser had his costs of suit, except those of the inquiry before the Master to ascertain the value. *Boothby v. Boothby*, xix. 271.

5. See also *Gurney v. Behrend*, xxv. 128.

SALVAGE.

1. *Part of crew returning to abandoned vessel.* A ship was, by order of her master, abandoned at sea, and on the next day her crew, who had been taken to Vigo, were, by order of the British consul, put on board a steamer, which fell in with the abandoned ship. Part of the crew volunteered to return to their ship, but without the master, and were accordingly put on board by the steamer; and, with the assistance of a smack and other boats, the ship was subsequently brought to Corunna. *Held*, that the crew were entitled to be rewarded as salvors. *The Florence*, xx. 607.

2. The crews of two ships, belonging to J. L., gave some assistance to a ship chartered to J. L., who was bound to provide and pay the master and crew of such ships, the cargo on board of which belonged to J. L. *Held*, in a suit against the ship, that no salvage could be claimed. *The Maria Jane*, i. 658.

3. *No danger incurred by alleged salvors—Tender—Towage.* No danger was incurred by the asserted salvors, and the master and crew of the vessel assisted were not aware of the existence of any danger to their own vessel, but accepted the services of a steamer to bring them into port, and a tender was made for such services of the usual amount for towage. *Held*, that the services did not amount to salvage services, and the tender affirmed, with costs. *The Harbinger*, xx. 641.

4. *Negligence and want of skill on part of salvors—Services on shore.* Where the owners pleaded that their ship was damaged to an amount exceeding the value of the services of the salvors by reason of their want of skill and care; and the facts showed mere ignorance of the coast, it was *held*, that such ignorance on the part of salvors will not bar a claim of salvage. Also, that continuous services rendered to the property on shore as well as on board, are salvage services. *The Rosalie*, xxv. 605.

5. *Derelict—Misconduct of salvors.* A ship, laden with lead and iron, sunk on the Shipwash Sand, and was there left by the master and crew. *Held*, that the ship was not a derelict; that the authority of the owners and underwriters remained; and the first finders, though they recovered part of the property, forfeited their claim to salvage, and became liable to the costs of a suit instituted by them as salvors, by reason of their subsequent misconduct towards, and forcible resistance to, the authority of the owners. *The Barefoot*, i. 661.

6. *Apportionment of salvage.* Where the mate and a sailor volunteered to serve on board a ship fallen in with in distress, having lost most of her crew from fever, and brought her into port, the salvage was apportioned between the mate and sailor, and the owner of the ship to which they had belonged. *The Active*, i. 644.

7. *Two sets of salvors—Agreement with one set.* Two agreements were made with one set of salvors, which, after being acted upon for a certain time, were abandoned by force of circumstances. A second set of salvors saved part of the property, but at a time when the agents of the owners had given notice that no assistance was to be given except by the first set of salvors. *Held*, that the first set of salvors were entitled to a reward, not under the agreements, but as having contributed to the saving of the property. That the agents had a right to refuse the assistance of all persons; but as only two of the second set of salvors were proved to have received notice to that effect, they, except those two, were entitled to a reward. But looking at the delay in instituting, and the mode of conducting the suit on their behalf only 100*l.* allowed them *nomine expensarum*. *The Samuel*, iv. 581.

8. A ship abandoned at sea, was taken possession of by a small schooner, and after being towed some time by the schooner, was boarded by several men from a steamer, who took possession of her, and towed her into Liverpool. The action on behalf of the steamer, was entered in the names of certain persons, who, being the underwriters of the ship and cargo, hired the steamer for the purpose of salvaging the ship. *Held*, that the schooner was entitled to salvage as first salvor; that the steamer, looking to the danger of the ship, and the small size of the schooner, was justified in taking possession of the ship; and the persons hiring the steamer were entitled to salvage as owners for the time. *The Pickwick*, xx. 628.

9. *Agreement between owner of vessel and agent of certain smacks—Claim by another smack.* Where an agreement has been entered into between the owner of a vessel and the agent of certain smacks that have performed salvage services for her, for the payment of a sum for such services, another smack cannot make application for a share of such sum, nor obtain any monition against such agent, either by ordinary law, or the provisions of the 3 & 4 Vict. or the 9 & 10 Vict. in respect to matters of wreck or salvage. *The Tenth of June*, xxix. 585.

10. *Agreement by master with salvors.* Where the master of a ship in distress agreed with the salvors to pay them a certain sum for their services, the agreement will be upheld as against the salvors, unless fraud be proved against the master. The value of the property saved is not a consideration upon which the agreement can be made to depend. *The Henry*, ii. 564.

11. *Agreement—Burden of proof.* Where, in salvage, an agreement is set up, the burden of proving such agreement is on those relying upon it; and without pronouncing the written agreement a forgery, the court will decide against it, as on failure of proof, unless clearly established by evidence. *The Resultatet*, xxii. 620.

12. *Salvage by fishing vessel—Compensation.* In considering salvage by fishing vessels, where the property saved is not exposed to imminent danger, the possible profit of the fishing is not to be included in the award for the service. *The Nicolai Heinrich*, xxii. 615.

13. *Removal of ship.* A ship which has been assisted into a roadstead is not to be removed without the consent of the salvors. *Ib.*

14. *Refusal by salvors of further assistance.* Where salvors are in possession of a vessel, and their services have been accepted, and they can discharge what they have undertaken with safety to the vessel, and with facility, it is not competent to any other persons to interfere with them. But in a doubtful case the salvors will not be justified in refusing further assistance. Where salvors, not employed at the time, prevented further assistance being given, although their services were afterwards accepted, and they saved the ship and cargo, the court awarded them 100*l.*, instead of 300*l.*, and allowed them two thirds only of their costs. *The Glory*, ii. 551.

15. *Who may be made parties on salvage claim.* The owners of a ship recovered from persons alleged to be pirates, by one of her Majesty's ships, have a sufficient interest to entitle them to be heard against an application, on the part of the officers and crew, for a reward for services as against pirates. *The Virago*, xx. 644.

16. *Action by common sailor sent to assist a stranded vessel.* In an action for salvage services, it appeared that the plaintiff, being a common sailor, was ordered by the captain of his own ship to go in a boat with others, a distance of fourteen miles, to assist a stranded vessel, and to put himself under the command of the captain thereof; it was held, that he could not maintain an action against the owner of the vessel saved for his personal services. *Lipson v. Harrison*, xxiv. 208.

SCHOOL.

See CHARITY.

SEAMEN.

1. *Implied obligation on part of ship-owner as to seaworthiness of vessel.* There is no implied obligation on the part of the owner of a ship towards a seaman who had agreed to serve on board of her, that the ship shall be in a fit state to perform the voyage; and in the absence of any express warranty to that effect, or any knowledge of the defect, or any personal blame on the part of the ship-owner, the seamen cannot maintain an action by reason of the ship becoming leaky, and of his being obliged to undergo extra labor. *Couch v. Steel*, xxiv. 77.

2. *Common sailor ordered to assist a stranded vessel.* A common sailor was ordered by his captain to go to the assistance of a stranded vessel and place himself under the direction of her captain. Held, that he could maintain no action for salvage against the owner of the vessel saved, for the personal services which he had rendered. *Lipson v. Harrison*, xxiv. 208.

3. *Action for special damages arising from breach of public duty by owner.* The 7 & 8 Vict. c. 112, s. 18, which makes every owner of a ship sailing out of any English port, and between that and any place out of the kingdom, liable to a penalty for a breach of public duty, does in no way interfere with the common-law right of a seaman serving on board the vessel to maintain an action in respect of a special damage resulting to him from the breach of the duty. *Couch v. Steel*, xxiv. 77.

4. *Continuous contract.* Where seamen are under a continuous contract binding

them to remain on board, whatever may be the number of voyages, until the return of the vessel to the place of shipment, their lien for wages extends to all the voyages made, and should be paid out of the freight and the proceeds of the sale of the vessel at the suit of a bondholder. *The Louisa Bertha*, i. 665.

5. *Dissolution of contract.* A mariner hired for a specific voyage, was in the course of it obliged to leave the ship and was sent to England by authority of a British consul, under the 7 & 8 Vict. c. 112, s. 60, as a witness upon a trial of a person for an offence committed on the high seas. *Held*, that this operated as a dissolution of the contract, and that the plaintiff could not recover any wages subsequent to the period when he was sent to England. *Melville v. De Wolf*, xxx. 323.

6. *Fresh agreement—Action for increased wages.* The plaintiff and other seamen had entered into articles of agreement to serve for a voyage from Liverpool to Melbourne and home. At Melbourne several of the crew deserted, and one of the crew was discharged by the captain. Whilst the desertion was going on, the captain entered into a fresh agreement with the plaintiff and the other remaining seamen, to raise their wages for the remainder of the voyage. *Held*, that the plaintiff never was, under the circumstances, released from the obligation of the original articles, and could not therefore maintain an action to recover the increased rate of wages for the voyage home. *Harris v. Carter*, xxv. 220.

7. *Deserting, excuse for—Cruelty—Threat to sell as a slave.* To a declaration by a seamen for wages, the defendant pleaded that the plaintiff had been engaged as a seaman on board *The Candace*, a British registered ship, for a voyage from Liverpool to San Francisco and back, and had during such voyage, and while he belonged to the said ship, at San Francisco, deserted from the said ship within the meaning of the 7 & 8 Vict. c. 112; and that the plaintiff afterwards, and whilst he was such deserter, engaged himself as a seaman for the voyage back to England from San Francisco with the defendant as the master of another ship, for wages to recover which this action was brought. Replication, that while the plaintiff was serving as seaman on board *The Candace*, the captain and officers flogged and punished him with great and unreasonable cruelty and severity, and that such floggings and punishments were not rendered necessary by the mutinous or improper conduct of the plaintiff, but were unnecessary and unreasonable; that the plaintiff requested the said captain and officers to desist, which they refused to do, whereupon, the plaintiff, having reasonable grounds to believe that they would continue to flog and punish him with such great and unreasonable cruelty and severity, in order to escape therefrom, deserted from the said ship for the cause aforesaid, and not otherwise. *Held*, a good answer to the plea. The plaintiff also replied to the same plea, that he was a negro, and that negroes are bought and sold as slaves in divers States of the United States; that while he was serving on board *The Candace*, and before he deserted, the captain of the said ship threatened to sell the plaintiff as a slave to certain citizens of the said United States; that San Francisco is situated in one of the United States, to wit, in California, and that the plaintiff had just and reasonable grounds for believing, and did believe, that on the arrival of the said ship at San Francisco, the said captain was about and meant to carry his said threat into execution; and that, in order to prevent the said captain from selling him as a slave as aforesaid, the plaintiff deserted. *Held*, to be no answer to the plea. *Prince Edward v. Trevellick*, xxviii. 205.

SEDUCTION.

The plaintiff's daughter, who had formerly been in the defendant's service, and was living with her parents, at the defendant's request, and with the consent of the plaintiff, went and resided at the defendant's house for a month, to attend to his business during the absence of his wife; and the defendant promised, before she went, to pay her something for so doing, and when she left the defendant's wife gave

5. *Service on solicitor.* The solicitor of a defendant resident abroad had been served with a *subpœna* to appear to an amended bill under the 26th order. Ordered that an appearance for the defendant be entered pursuant to the 29th order. *Zulueta v. Vinent*, iii. 76.

6. Decree taken against a defendant on an affidavit of service of the *subpœna* to hear judgment. The affidavit stated service on T., who, according to the belief of the deponent, was the defendant's solicitor. *Held*, that if it should appear on the record that T. was such solicitor, the affidavit would be sufficient. *Marsden v. Blundell*, ii. 33.

7. *Substituted service.* A defendant having gone abroad, substituted service of the replication and other process in a supplemental suit, not requiring personal service, was ordered to be made on the solicitor in the original suit. *Scott v. Wheeler*, v. 44.

8. Substituted service ordered of a writ of summons issued upon the Master's certificate upon a claim. *Baker v. Anthony*, vii. 213.

9. *Necessity of affidavit for.* Under the new practice established by 15 & 16 Vict. c. 86, s. 58, an affidavit of merits is not necessary in an application for substituted service upon the plaintiff's attorney, the plaintiff being out of the jurisdiction. *Sergison v. Beavan*, xv. 6.

10. An order directing service of a bill and notice of motion on the solicitors of a party who resides abroad may rightfully be made. *Hope v. Hope*, xxvii. 249.

11. *Trustee Relief Act—Substituted service of petition.* Where the trustee, who has paid a trust fund into court under the Trustee Relief Act, cannot be found, service on him of the petition for payment out of the fund, at the address given by him in his affidavit on the occasion of his paying in the money, will be deemed good service. *Ex parte Baugham*, x. 158.

II. Of Services in general; Miscellaneous Cases.

1. *Service on wife—Foreclosure claim.* On a claim for foreclosure, service of the writ of summons on the wife of a party interested in the equity of redemption, who was travelling in America, was ordered to be deemed good service on the husband under the stat. 4 & 5 Will. IV. c. 82, the wife being in the possession and receipt of the rents and profits of the mortgaged property. *Carwardine v. Wislade*, vi. 103.

2. *Summons for an assault left with wife—Justices to judge of sufficiency of service.* A summons to appear before justices the following day, at a place eight miles off, was left with the wife of A after he had gone to work. He returned at eleven that night. Failing to appear, he was convicted of an assault. *Held*, that the question of the sufficiency of the service of a summons was a matter upon which the justices were the proper parties to decide. *Semble*, such service was sufficient. *Ex parte Williams*, viii. 336.

3. *Service of summons on lunatic—Common-law Procedure Act.* There is no provision in the Common-law Procedure Act, 1852, for the service of a writ of summons upon a lunatic in a private house; and as the writ of *distringas* is abolished, there is no means of proceeding in an action against such lunatic. *Holmes v. Service*, xxviii. 355.

4. The 17th section of the act, which enables the court to allow an action to proceed after reasonable efforts to effect personal service, applies only where the writ has come to the defendant's knowledge, or he wilfully evades the service. *Ib.*

5. *Duty of keeper of private asylum to permit service.* *Semble*, That it is the duty of the keeper of a private lunatic asylum to permit a writ of summons to be served on the lunatic, or else application may be made for a *habeas corpus* to bring up the lunatic that service may be effected. *Ridgway v. Cannon*, xxviii. 125.

6. A judge at chambers having made an order directing an appearance to be entered for a lunatic defendant, upon an affidavit of service of the writ of summons by leaving a copy with the keeper of an asylum in which the lunatic was confined,

without a previous writ of *distringas*,—the court set aside the order. *Blake v. Cooper*, xx. 298.

7. *On municipal corporation.* A railway company paid into court a sum of money for the purchase and severance of land taken by them belonging in fee simple to the mayor, aldermen, and citizens of L., and over which the freemen of L., 500 in number, had a right of pasturage. A special act was afterwards passed to enable the corporation to convey the land to the railway company free from these rights of common, and it enacted that the purchase-money was to be applied for the permanent benefit of the freemen of L., as the court of chancery should direct, by any order to be made in the matter of that act, and *ex parte* the mayor, aldermen, and citizens of L.; and seven days' notice of any such application was to be given, by affixing the same to the town hall. *Held*, that some of the freemen of the city of L., and the attorney-general, ought to be served with the petition. *Re The Great Northern Railway Act*, xiii. 315.

8. *On secretary of an incorporated company.* A company was incorporated by statute for making a railway, part of the line lying in England and part in Scotland; the act embodying the Companies Clauses Consolidation Acts for both countries. By a subsequent local act another Scotch railway company was amalgamated with the company. A party having a claim against the company in respect of certain shares arising out of that amalgamation, commenced an action in England, and served process on the secretary of the company while in London. *Held*, that this service was good. *Wilson v. The Caledonian Railway Co.* i. 415.

9. *Of capias on debtor.* After a warrant for arresting a debtor under the 14 & 15 Vict. c. 52, (the Absconding Debtors' Arrest Act,) has been issued, the *capias* required to be issued under section 1, must be served on the defendant, if in custody, within seven days of the date of the warrant, and if not so served it ceases to have any operation, nor can it be treated as a valid *capias* under the 1 & 2 Vict. c. 110. A second *capias* may, however, be issued after the seven days upon fresh materials, under the general powers given by the 1 & 2 Vict. c. 110. *Masters v. Johnson*, xii. 572.

10. Where a defendant is arrested under the 14 & 15 Vict. c. 52, s. 1, and is discharged upon making a deposit in lieu of bail, it is not necessary to serve him with a writ of *capias*, although he may be in custody upon another warrant. *Eld v. Vero*, xx. 514.

11. *On defendant imprisoned for crime.* The governor of Cold Bath Fields Prison having, in obedience to an order of the visiting justices, refused to allow service of a writ upon a defendant, who was in the prison under criminal sentence, the court granted a rule to show cause why an attachment should not issue against him; after which the justices permitted service of the writ. *Danson v. Le Capelain*, xii. 551.

12. *On defendant's clerk at warehouse.* A rule *nisi* cannot be made absolute, no cause being shown, on an affidavit which states that service of the rule has been effected on a clerk of the defendant, at the warehouse of the defendant. The old practice of requiring a service at the defendant's dwelling-house must be adhered to. *Medlicott v. Williams*, i. 305.

13. *Copy of mandamus served—Original writ not shown.* Where a copy of a writ of *mandamus* was served without showing the original, and the defendant appeared, the court refused to set the service aside. *Regina v. The Birmingham and Oxford Railway Co.* xvi. 94.

14. Service of a rule upon "a female servant at the lodgings of the defendant," is not good service. *Price v. Thomas*, xx. 292.

15. *Of bill of exchange.* In an action by an indorsee against three defendants, as acceptors of a bill of exchange, who have suffered judgment by default, service of the rule *nisi* to compute on the London agent of the attorney of two of the defendants, is a sufficient service to justify the court in making the rule to compute absolute. *Ettison v. Wood*, xii. 458.

16. *Petition for new trustees—Reversioner to be served.* Demise of lands for 1000 years on certain trusts. Petition for the appointment of new trustees. *Held*, that the reversioner ought to be served with the petition. *In re Farrant's Trust*, vii. 47.

17. A defendant served with a copy of a bill under the 23d order of the 26th August, 1841, must be re-served if the bill is amended. *Vincent v. Watts*, vii. 6.

18. *Misnomer.* Where a defendant, who has been served with a copy of the bill, under the 23d order of August, 1841, has been misnamed in the bill, leave will be given, on production of an affidavit showing the identity of the party served, to enter a memorandum of such service with the name of the defendant correctly stated in it. *Witham v. Salvin*, x. 274.

19. "*Principal officers, &c., of the navy*"—*Service of writ against.* A writ in an action of debt against the "principal officers and commissioners of the navy," by their collective name, was served upon one of their number. Upon a motion to set aside this writ for irregularity, the affidavits stated that the action was brought for a cause not maintainable against the defendants by their collective name; viz: for half-pay, it was *held*, first, that the court could not upon this motion look at the affidavits as to the cause of actions, and that inasmuch as the 1 & 2 Geo. IV. c. 93, s. 9, authorized some actions of debt to be maintained against the defendants by their collective name, there was no ground for setting aside the process as irregular. Secondly, (per Maule, J.) that the proper method of effecting complete service upon the commissioners is by serving each of them. *Williams v. The Commissioners, &c.* vii. 449.

20. *Of notice of motion.* Where the defendant is out of the jurisdiction, and his solicitor had absconded, service of notice of motion at the solicitor's address for service held sufficient, though the place mentioned in such address was now untenanted. *Newton v. Thomson*, xiii. 469.

21. *Appearance entered by plaintiff for the defendant—Service of notice of filing of replication.* Where an appearance has been entered by the plaintiff for the defendant, who has absconded, notice of the filing of the replication under the Chancery Procedure Amendment Act, and the 28th of the General Orders of August, 1852, is to be left at the last-known place of abode of the defendant, and to be advertised in *The Gazette* and in two county papers. *Barton v. Whitcomb*, xvii. 491.

22. The court granted a *distringas* to compel appearance upon an affidavit showing the proper number of calls at the defendant's residence for the purpose of serving a summons, the answers being that the defendant was ill, and could not be seen—without the usual statement of the deponent's belief that the defendant was keeping out of the way to avoid service. *Sheppard v. Williams*, xx. 299.

23. Service of office copy of decree taken *pro confesso*. See *Kemp v. Latter*, xiii. 324.

24. As to service of declaration and notice in ejectment, see *Laundry v. Roe*, xxii. 449.

SET-OFF.

1. *Statute of set-off—Mutual debts.* The statute of set-off, 8 Geo. II. c. 24, applies only where the debts between the parties are mutual legal debts, the object of the statute being to prevent cross-actions between the same parties. *Isberg v. Bowden*, xxii. 551.

2. *Suit brought by plaintiff as agent having no interest.* Where the plaintiff entered into the charter-party as master of the ship, and for and on behalf of, and as agent for the owner; and the plaintiff never had any beneficial interest in the charter, or any lien on the freight, and he brought the action solely as agent and trustee for the owner who was indebted to the defendant in a certain amount, which the defendant offered to set off, it was *held*, that the statute of set-off did not apply. *Id.*

3. *Executor may set off a debt which accrued after death of testator.* Where a de-

damages. *Held*, that upon these facts the defendant was entitled to the verdict, and a rule for a new trial was made absolute. *Nichols v. Tuck*, xvi. 104.

13. *Replication—Joint debt—Evidence.* Where to a plea of set-off the plaintiff replies that he is not indebted as in the plea alleged, he may under this replication avail himself of the objection that the debt is not due from himself alone, but from a third party jointly with him. *Arnold v. Bainbrigge*, xxiv. 451.

14. As to the sufficiency of replication to a plea of set-off under the 1 & 2 Vict. c. 110, see *Wickens v. Goatley*, viii. 420.

15. *Set-off in equity—Retaining legacy—Bankrupt legatee.* An executor and residuary legatee (admitting assets) is not entitled, as against the assignees in bankruptcy of a legatee, to retain the legacy in payment of a debt due to him individually from the bankrupt legatee. *Freeman v. Lomas*, v. 120.

16. *Set-off pro tanto inferred.* The devisees of a mortgagor sold at auction the equity of redemption and other lands to the mortgagee, who paid the usual deposit, agreed what interest should be paid on the rest of the purchase-money, and soon after took possession. The mortgagee and her devisees kept possession for eleven years, during which time no demand was made for the balance of the purchase-money, or interest on the mortgage. Upon a claim by the devisees of the mortgagor for specific performance of the contract of purchase, it was *held*, under the circumstances, that a set-off *pro tanto* was to be inferred from the date when the mortgagee took possession, and that, from that period, interest at the agreed rate only was payable upon the balance of the purchase-money. *Wallis v. Bastard*, xxxi. 175.

17. See also *Egremont v. Lee*, x. 188.

SETTLEMENT.

1. *Voluntary settlement, requisites of.* The court, in order to give effect to voluntary settlements, requires, where the settler is the legal owner, every thing to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favor of the donee. *Bentley v. Mackay*, xv. 62.

2. *Marriage settlement of real and personal property—Appointment—Election.* A has an estate tail in realty, with remainder to B and her children, and an absolute interest in personalty. By one marriage settlement she places her personalty, and by another of the same date, her realty in trust for herself for life, with remainder to her children, and in default of children, in trust for B, with remainder to her children, reserving to herself a power of appointment of a life-interest in each estate to C. A exercises this power, and dies without ever having had a child or barred the entail. *Held*, that B and her children had their election between the interest given them in the personalty, and their present interest in the realty disposed of by appointment to C. *Bacon v. Cosby*, iii. 186.

3. *Settlement by feme sole upon herself in contemplation of a certain marriage—Marriage with another person—Revocation—Trustees.* A woman while sole, in contemplation of a marriage with A, assigned the whole of her property to trustees for the benefit of herself until her marriage, if any; or in case no such marriage should be solemnized, and from and after the solemnization (if any) of the same marriage upon trust for her; and after her decease, in case she should marry and have issue, upon trust for the children as therein mentioned. The fund was transferred to the trustees; but the contemplated marriage did not take place, and the woman married another person. *Held*, that the settlement was voluntary; that the trusts arose upon the fund being completely vested in the trustees; that they could not at the request of the settler allow any part of the fund to be withdrawn; and that the settlement was good upon her while sole, and upon her and her issue in the event of any marriage, and could not be revoked. *M'Donnell v. Hesilrige*, xv. 587.

4. *By equitable owner.* A, being equitably entitled to a freehold estate, and also to

if the proceeds of the sale of a part of the lands of the estate A be applied to the redemption of the land tax on both estates in the lifetime of the father and the first son, the second son cannot afterwards, as the owner of estate A, have any equity to follow the money thus paid for the benefit of estate B. *Harrison v. Round*, xv. 563.

11. "*Usual and necessary powers*," what are. Where the will contains no direction as to the powers to be inserted in a settlement on a married woman, powers of leasing, sale, and exchange, and provisions for maintenance and advancement, and for the appointment of new trustees, are to be inserted as usual and necessary powers. *Turner v. Sargent*, xxiii. 580.

12. *Settlement of limited interest in a term—Memorial of deed*. If a man has a limited interest in a term, and settles it to a certain use, and then gets a new and extended term substituted for it, he cannot, by so doing, avoid the previous settlement. A deed contained recitals which described two persons as concurring in settling property to which they were "respectively entitled." It afterwards contained a grant to trustees of a certain part of this property, as if made by one of these persons, when in fact that part belonged to the other. The memorial of the deed described both as the granting parties; this description was not one of the things required by the statute. *Held*, not to vitiate the effect of the memorial under the Registration Act. *Mill v. Hill*, xxii. 20.

13. *Charge on estate—Interest*. Where a tenant in tail of lands, subject to an unpaid legacy, settles part of them with covenants against incumbrances, the legacy as to him and the persons to whom the lands are settled is a charge upon that part of the lands not included in the settlement, and, not being in the nature of a trust, but only a charge, the legatee is only entitled to six years' interest from the time of making claim. *Hughes v. Williams*, x. 256.

14. As to the settlement of paupers, see PAUPER.

15. See, also, Page v. Soper, xxi. 499.

SHERIFF.

I. RIGHTS, DUTIES, AND LIABILITIES OF SHERIFFS.

II. MISCELLANEOUS CASES.

I. Rights, Duties, and Liabilities of Sheriffs.

1. *Claim to goods taken in execution—Judgment*. Where a sheriff or bailiff sets up a claim to goods taken in execution by him as against a third party, he must show a judgment against the execution creditor, and his production of the writ of execution alone is not sufficient for this purpose. *White v. Morris*, xi. 515.

2. *Seizure of wrong party's goods—Rent*. Where the sheriff seized the goods of A, under an execution against the goods of B, and, after the making of an interpleader order, and before the trial of the issue, paid the landlord a quarter's rent, out of the proceeds of the goods, it was *held*, that the sheriff was bound to pay over the amount of the quarter's rent, as well as the rest of the proceeds of the sale, to A, after the decision of the issue in his favor. *White v. Binstead*, xx. 212.

3. *Goods to be removed*. The statute of 8 Anne, c. 14, s. 1, under which a landlord is entitled to get his rent paid out of goods taken in execution, does not apply unless the goods be removed from the premises. *Ib.*

4. *Action against, for escape—Measure of damages—Final process—5 & 6 Vict. c. 98*. In an action on the case by an execution creditor against the sheriff, for the escape of his debtor, the measure of damages is the value of the custody of the debtor at the moment of the escape; and no deduction ought to be made on account of any thing that the creditor might have obtained by diligence in retaking the debtor after the escape. *Arden v. Goodacre*, v. 436.

5. *Receiving payment—Liability for acts of bailiff*. Although the sheriff is respon-

sible for all acts of his bailiff done in the execution or under color of a writ of execution, because he has committed the duty which properly belongs to himself to another, yet, as it is no part of the sheriff's duty to receive payment of the amount for which a judgment debtor is in his custody, he will not be liable if his bailiff receives the amount of such debt from his debtor and misappropriates it or neglects to pay it within a reasonable time to the creditor. *Wood v. Finnis*, x. 537.

6. *Receiver—Fieri facias—Rent—Action, application to stay.* Upon an application by the sheriff, who was no party to this suit, the court refused to restrain the plaintiff from prosecuting an action at law against him to obtain payment of a sum of money reserved for rent, which the sheriff, upon the stay of the action, offered to pay into court, and which was part of a larger sum of money levied under a writ of *fieri facias* issued upon a judgment obtained in an action at law by a stranger against the tenant of the estate which the plaintiff in this suit claimed, and over which a receiver had been appointed. *Trye v. Trye*, v. 193.

7. A sheriff who intends to levy, may, before actual seizure, apply for relief under the Interpleader Act. *Day v. Carr*, xvi. 578.

8. As to the duty and liability of the sheriff in case of fines, see *Wüdes v. Morris*, xiv. 181.

II. Miscellaneous Cases.

1. *Disqualification by interest.* A local improvement act authorized landowners' damages to be assessed by a jury summoned by the sheriff, or, if he is an interested party, by the coroner. Another section adds that no person liable to the rates shall be disqualified to act as justice, juror, or under-sheriff, in such cases. *Held*, that the sheriff, if liable to the rates, is disqualified; that an inquisition under a warrant to him is void, though he acted by his under-sheriff; and that the objection is not waived by the party appearing, if he has no knowledge of it at the time. *Regina v. The Sheriff of Warwickshire*, xxx. 223.

2. *False return of nulla bona—Pleading—Evidence.* A return of *nulla bona* to a writ of *fi. fa.* means no goods applicable to the plaintiff's writ. Therefore, if a declaration alleges a false return of *nulla bona*, and that the sheriff took in execution goods of the judgment debtor of the value indorsed on the writ, and levied the same thereout, and the defendant pleads that he did not levy *modo et formâ*, the defendant may, under that plea, show that the plaintiff's judgment was obtained by fraud, and that he, the defendant, has paid over the proceeds of the levy to another execution creditor, although the writ of the latter was of a later date than that of the plaintiff. *Shattock v. Carden*, xi. 570.

3. *Estoppel by return.* The sheriff returned to a writ of *fi. fa.* against W., that before the delivery thereof to him, another writ of *fi. fa.* against W. was delivered to him, and that by virtue thereof he seized the goods of W. In case against the sheriff for a false return, it was *held*, first, that the sheriff was not estopped by his return from showing that the goods seized under the first writ were not the goods of W.; secondly, by Erle, J., that though the judgment on which the first writ issued was fraudulent, the sheriff seized the goods of W. under the first writ, and not under plaintiff's writ. *Remmett v. Lawrence*, i. 260.

4. *Bonâ fide seizure of goods—Question for jury.* It is a proper question to leave to a jury, whether bailiffs have acted *bonâ fide* in seizing goods, believing that they were authorized so to do, and the circumstance that the bailiffs have taken indemnity does not negative the *bona fides* of their conduct. *White v. Morris*, xi. 515.

5. As to the sufficiency of a declaration in an action against a sheriff, for treble damages for extortion, under 29 Eliz. c. 4, see *Berton v. Lawrence*, i. 453, and *Holmes v. Sparks*, xi. 542.

6. See *FZES*.

SHIPS AND SHIPPING.

- I. RIGHTS AND LIABILITIES OF OWNERS AND PART-OWNERS, &C.
- II. POWERS, DUTIES, AND LIABILITIES OF MASTER.
- III. COLLISION.
- IV. CHARTER-PARTY; BILL OF LADING; FREIGHT; DEMURRAGE.
- V. TOWAGE.
- VI. SALE AND TRANSFER OF VESSEL; MORTGAGE OF SHIP AND FREIGHT; REGISTRATION.
- VII. BOTTOMRY BOND.
- VIII. MISCELLANEOUS CASES.

I. *Rights and Liabilities of Owners and Part-Owners, &c.*

1. *Pilot, necessity to take*—*Liverpool Pilot Act, 5 Geo. IV. c. 73*—*Proceeding to sea.* By the 35th section of the *Liverpool Pilot Act, 5 Geo. IV. c. 73*, it is enacted that in case the master of any ship, outward bound, shall proceed to sea, and shall refuse to take on board a pilot, he shall pay the pilot who shall first offer his service at a certain rate as if the pilot had piloted the vessel, and all expenses for recovering the same. On the 2d of December a vessel left the *Liverpool Docks*, with a pilot on board; on the 3d, the boat of the plaintiff, who was then employed by the owners in raising the vessel's anchor, was lost, through the carelessness of those on board the ship. At this time the master was not on board, and the vessel being employed by the post-office, was not to sail till the 4th of December; she was at anchor, and her rigging was being completed. *Held*, assuming an outward-bound vessel to be liable when proceeding to sea to take a pilot on board, still, that this vessel was not proceeding to sea, and that the owners were not bound to have a pilot on board. *Rodrigues v. Melhuish*, xxviii. 474.

2. *Owners liable unless fault exclusively pilot's.* Where, by the mismanagement of a vessel which is proceeding to sea, damage is done, the owners will not be exonerated unless they show that the damage was occasioned exclusively by the fault of the pilot. *Ib.*

3. *Ship falling over and sinking a tug*—*2 Will. IV. c. 67*—*Harbor master.* By the 2 Will. IV. c. 67, the company of proprietors of the *H. Wet Docks* were empowered to appoint such officers as to them should seem meet, and to remove ballast from and out of ships entering the port of H.; and by the same act power was given to any person appointed, in pursuance of the act, to act as dock master, to regulate and direct the placing and mooring of ships in the docks, and a penalty is imposed on all persons refusing or resisting the orders of the dock master. *Held*, where a ship was moved by a steam tug, under the directions of the harbor master, the ballast having been taken out by his order, and fell over and sunk the tug, that the owners of the ship were not responsible for the damage. *The Broeder Trow*, xx. 634.

4. *Admiralty rules—Lights—Owner not in charge of vessel—Pleadings.* It is provided by statute, that the admiralty shall make and publish rules as to lights; that all owners and masters, or persons having charge of vessels, shall be bound to observe them; and in case of default, the master, &c., or the owner, if in fault, shall forfeit 20*l.* All damage arising, &c., is, in the absence of proof to the contrary, to be attributed to the wilful default of the master or person in charge. The declaration alleged that defendant's vessel, through negligence of his servants, had no such light as was enjoined by a rule which was set forth; whereby a collision occurred, and plaintiff's vessel was damaged. *Held*, that the declaration was bad; that the owner was not liable under the statute, unless he was in charge of the vessel; and that if the allegations with respect to the statute were struck out, the declaration would be bad, as it would be

quite consistent with it, that the damage was the consequence of the plaintiffs' own negligence. *The General Steam Navigation Co. v. Morrison*, xx. 267.

5. *Sunken vessel—Duty of owner.* The owner of a vessel sunk in a navigable river is bound to use proper care to prevent accidents to other vessels so long as he has the possession and control of it, that is, so long as by due care and exertion he can either remove it, or so far shift its position as to prevent such injury. This duty will be transferred to a purchaser of the sunken vessel; and it makes no difference that the vessel lies in a part of the channel not ordinarily used for navigation: but the duty ceases on the abandonment of the possession of the vessel. *White v. Crisp*, xxvi. 532.

6. *Revenue Act—Smuggling.* The owner of a vessel, who knowingly lets his vessel for a smuggling adventure, and the cargo of which is unshipped without the duties being paid, is liable to the penalties, under the 8 & 9 Vict. c. 87, s. 46, as a person "concerned" in the illegal unshipping of the goods. *The Attorney-General v. Robson*, iv. 405.

7. *Management of ship—Equity jurisdiction.* No question arises as to the jurisdiction of the court of chancery in enforcing the rights of some against the other part-owners of a ship, with regard to the management of the ship and the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship. *Darby v. Baines*, xii. 238.

8. *Ship's husbands, being part-owners, contract by—Notice of dismissal—Practice—Jurisdiction.* The husbands of a ship, who were part-owners, having made an underhand bargain for their private benefit, which was not known to exist by the captain and the other part-owners till several months after a charter-party had been obtained, received a notice of dismissal which they contested, and they took possession of some of the machinery. The other part-owners filed a bill to obtain possession thereof and to have a receiver appointed. *Held*, that the application was not too late, and, under the circumstances, that the court of chancery had jurisdiction to appoint a receiver for the machinery. *Brenan v. Preston*, xxi. 604.

9. *Payment by broker binding on co-owners.* A broker who had received money on account of the owners of the ship, offered to pay it to the captain, who was also managing owner, by a check. This the captain declined, preferring that the broker should open a credit for him at a bank in favor of H., which the broker did. The bank accordingly paid H., for which H. gave a bill upon the broker, who paid it when due. The broker having sued the co-owners for the balance of his account, it was *held*, that this was a good payment of 250*l.* by the broker, and binding on the co-owners. *Anderson v. Hillies*, x. 495.

10. *Registered owner—Agency.* Defendant being the registered owner of a ship; agreed to sell it to G., contracting to repair it. The agreement was void for not reciting the register. G., with privity of defendant, appointed T. master, who was registered accordingly; and went on board and acted as master, defendant having ship-keepers and an agent on board, who superintended the repairs and paid dock-dues. Defendant ordered and paid for certain repairs, but refused to supply new running rigging. This was furnished by plaintiff, upon T.'s order, and plaintiff demanded payment of defendant as owner, having no knowledge of G. or defendant, but having inspected the register, whether before or after supplying the rope did not appear. Not receiving the price of the ship, defendant took her and sent her off under a new master, with the rope on board. He had never seen T. or given him authority to purchase. *Held*, that upon this evidence it was properly left to the jury to say whether, as between the plaintiff and himself, the defendant had given authority to T. to order the rope to be supplied for the use of the ship. *Erle, J., dissent.* *Frost v. Oliver*, xx. 114.

11. *Seaworthiness of vessel.* A vessel lying in dock starts a plank in a gale of wind. The plank was a sound one. *Held*, that the vessel must be presumed unseaworthy,

as she ought to be equal to a strain such as all ships are liable to. *Christie v. Trott*, xxv. 262.

12. In an action by a shipper against a shipowner, upon a breach of contract that the ship should be seaworthy at the commencement of the voyage, defendant pleaded that before loss to the plaintiff, the ship was made seaworthy. *Held*, no plea. *Dunbar v. Smeethwaite*, xxix. 189.

13. Where goods, forming part of the freight of a ship, have been sold at an intermediate port to defray expenses necessarily incurred in repairing the vessel, the merchant is not entitled to claim from the shipowner the price which they might have realized at the port of delivery unless the ship arrives. *Atkinson v. Stephens*, xiv. 407.

II. Powers, Duties, and Liabilities of Master.

1. *Suit for wages.* A shipmaster has a right to sue for his wages under the 7 & 8 Vict. c. 112, s. 16, even though he has settled with the owner of the ship, taking a bill of exchange for balance of accounts, which balance included his wages as master. *The Simlah*, v. 558.

2. *Remedy against ship.* *Semble*, that the master has his remedy against the ship where the owner of a majority of interests is bankrupt, or insolvent. *Id.*

3. *Implied authority of master.* Where seamen are injured by an accident, and put on shore while the ship proceeds on the voyage, the captain of the ship has no implied authority to make the shipowner liable for expenses incurred for their maintenance and care. *Organ v. Brodie*, xxviii. 530.

4. *Agreement to pay seamen higher wages.* An agreement by a master of a vessel, made at a foreign port where there was great danger of the crew deserting, to pay a higher rate of wages for the home voyage than was fixed by the articles for the voyage out and home, is not binding on the owners. *Harris v. Carter*, xxv. 220.

5. *Distribution by master of deserters' wages.* The master of a ship, being deserted by some of his crew, distributed the amount of the wages forfeited by the deserters amongst those who would navigate the ship home. The owners claimed a deduction of the money so paid by the master. *Held*, that the payment having been made illegally, the owners were entitled to deduct the amount from the wages due. *The Araminta*, xxix. 582.

6. *Master has no authority to sign bill of lading of goods not on board.* The master of a ship has no general authority, as such, to sign a bill of lading for goods which are not put on board the vessel; and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board. *Grant v. Norway*, ii. 337.

7. *Master signing bill of lading of goods not on board.* Where a captain has signed a bill of lading for a cargo that is actually on board his vessel, his power is exhausted; and he has no power, by signing other bills of lading for goods that are not on board, to charge his owner. *Hubbersty v. Ward*, xviii. 551.

8. *Authority of master to pledge credit of owner.* The authority of the master of a ship to pledge the credit of his owner is incident to his being employed to bring the ship to the end of its voyage, and to obtain things necessary for that purpose he may, in the absence of the owner, or any easy means of communicating with him, pledge his credit, or even borrow money in his name, where immediate payment for such necessary things is required; but he has no authority to borrow money to pay for work previously done. *Beldon v. Campbell*, vi. 473.

9. *Borrowing money.* In an action for money lent, it appeared that the defendant, residing at Exeter, was owner of a ship, and that P., the master, being wind-bound in a river, at the distance of one day's post from Exeter, borrowed 5*l.* of the plaintiff, to buy provisions. The master was called as a witness, but was not asked whether he could have got the goods on the owner's credit. *Held*, that the jury were justified in

inferring that there was such necessity for borrowing the 5*l.*, as to make the defendant liable. *Edwards v. Havell*, xxiv. 303.

10. *Hypothecation by master.* The master of a ship has no authority to hypothecate the ship for money advanced for repairs, unless the payment of the money borrowed is made to depend upon the arrival of the ship; nor can he pledge the ship itself and the personal credit of the owners. *Stainbank v. Fenning*, vi. 412.

11. The master of a ship obliged to borrow money in a foreign port for repairs of the vessel, has no authority to mortgage the vessel so as to transfer the property in it to the lender; but he may, in case of necessity, hypothecate it, so as to give the lender a right to proceed against the vessel by admiralty process, provided the lender incurs the sea-risk, and the hypothecation is only to take effect in case of the safe arrival of the vessel. The master has no authority to hypothecate the ship, and also to pledge the owner's personal credit, however low may be the amount of interest required by the lender. *Erle, J., dubitante. Stainbank v. Shepard*, xx. 547.

12. *Passenger ship—Duty of master to forward passengers.* If any passengers of a passenger ship shall, without any neglect of their own, (as by reason of the ship being lost,) find themselves within any colonial or foreign port, the master of the ship is bound under "The Passengers Act," to forward them to their original destination; and the amount expended by him in forwarding them may be recovered from the underwriters of a policy of assurance on the passage-money against all costs, charges, and liabilities to which the owner may be subjected under sects. 46 to 51, of the act in question. *Gibson v. Bradford*, xxx. 194.

III. Collision.

1. *Admiralty regulations—Obligation to keep a look-out.* The admiralty regulations issued under the 14 & 15 Vict. c. 79, and which direct all sailing vessels to carry a light, are applicable to sailing vessels within the port of London, although the corporation of London, as conservators of the navigation of the Thames, have made in that port a by-law, which directs lights to be carried by steamers, but does not provide for the case of sailing vessels. Vessels are as much bound to keep a look-out as they were before the statute. The fact that a vessel was without a light when injured does not of itself relieve the vessel running her down from liability. *Morrison v. The General Steam Navigation Co.* xx. 455.

2. *Duty of vessels approaching each other.* Where two vessels are approaching each other in such a manner that there is danger of a collision, each vessel must port her helm. *The Panther*, xxiv. 585.

3. *Neglect of regulations respecting lights.* The neglect of a vessel to observe some of the admiralty regulations in regard to carrying lights, will not prevent a recovery of damages for a collision, if such neglect did not contribute to the injury. *Ib.*

4. *Lien on ship causing.* Damage caused by collision creates a lien on the ship in fault. *Harmer v. Bell*, xxii. 62.

5. *Change of ownership as affecting liability.* In a case of collision, a subsequent change of ownership does not affect the liability of the ship. *The Bold Buccleugh*, ii. 536.

6. *Rule of navigation—Vessels close hauled.* The general rule of navigation, where two vessels are close hauled and nearing one another is, that the one on the port tack should give way, and the one on the starboard tack keep her luff; but this rule will not excuse the vessel on the starboard tack not taking other measures to prevent a collision if necessary. *The Lady Anne*, i. 670.

7. *Pleading.* The pleadings should state the cause of the collision as accurately and distinctly as possible, leaving nothing to inference. *Ib.*

8. *Rapid sailing—Look-out.* There is no fixed rule as to the rate of sailing, which depends upon the locality and other circumstances; but where a ship is sailing at a

rapid rate, her master and crew are bound to exercise greater caution. *Held*, that where a steamship was going at the rate of twelve and a half knots an hour, in a dense fog, and seven hundred miles from land, and the evidence showed that she had only the ordinary look-out, and only one man at the wheel; that proper arrangements were not made as to the engines, or for reporting orders to the engineers; and that an erroneous order was given to the man at the wheel; her owners could not avail themselves of the plea of inevitable accident in a cause of damage. *The Europa*, ii. 557.

9. "*At the masthead*," meaning of. An admiralty regulation says: "All sailing vessels at anchor, at roadsteads or fairways, shall exhibit between sunset and sunrise a constant bright light at the masthead;" and the act says, in case of collision from neglect of these regulations, the party in fault shall not recover damages. A sailing vessel was lying, after sunset, with a light in the larboard mizzen rigging, but none at the masthead. A steamer came into collision with her. In a cause of damage, the Trinity Masters, under a direction of the judge, were of opinion that the light hoisted where it was, would be more visible to the steamer than if at the masthead; and the judge gave decree against her. *Held*, reversing the decree of the court of admiralty, that "at the masthead" meant "at the very top" of whichever was the standing mast; that the statute was imperative; that the regulation must be literally complied with at the peril of the party; and, as it appeared that the collision arose out of the non-observance of such regulation, the sailing vessel could not recover. *Valentine v. Cleugh*, xxix. 49.

10. *Pilot—Interference of master and crew*. A ship under sail, and in charge of a licensed pilot, in running through the Downs on a dark night, came into collision with a ship at anchor. *Held*, first, it is the duty of the pilot and not that of the master, to determine where, and whether or not, the ship shall be brought up. Secondly, interference, as distinguished from suggestion, is the doing that which the pilot alone ought to have done. Thirdly, a hail from any of the crew on the look-out to alter the helm, if such advice be adopted by the pilot as a proper measure, will exonerate the owners; otherwise if the advice be adopted by the pilot unthinkingly. *The Lochlibo*, i. 651.

11. *Both vessels in fault—Pilot—Costs*. In a collision, where the court, assisted by Trinity Masters, decided that both vessels were to blame, but that with respect to one of them the blame was to be attributed to the pilot, who had been taken on board under a local (Liverpool) Pilot Act. *Held*, that such vessel was not to contribute to the loss; and with respect to costs, that each party must pay his own costs. *The Montreal*, xxiv. 580.

12. *Lights exhibited by neither vessel*. In a cause of collision, the fact that neither vessel exhibited a light was unnoticed in the pleadings and the argument; but it was *held*, that as lights ought to have been exhibited, neither vessel could recover. *The Aliwal*, xxv. 602.

13. *Violation of statute regulations*. A steamer in coming down the River Mersey, kept too near the larboard shore, instead of keeping towards the starboard shore, contrary to the stat. 9 & 10 Vict. c. 100, s. 9, and 14 & 15 Vict. c. 79, s. 27. *Held*, that, under the facts of the case, damage should be pronounced for. *The Nimrod*, ix. 560.

14. *Admiralty regulations—Lights—Question for jury*. The admiralty regulations require vessels to exhibit certain lights at night, and prescribe rules for two vessels meeting where there is risk of a collision. In an action for damages by collision, where the plaintiff's vessel is proved to have shown the proper lights, the master of the other vessel is not to judge whether or not there was risk of a collision, but it is for the jury to decide whether there was such a probability, and whether the other vessel followed the prescribed rules. *The General Steam Navigation Co. v. Mann*, xxvi. 339.

15. *Liability of freight for damages*. The whole freight due, or to grow due, during

the voyage which may be in prosecution or contracted for at the happening of loss by collision, is liable to answer for such loss. *The Benares*, i. 637.

16. *Second action for same cause.* An American ship was arrested, and bailed in a cause of collision promoted by the owners of the ship and cargo damaged, and the damage pronounced for. Subsequently, it was ascertained that the damage to the cargo was to a greater extent, and they arrested the ship in a fresh action. *Held*, that the action could not be maintained, the parties and cause of action being the same. *The Kalamazoo*, ix. 557.

IV. *Charter-party, Bill of Lading, Freight, Demurrage.*

1. *Construction of charter-party—Accident to colliery.* By a charter-party the master of a vessel agreed to proceed to a certain colliery, and load a cargo. Both parties knew that an accident had happened preventing the colliery being worked; but the agents told both parties they should resume work in a few days. The ship was loaded in her turn, but not till several days later than was expected. *Held*, that if the colliery got to work in a reasonable time, and the ship was loaded in a reasonable time after, the freighters were not liable to compensate the master for the delay. *Harris v. Dreesman*, xxv. 526.

2. *Performance.* An agreement to "sail and proceed from Amsterdam with all convenient speed to L., to leave Amsterdam not later than all March," is fulfilled by a vessel which quits the docks at Amsterdam on the 30th of March, partly ballasted, reaches the entrance of the North Holland Canal that evening, arrives at Alkmaar on the 31st; stays there on the 1st and 2d April, completing her ballast; sails on the 3d, and arrives at L. on the 17th. *Van Baggen v. Baines*, xxv. 530.

3. *Stipulation as to commission.* A charter-party stipulated that the ship was to be consigned to E. "on the usual terms," one of which was, that E. might procure the homeward freight, at a commission of 5*l.* per cent. The owners, however, made an agreement with a third party for the homeward freight. The charterers who had previously agreed with E. for a share in the commission, thereupon sued the owners for a breach of their agreement, but were unable to prove at the trial in what proportion the commission was to be divided between themselves and E. *Held*, that the stipulation as to commission having been inserted for the benefit of E., the plaintiffs, notwithstanding their inability to prove their interest in the commission, were entitled to recover as trustees of E. *Robertson v. Wait*, xx. 434.

4. A charter-party stipulated, that the ship should sail to P., take a cargo there, proceed therewith to V., thence to any port or ports between V. and G., and to G., there discharge the cargo taken at P. and the ports between V. and G.; and at all or any of the above ports take a full cargo and return to London—freight being paid at 5*l.* per ton—"such freight being in full for the voyage, the cargo from P. being freight free, as well as goods shipped at V., if any, for the port at which she should load her homeward cargo." She carried goods from V. to X., a port between V. and G., but took no homeward cargo at X. Seventy running days were allowed for "loading, discharging, and reloading." *Held*, that no freight could be recovered from V. to X.; and that the seventy days were exclusive of the discharging of the homeward cargo at London. *Sweeting v. Darthez*, xxv. 326.

5. *Meaning of "final sailing."* By a charter-party, the freight was to be paid "on the final sailing from the port of loading." The vessel was wrecked after she had her clearances on board, and had left the dock gates, and reached a ship-canal between high and low water, and within the jurisdiction of the port. *Held*, not to be a final sailing, within the charter-party. *Roelandts v. Harrison*, xxv. 470.

6. *Principal and agent—Fraud—Title to goods.* A chartered a ship in his own name, and consigned it to B in Cuba, under an agreement that B should ship goods and consign them to A, and that A should accept B's bills for their value. After A

had accepted bills on the faith of the agreement, B sold the cargo to C, who had notice of the terms of the charter-party, and it was consigned to another person. *Held*, assuming that the fact of A's appearing principal on the charter-party made it incumbent on C to ascertain the relations between A and B, yet that, as B was actually the principal, and not the agent of A, C could safely deal with him for the cargo, and that the circumstance that B had committed a fraud on A did not prevent C from obtaining a good title to the goods. *Zulueta v. Tyrie*, xxi. 582.

7. *Breach, what is.* The defendants agreed by a charter-party that the ship should proceed to G., or as near thereto as she could safely get, and there load a cargo, the act of God, &c., and every other dangers and accidents of the seas, rivers, and navigation during the voyage excepted. The ship arrived on the 5th of November off the mouth of the Danube, and waited there a month, during which there was not enough water^a for her to pass the bar. She was then driven by stress of weather to the nearest safe port, where she afterwards took in a cargo and sailed for England. On and after the 7th of January there was sufficient water in the port for the ship to have crossed and to have gone up to G., and there shipped a cargo. *Held*, that, under these circumstances, there was a breach of the charter-party, and that the defendants were not justified in putting an end to the contract by any of the excepted causes. *Schilizzi v. Derry*, xxx. 312.

8. *Inability to perform voyage.* The owner of a vessel covenanted, by charter-party, that she should carry six successive freights of coal; the last voyage should be made not later than the last day of February, 1853, "the act of God, the queen's enemies, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind during the said voyage always excepted." Three voyages were duly performed, and to an action brought for the non-performance of the other three, the defendant averred damages received from dangers of the seas unfitting the vessel for the fourth voyage, that repairs were made as soon as practicable, but that the vessel could not be got in readiness for sea by the day aforesaid. *Held*, to be no defence, inasmuch as the inability to perform the voyages within the time specified did not discharge the contract, or afford any excuse for not commencing the fourth voyage. *Pope v. Davidge*, xxviii. 569.

9. *Custom—Evidence.* Under a charter-party to load "a full and complete cargo of sugar, molasses, ^{and} other produce," the vessel took as much sugar and molasses packed in hogsheads and puncheons as could be so carried, leaving spaces which would have contained small packages. In an action for not loading the agreed cargo, it appeared that, by the custom of the port of lading, such a cargo was a full and complete cargo of sugar and molasses. *Held*, on appeal, that the custom applied was a reasonable one, not inconsistent with, but only explanatory of, the contract; and was therefore admissible to prove compliance with the charter-party. *Cuthbert v. Cumming*, xxx. 604.

10. *Dissolution of charter-party by war.* To a declaration for not taking a cargo on board the plaintiff's ship at a Russian port, according to charter-party, it is a good plea to aver that plaintiff and defendant, both British subjects, had notice of war between England and Russia before the breach of the charter-party; that the ship was a British registered ship; that no license from the queen could be obtained for loading any cargo there; that defendant could not, without trading with the enemy, have loaded the said ship as agreed; nor could the plaintiff, without trading with the enemy, have received such cargo on board. *Reid v. Hoskins*, xxx. 406.

11. Declaration on a charter-party to Odessa, there to load from defendant's factor, and return to England. Breach, defendant's default in loading, and his detaining the ship on demurrage at O., and not paying for it. Pleas, first, that before defendant, a British subject, had procured any cargo, and before ship arrived at O., this became a hostile port by declaration of war with Russia; so defendant could not fulfil his agreement without trading with the enemy; of which plaintiff had notice before

the lay-days expired, whereby the charter-party was rescinded. Second, denying the detention. Replication; two orders of council, at the beginning of the war, that enemies' property, not contraband of war, in neutral vessels, should be free from seizure; and allowing Russian merchantmen time to load within this kingdom and sail on their voyages; further, another order, later, but while time still remained to load in the lay-days, that neutral vessels might import or export goods not contraband, to whomever belonging; and that subjects and neutrals might trade with all places not blockaded, except that no British vessel should enter an enemy's port. Averment of neutrality of vessel and plaintiff; that O. was not blockaded nor the cargo contraband, so that it might and ought to have been loaded. *Held*, on demurrer, that the replication was no answer to the first plea, the first two orders being inapplicable, and the third too late to prevent the dissolution of the contract, or revive it. But, *Held*, that the plea was no answer to the action, for the cargo might perhaps have been loaded legally; or if not, it was because defendant's agent chose not to purchase until the ship arrived, and could not set up this omission as an excuse. *Esposito v. Bowden*, xxx. 336.

12. *Captain to sign bills of lading.* G. and the plaintiff, the master of a vessel, agreed by charter-party that the vessel should load flour, the "captain to sign bills of lading at more or less freight without prejudice to this agreement," and, being loaded, proceed to L., the freight to be "a lump sum of 100*l*." G. put some flour on board, and P., for himself and the defendant, 500 bags more. For the latter, the plaintiff signed a bill of lading, running "which I shall deliver in your name to Z. (defendant) paying me freight according to contract with G." P. inclosed this bill of lading to the defendant in a letter, saying "I have given an order in favor of G., that on delivery you will pay them as freight —," (naming a larger sum than would be due on the 500 bags in proportion to the whole cargo at 100*l*.) The defendant purchased P.'s interest, and received the 500 bags under the bill of lading. G. paid the plaintiff the 100*l*., and demanded freight for the 500 bags from the defendant, who did not pay it. *Held*, that there was no evidence for a jury of any contract by the defendants to pay freight on the 500 bags to the plaintiff. *Zwilchenbart v. Henderson*, xxv. 560.

13. *Goods put on board after bill of lading is signed.* If a bill of lading is signed before the goods are shipped, and afterwards, before the vessel sails on the voyage, described in the bill, goods are put on board as and for the goods named in the bill of lading, such bill will operate on such goods by way of estoppel, as against the shipper and master. And where the master of a vessel upon receiving property on board, signs and delivers to the owner a regular bill of lading, he cannot afterwards prejudice such owner by executing another bill of lading, acknowledging the property to have been shipped by another party. *Hubbersty v. Ward*, xviii. 551.

14. *Right to freight in respect of deck—Charter-party.* By a charter-party, it was agreed that (the cabin and state-rooms and sufficient room for cables, ship's stores, &c., throughout the charter-party being excepted) the vessel should take on board from the charterers (who were to have the full reach of the vessel's hold, from bulkhead to bulkhead, including the half deck,) a full and complete cargo, and should proceed to Halifax, and there deliver the said cargo. In consideration whereof, the charterers should pay for the use and hire of the said vessel, 420*l*. That such goods only as the charterers might direct should be received on board the said vessel; and that no goods were to be received in the cabin, or any part of the vessel, without the consent of the charterers. *Held*, that the deck was excluded from being let to the charterers, and therefore the freight in respect of the deck was due to the owners. *Neill v. Ridley*, xxviii. 436.

15. *"Highest freight."* The plaintiff declared, that by a charter-party he was to sail from S. to Southampton, and that the defendant thereby engaged to pay "that freight which the captain could prove to have been the highest paid on the same passage when the ship passed Elsinore, but not below 90*s*. per," &c. *Held*, that this did not extend

to freights payable on a passage on the same district of water, which might include London as well as Southampton; and that therefore proof by the captain that higher freights than 90s. had been then earned by vessels from S. to London, and that the freights to Southampton were at that time higher than the London freights, did not prove that a higher rate than 90s. had been earned on the same passage by water, as contemplated in the charter-party. *Jervis, C. J., dubitante. Held*, also, that the expression "highest paid," meant "highest payable," or "contracted to be paid." The words in the charter-party were, "freight which the captain could prove by evidence." *Semble*, that there was no variance between this and the allegation in the declaration, "freight which the captain could prove." *Gether v. Capper*, xxix. 242.

16. *Demand for redelivery of goods already shipped.* After goods have been taken on board a general ship to be conveyed on freight, and bills of lading signed by the captain, the owner of the goods cannot, before the sailing of the ship, insist upon the goods being redelivered to him without paying the freight that might be earned, and indemnifying the master against the consequences of the bills of lading signed by him. And if he do so, and the master refuses to deliver them up, and carries them to the port of destination, an action for the freight money can be maintained. *Tindall v. Taylor*, xxviii. 210.

17. *Primage—Pleading.* Declaration that certain goods had been received on board a vessel of the plaintiffs for conveyance from London to Port Phillip, upon the terms that, two months after the sailing of the vessel, freight and primage should be paid in advance. Averment that two months had elapsed since the sailing of the vessel and demand of the freight and primage, and that the defendant had not paid the amount. Plea, that after the receipt on board of the said goods, and after a reasonable time for the vessel to have sailed, and a reasonable time before she sailed, the defendant demanded a return of the goods, and gave the plaintiffs notice that he did not wish the same to be carried, and required a redelivery and return to him, but the plaintiffs wholly omitted so to do, and afterwards sailed with the said goods against the will of the defendant. Replication, that before the defendant's demand and the sailing, the captain, at the defendant's request, signed five parts of the bill of lading for delivery of the said goods to D. and Co., at Port Phillip, or their assigns, one of which parts was transmitted to the said D. and Co. by the defendant; that the defendant had not at any time paid or offered to pay the freight in the declaration mentioned, nor returned or offered to return the said part of the bill of lading, nor offered to indemnify the plaintiffs against any claim or right which D. and Co., or an assignee of the bill of lading, might have. Rejoinder, that D. and Co. were the agents of the defendant, and the said bill of lading was sent to them by the defendant to be held, and was held, by them as such agents of the defendant, and not otherwise, and that the defendant had always been and continued the legal owner of the goods, and that of this, plaintiffs had notice. *Held*, upon demurrer, that the plea was no answer to the action; that, consistently with the allegation in the plea, a reasonable time for the vessel to have sailed might have elapsed before the demand for a redelivery was made, as alleged, without any wilful or unjustifiable delay on the part of the master, and therefore that the plea was not helped by that allegation. But, secondly, supposing any doubt to have existed as to the legal effect of that allegation, it was removed by the replication, which showed that the action was maintainable. And thirdly, that the rejoinder was no answer to the replication. *Ib.*

18. *Evidence—Custom.* The plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and there having loaded a cargo of Indian corn to proceed to a safe port in the United Kingdom. The plaintiffs accordingly shipped at Salonica, 1,180 quarters of Indian corn; and on the 22d of February, 1846, the master signed a bill of lading, making the corn deliverable "to order of the plaintiffs or to their assigns, he or they paying freight as per charter-party." The plaintiffs indorsed the bill of lading, and sent it, together with the charter-party, to B, their London agent,

with orders to sell the cargo on their account; and they also, through B, insured the cargo "at and from Salonica to the port of discharge in the United Kingdom," &c., "corn warranted free from average unless general, or the ship be stranded." On the first of May, 1848, B employed the defendants, corn-factors in London, to sell the cargo, and sent them the bill of lading indorsed, the charter-party and policy of insurance; and they advanced 600*l.* on the cargo. The custom of corn-factors is to sell under a *del credere* commission, and when so selling not to mention the purchaser. On the 16th of May, 1848, the defendants sold the cargo to C and sent him a bought note, which stated that he had bought of them "1,180 quarters of Salonica Indian corn, of fair average quality when shipped, at 27*s.* per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, payment at two months from this date, upon handing over shipping documents." On the same day the defendants wrote to B, advising him of the sale, but without making any mention of the purchaser or of commission. The vessel sailed from Salonica on the 28d of February, and having met with tempestuous weather, the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo, having been surveyed, was found to be unfit to be carried further, and on the 24th of April it was sold. On the 23d of May, C gave the defendants notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March, 1849, C became a bankrupt. The plaintiffs brought the present action against the defendants to recover the price of the cargo, and declared specially on a *del credere* guaranty. *Held*, first, that evidence was not admissible of usage to explain the meaning of the contract. Secondly, that the meaning of the contract was, that the purchaser bought the cargo if it existed at the date of the contract; but that if it had been damaged or lost, he bought the benefit of the insurance; and, therefore, he was bound to pay the stipulated price in a reasonable time after the bill of lading and other shipping documents were handed over to him. *Pollock, C. B., dissentiente. Couturier v. Hastie, xvi. 562.*

19. *Action by shipowner against indorsee of bill of lading—Custom.* In an action for freight by a shipowner against the indorsee of the bill of lading, to whom goods had been delivered at Liverpool, and who had accepted them, the bill of lading making them deliverable, "he paying freight for them five eighths of a penny sterling per pound, with 5*l.* per cent. and average accustomed," it was *held*, that evidence was admissible that by the custom of Liverpool the plaintiff was entitled to a deduction of three months' discount from the freight; though such custom applied only to goods coming from certain ports in the southern states of America. *Brown v. Byrne, xxvi. 247.*

20. *Action for freight—Payment in admiralty court—Pleading.* To an action for freight, it is a good plea to the further maintenance of the action, that before the freight was earned, the master of the ship raised money for the use of the ship upon bottomry bond, pledging the ship and freight; and that upon the non-payment of the sum borrowed, and after the commencement of the action, proceedings were taken in the admiralty court; and that in obedience to a monition from that court, the defendant paid into the court of admiralty the amount of the freight, although the amount secured by the bottomry bond is less than the freight. The declaration alleged that "the defendants were indebted to the plaintiff for freight," for the conveyance of goods, &c. *Held*, bad in substance, it not appearing that the debt was a money debt, or that it was payable before the commencement of the action, but an amendment was allowed. *Place v. Potts, xx. 505.*

21. *Excess of authority by agent—Ratification by principal.* The defendant chartered a ship to bring from Bombay, at 3*l.* 5*s.* per ton, a cargo, not being his own, but for the purpose of making a profit on an increased rate of freight. The defendant's agents filled the carrying part of the vessel and then the cabin with their own goods, which were consigned to the defendant, as their factor, for sale. The defendant refused to pay the plaintiff more than 3*l.* 5*s.* per ton for the freight of the cabin goods,

but had charged his agents with the payment of 7*l.* per ton, and had allowed them commission at that rate. The goods having been stopped for the non-payment of a bill of exchange, given in respect of them, the defendant, after the commencement of the action, the bill having been paid, obtained possession of the goods. *Held*, first, that although the defendant's agents at Bombay had no authority to put the goods into the cabin, yet if they did so, and the defendant on the ship's arrival took to them and received the freight, he was bound to pay the plaintiff the current freight, and was not confined to the charter freight of 3*l.* 5*s.* per ton. And, secondly, that the action was not brought too soon, for that the taking to the cabin cargo for the purpose of obtaining the freight rendered the defendant liable irrespective of the possession obtained after action brought. *Micheson v. Nicol*, xiv. 398.

22. *Lien for freight.* By a charter-party, it was stipulated that the ship should proceed to London, and there deliver her cargo on being paid freight a lump sum of 2,800*l.* in full of all charges. At the end of the charter-party was the following clause: "The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any." Under this charter-party, the charterers shipped goods as their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in London, who were under a general engagement to honor bills drawn upon them by the charterers, upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment in question. *Held*, that the owners had a lien upon the goods for the entire lump freight. *Gledstanes v. Allen*, xxii. 382.

23. *Shipment of corn—Increase of bulk by heat.* A vessel was chartered to carry a cargo of corn for freight payable at a certain rate per quarter. 2664 quarters were shipped, and the master signed bills of lading in the usual form, which contained a memorandum "quantity and quality unknown." The vessel arrived with the cargo, and it was found to contain 2785½ quarters. In the voyage, a portion of the corn had become heated and damaged, whereby its bulk was increased. *Held*, that freight was payable on the quantity of corn shipped, and not on its measurement at the port of discharge. Per Pollock, C. B., Alderson, B., and Platt, B. *Martin, B., dissentiente. Gibson v. Sturge*, xxix. 460.

24. *Action for freight—Jurisdiction of the court of admiralty.* To an action for freight, the defendants pleaded in bar of the further maintenance of the action, the hypothecation of the ship and freight by the master, a suit in the admiralty court by the obligee of the bottomry bond, a monition commanding them to bring the freight into that court, and that the freight had been paid in by them pursuant to the monition. *Held*, that the plea was a good answer to the action, as the court of admiralty had jurisdiction to decide upon all claims to the freight so paid into court, made by any of the parties to the suit before it. *Place v. Potts*, xxvi. 565.

25. *Demurrage—Question of fact.* It is a question of fact for the jury, whether the indorsee of a bill of lading is liable for demurrage. *Wegener v. Smüh*, xxviii. 356.

26. Where a charter-party contained a provision for demurrage, and the bill of lading stated the cargo to have been received as against freight and "other conditions" as per charter-party, and the assignee of the bill of lading accepted the cargo and paid the freight, but repudiated his liability to pay for demurrage, it was *held*, in an action by the shipper against the assignee, for the demurrage, that the judge properly left it to the jury to say whether the defendant was liable for the demurrage. *Ib.*

27. *Liability of indorser of bill of lading for acceptance.* By the charter-party, the master was to "deliver his cargo against payment of freight" and "freight to be paid on delivery of cargo." The bill of lading made cargo deliverable "on paying freight as per charter-party," and was indorsed to defendants; they received part of the cargo; the master then demanded payment of freight thereon; defendants refused,

and the delivery was stopped. They then notified him they should not pay for demurrage thus occasioned. *Held*, that defendants by accepting such a bill of lading agreed to accept the cargo within a reasonable time and to pay all the charterer must have paid; that they were bound to pay freight as the cargo was delivered, had broken their contract, and were liable in damages for the delay, at the rate stipulated in the charter-party. *Moller v. Young*, xxx. 345.

28. The freighter of goods who has entered into a contract noted on the bill of lading with the shipowner to pay demurrage, the goods being deliverable by the bill of lading to him or his assignees on paying freight, is not relieved from his liability to pay demurrage, although the bill of lading has been assigned before the arrival of the ship, and the goods are parted with by the shipowner to the assignee without satisfaction of the shipowner's lien. *Harrison v. Spaeth*, xxviii. 132.

29. *Liability of consignee—Acceptance.* A consignee by accepting goods under a bill of lading, does not render himself liable to the master for demurrage, unless it makes, either in terms or by reference to the charter-party, the goods deliverable only on payment of demurrage; in which case he does render himself liable. But where the words were "they paying as per charter-party," the word "freight" having been struck out, it was *held*, to apply to payment for the carriage of the goods, and not to render the consignee liable for demurrage at port of shipment. *Smith v. Sieveking*, xxx. 382.

V. Towage.

1. *Ordinary towage.* Ordinary towage is service rendered in expediting an undamaged ship on her voyage. In ordinary towage, an agreement may be affected by subsequent events. *The Kingaloch*, xxvi. 596.

2. *Extraordinary towage.* Extraordinary towage is a service rendered in bringing a disabled ship to a place of safety. In extraordinary towage the agreement is, as a general rule, binding. The state of the ship must be fully disclosed, in order that the agreement may be valid *ab initio*. *Ib.*

VI. Sale and Transfer of Vessel; Mortgage of Ship and Freight; Registration.

1. No action can be maintained for the breach of an executory contract for the sale of a ship, unless the contract be by an instrument in writing containing a recital of the certificate of registry. *Duncan v. Tindal*, xx. 224.

2. *Transfer by bill of sale—Indorsement on—Registry.* If a party transfers to another a part of a ship by bill of sale, on which is indorsed, that if the transferor pay the transferee a certain sum of money and interest, then the sale shall be void, and the bill of sale be registered without any notice being taken of the indorsement, and the transferee sells to a third party, the original transferor has still a right to redeem, with costs, so far as they are caused by the denial of his right to redeem. *Whitfield v. Parfitt*, vi. 48.

3. *Unregistered contract of sale—Equity.* A contract for the sale of a ship, or a portion of a ship, cannot be recognized in a court of equity, unless it has been registered. Whether upon such a contract an action for damages would lie, *quære*, per Lord Cranworth, L. J. *Hughes v. Morris*, xii. 291.

4. The provisions of the Ship Registry Acts, apply equally to contracts as to sales, and the whole frame of these acts negatives any equity resulting out of the doctrine of notice. An unregistered agreement, therefore, with the registered owner of a ship, which the owner subsequently transfers for value to another person who has notice of the agreement, cannot be enforced either as against the ship or its proceeds. *McCalmont v. Rankin*, xix. 176.

5. *Sale by part-owner in foreign port under power of attorney—Mortgage.* Where B., part-owner of a ship, gave the master, the other part-owner, a power of attorney to sell his share, and the master sailed, and, in a foreign port, sold the whole, B., in

the mean time, having mortgaged his share of the ship and freight to one who had no knowledge of the power of attorney, and after the ship had sailed, it was *held*, that the mortgagees of B. had the preference of title over the purchaser from the master. *Cato v. Irving*, x. 17.

6. *Mortgagee of ship not entitled to proceeds of cargo—Privity of contract.* The mortgagee of a ship who takes possession of her at the end of a voyage is not entitled to any part of the proceeds of her cargo, when there is no privity of contract between the parties as to the cargo, but only as to the ship. This principle is analogous to the well-known rule, that a mortgagee is not entitled to back rents against a mortgagor in possession. *Alexander v. Simms*, xxvii. 288.

7. *Liability for interest, after condition broken.* A mortgage of a vessel having been executed to secure repayment at the end of six months of a sum of money, with interest thereon at the rate of 10l. per cent., with a power of sale at the end of that time, and the interest and principal not having been paid at the expiration of the six months, it was *held*, that the defendant was liable to pay interest at the rate of 10l. per cent. in respect of the time that elapsed after the expiration of the six months. *Morgan v. Jones*, xx. 454.

8. *Mortgage of freight.* S., being the sole registered owner of the ship *Ellen*, sent her to H., at New Orleans, with general instructions to do the best he could to load her on freight, or shipping cotton on joint account of S. and H. It is usual when cotton is shipped on account of the shipowner, to insert in the bill of lading "nominal freight," or the terms "no freight, being the owner's property," which enables the shipper to sell bills drawn against the shipment on better terms, or to obtain a larger advance than where full freight is charged. Purchases were made on joint account of H. and S., and bills of lading drawn in the above form on several occasions during two voyages of *The Ellen*. In May, 1851, cotton was purchased by H., on joint account of H. and S., and shipped on board *The Ellen*, for which two bills of lading were signed. The first was dated the 7th of May, and was for 381 bales of cotton, to be delivered unto order or assigns, he or they paying freight for the said cotton, 1s. per bale, being owner's property, and when draft against the same is paid, say 2,590l. 9s. 8d., with primage and average accustomed. The other was dated the 15th of May, and was for 381 bales, and contained a similar clause as to the amount of freight, but not stating them to be owner's property. These bills were signed by the master, and the draft for 2,590l. 9s. 8d., referred to in the first bill of lading, and drawn for the invoice price of the cotton, was purchased on the day of its date by the plaintiff's house at New Orleans, who took, at the same time, from the shippers, indorsed in blank, the first bill of lading, as security for the due payment of the draft. A bill of exchange dated the 15th of May, 1851, for 3,169l. 19s. 3d., was in like manner drawn for the price of the cotton, in the second bill of lading, which bill of exchange was also purchased by the plaintiffs; the second bill of lading being in like manner indorsed to them. These bills, when due, were dishonored by S., and were taken up by the plaintiffs. On the 10th of May, 1851, S. being indebted to the defendants, assigned *The Ellen*, by way of mortgage, with all her freight and earnings, with a power of sale, and authority to receive the freight. *Held*, that the mortgagees were only entitled to demand from the plaintiffs the freight specified in the respective bills of lading for there was authority given by S. to H. to ship the goods on those terms, and the mortgage did not invalidate an arrangement made pursuant to previous authority from the mortgagors, and before the mortgage could be known. *Brown v. North*, xvi. 486.

VII. *Bottomry Bond.*

1. *Bond on ship, freight, and cargo—Ship abandoned as total loss.* Bond on ship, freight, and cargo; the money to be paid within twenty-one days of the ship's arrival in the port of London, and not to be demanded or recovered in case the ship and

her cargo be lost, miscarry, or be cast away on the voyage. The ship never reached the port of London, but was abandoned as for a total loss at Algoa Bay, where part of the cargo was sold, and the proceeds brought to England, and part put into another ship, and also brought to England. The fact that the ship could not be repaired was not proved. *Held*, that the bond must be pronounced for, and enforced against the proceeds of the cargo and the cargo transhipped. *The Elephanta*, ix. 553.

2. *Charter-party executed after bond on ship and freight.* The master of a ship having given a bond on ship and freight to A, subsequently chartered the ship to B, who, by the terms of the charter-party, was to advance part of the freight to defray necessary expenses already incurred; the charter-party then provided for payment of the balance of freight to A, in discharge of the bond. *Held*, that the bondholder had no claim upon the freight advanced as against the consignee of the cargo and assignee of the freight. *The Cynthia*, xx. 625.

3. *Repairing damaged ship—Want of notice of intention to take bond—Advances on personal credit.* A British ship, being damaged, was repaired at Elsinore. S. & Co. undertook the management of and ordered the repairs, and corresponded with the owner of the ship and part-owners of the cargo, but gave no intimation to them or the master of their intention to take a bottomry bond as a security, for many weeks, and only just before the ship sailed; bond pronounced against, with costs, on the ground that the repairs were ordered, in the first instance, on personal credit, and that S. & Co. should have given the master and owners immediate notice of their intention to take a bond, and that advances on personal credit cannot afterwards be converted into a bottomry transaction. *The Wave*, iv. 589.

4. *Notice to consignees.* A letter from the British consul in a foreign port, written on behalf of the master of a small British vessel and his agent, informing the consignees in England of the damage sustained by the ship, but making no application for money, nor referring to the necessity for repairs, is sufficient notice for the purpose of raising money on bottomry. The defence intended to be relied on as against a bottomry bond, should be stated in the pleadings. *The Bonaparte*, xx. 649.

5. *Bond given by consul—Mutiny.* A British ship, whose master and officers had been murdered in a mutiny, came into a foreign port, where the British consul took possession of her, appointed a master, and gave a bottomry bond on the ship. Bond pronounced for. *The Cynthia*, xx. 623.

6. *Bond taken by agent.* There are cases in which an agent may take a bottomry bond. A ship, damaged on leaving New York, returned to that port. M., who had acted as agent for her owner, gave the owner notice of the accident, and of his intention to get the ship ready for sea again as soon as possible. The owner communicated with M., and with the ship's master, but provided no funds for the expenses; there was no evidence that the owner or master had credit at New York. When the ship was ready for sea, the master, not being able to pay for the expenses, advertised for a loan on bottomry; and M.'s offer being the lowest, the bond was given. *Held*, that the bond was valid. *The Oriental*, ii. 546.

7. *Court may allow bondholders to pay claims.* In a cause of bottomry, where no appearance is given for the owners, and actions for wages, &c., are entered against the ship, the court may allow the bondholders to pay the claims which were the subject of those actions, on giving security for the protection of the owners' interests. *The John Fehrman*, xx. 648.

VIII. Miscellaneous Cases.

1. *Liability of agent employed to obtain charter-party—Retention of freight for private debt.* A & B owned a ship. A transferred his share to C. "A & B" were partners, and the name of the firm was retained after A's death. The firm, as ship's husband, employed defendant, as agent to obtain a charter-party. The agent having a debt

due him from the firm, received the freight beforehand under the charter. He knew nothing of the transfer to C. *Held*, in an action by the surviving executor of C, and B, that the defendant was liable either on the count for money had and received or for neglect of duty, he having no right to retain the freight, which belongs to the owners of a ship. *Walshe v. Provan*, xx. 570.

2. *Death of master—Ship rescued from captors—Master in the navy.* A British ship, whose master had died, having been rescued from captors, was sent home under the command of a master in the navy, who was placed in charge by the naval officer commanding on the station. On her voyage she met with bad weather, and put into a port at Fayal, where she was, after survey, sold at public auction to a Portuguese merchant, by the master. *Held*, first, that the navy master in command had, as to the sale, the ordinary power of a master and more; second, that under the law of England, as well as under the general maritime law, the master has no power to sell a vessel except in case of necessity; third, that the facts proved did not show such necessity; fourth, that the laws of Fayal, supposing them to be as alleged, did not justify the sale; fifth, that the case must be decided by the general maritime law; and that a British court of admiralty could not adopt as an exception to this, a local law rendering valid the sale of a British ship in a foreign port through the executive power of an officer of the customs, without the judgment of a court of justice; sixth, that the claimants were entitled to costs because it is now laid down by all the courts that costs are to follow the result in every case. *The Eliza Cornish*, xxvi. 579.

3. *Passenger ship—Emigration officer—Stat. 15 & 16 Vict. c. 44.* An emigration officer appointed under the 15 & 16 Vict. c. 44, is justified, under sect. 26, in refusing to certify that the requirements of the act have been complied with, if he, acting *bonâ fide*, deems that the quantity of cargo on board of a passenger ship is such as to endanger the safety of the ship, although none of the articles expressly prohibited are on board, solely because the ship is too deep in the water. Sect. 16 does not apply to such a case. *Steel v. Schomberg*, xxix. 97.

See SEAMEN; SALVAGE.

SIMONY.

An agreement by two incumbents to exchange their livings in their present state, and that one of them shall not call on the other to pay for repairs, is not necessarily simoniacal. It seems, that if the dilapidations are insignificant, such agreement is not simoniacal, nor an agreement mutually to forego the amount, where the dilapidations are nearly equal. And further, that if facts are pleaded which show that an agreement must necessarily be simoniacal, it need not be alleged that the agreement was made "corruptly," in order to bring it within the 31 Eliz. c. 6. *Goldham v. Edwards*, xxx. 485.

SLANDER.

See LIBEL AND SLANDER.

SMUGGLING.

See (SHIPS AND SHIPPING) *The Attorney-General v. Robson*, iv. 405.

SPECIFIC PERFORMANCE.

1. *Jurisdiction—Small matter in dispute.* The court will not speculate as to what damages a jury might have given for the breach of an agreement, nor on the damage caused to property by failure of a sale; therefore the specific performance of an agreement to purchase land, where the consideration money is 50*l.*, is not too small a matter for the jurisdiction of the court. *Bennett v. Smith*, x. 272.

2. *When court will not enforce performance—Discretion.* A court of equity will not enforce a contract when the party seeking to enforce it has made an independent

engagement as an inducement for the other party to contract, but has refused to fulfil that engagement. A court of equity has complete discretion whether to enforce a contract or not. *Myers v. Watson*, vii. 66.

3. *Ambiguous contract.* A contract for a lease of "coals, &c.," or "minerals," is too ambiguous to be carried out by this court. *Price v. Griffith*, viii. 72.

4. *Contract by part-owner for lease of whole property.* A contract by the owner of one undivided moiety of a colliery, for a lease of the whole colliery, will not (in the absence of fraud or collusion) be decreed to be specially carried out as to his own moiety, either with or without compensation. *Ib.*

5. *Semble*, in such a case the parties will be left to damages at law. *Ib.*

6. *Covenant to renew lease by mesne landlord—Negligence of lessee.* Equity will not decree the specific performance of a covenant by the *mesne* landlord with his lessee for the renewal of the lease, after the lessee has wilfully neglected or refused to renew; and the non-payment, after demand, of the fine which the *mesne* landlord has paid to the superior landlord, amounts to such neglect or refusal. *Chesterman v. Mann*, xii. 192.

7. *Agreement to guarantee composition to releasing creditors—Misapprehension of both parties.* An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtor of their respective claims, is an agreement entered into with such creditors only as actually signed before that day, and cannot be enforced in favor of a creditor who, in consequence of a misapprehension by both parties of their respective rights, failed to sign the release before the day specified. *Emmet v. Dewhirst*, viii. 83.

8. *Of agreement by railway company to purchase lands.* Lands were settled to such uses as A and B should, by a joint deed, executed in the presence of witnesses, appoint; and, in default of appointment, to use in strict settlement, A and B being the first tenants for life in succession. In 1845, the S. W. Railway Company contracted with A and B for the sale of land, but the price was not fixed. In 1846, the company advanced part of the consideration money to them, on their joint receipt, in which it was stated that the money was "in respect of the lands, part of our estates, required for the purposes of the S. W. Railway Company." Before any formal exercise of their joint power by A and B, A died. Afterwards, other parts of the settled lands were contracted to be sold to the company. *Held*, that this was not such a contract as could be enforced against B; and that the receipt was not such a defective execution of the power as would be aided in equity. *Morgan v. Milman*, xiii. 312.

9. *Authority of agent of vendor.* Where the authority of the agent of a vendor is not sufficiently proved, a specific performance at the suit of the purchaser will be refused. *Wilkinson v. Stringer*, xiii. 500.

10. *Agreements to purchase leased houses—Tenants to quit when houses sold—Rent.* Houses described in the particulars as in the respective occupations of specified under-tenants, and as let to Messrs. I. "at the very low rent of 50*l.* per annum, who have received notice to quit" at a day past, but with a subsequent written permission to occupy on the same terms as before until the tenements are sold, were contracted to be sold subject to a condition, that the purchaser should be entitled to the rents from a specified day. On completion after that date, the purchaser claimed to be allowed a rent at the rate of 150*l.* a year, the sum which the under-tenants paid the tenant, on the ground that, in allowing the tenant to continue in possession at the rent of 50*l.* a year after the date of the contract for sale, the vendors were guilty of wilful default. On a claim by the vendors to enforce specific performance, it was *held*, that the purchaser not having required the vendors to turn the tenant out, they were not guilty of wilful default in allowing him to remain at the lesser rent; and specific performance was decreed, the plaintiffs accounting only for the lesser rent. *Crosse v. The Duke of Beaufort*, xi. 295.

11. *Contracts for sale and purchase of chattels—Trust.* Courts of equity will not lend their assistance to enforce the specific performance of ordinary contracts for the sale and purchase of chattels, unless there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject-matter is a personal chattel, will not prevent this court from enforcing the due execution of that trust. *Pooley v. Budd*, vii. 229.

12. *Incorrect particulars of claim by landowner.* A landowner, in the particulars of his claim against a railway company for land to be taken, stated that he was seised in fee of the land, subject to an unexpired lease, with a stated amount of rent reserved; he then claimed a given sum for his interest. To this the company assented by their solicitor, who signed an agreement to purchase. The abstract of title was then delivered to the solicitor, and it appeared that the land to be taken was not the whole which was included in the lease, and for which the rent was payable. The company refused to perform the contract, but specific performance was decreed, the landowner having filed a bill therefor. *Inge v. The Birmingham, Wolverhampton, &c. Railway Co.* xxiii. 601.

13. *Onerous contract by railway company to buy land if the owner would not oppose a bill in parliament.* An existing railway company, duly authorized, promoted a bill in parliament for extending their line, and entered into an absolute, but onerous, agreement with a landowner as to the purchase of his estate, in consideration of his withdrawing his opposition to the bill. The act passed, but without containing such special powers as to A's estate as had been agreed upon; no money was raised under the act, and the scheme utterly failed. *Held*, that the company were bound specifically to perform their contract, and that it was no objection to enforcing specific performance that it would involve the payment of the purchase-money out of the general funds of the company, and thus work hardship upon the shareholders who had no notice of the arrangement. *Hawkes v. The Eastern Counties Railway Co.* xv. 358.

14. *Agreement to purchase of trustees under power.* A testator devised copyholds to such uses as his two trustees, or the survivor of them, &c., should by deed appoint, and, subject thereto, to the use of the trustees, their heirs and assigns, forever. *Held*, that a purchaser who had agreed to buy was bound to complete on having a proper deed of appointment from the trustees without the trustees being first admitted. *Glass v. Richardson*, xv. 383.

15. *Agreement for a compromise of suit—Misapprehension.* A tenant for life filed a bill setting out documents which showed that he was such tenant, but by mistake he alleged that he was tenant in tail. After an interim order, the suit was compromised by agreement. *Held*, that the erroneous allegation of title in the bill could not be regarded as having led to such a misapprehension of it as to prevent a court of equity from enforcing the agreement for compromise. *Richardson v. Eyton*, xv. 51.

16. *Independent covenants in same indenture—Breach by one party no defence to breach by the other.* Where an indenture contains covenants by each of the parties to it, which, upon the true construction of the whole deed, are legally independent of each other, a breach of his covenant by one party, subsequent to the execution of the deed, does not constitute a ground of defence to a bill for the specific performance of his covenant by the other. *Gibson v. Goldsmid*, xxvii. 588.

17. *Construction of Inclosure Act, 8 & 9 Vict. c. 118, s. 147—Power of exchange under.* *Held*, in a vendor's suit for specific performance, that the inclosure commissioners have power, under the Inclosure Act, 8 & 9 Vict. c. 118, s. 147, to confirm an exchange of gavelkind lands in Kent for common socage lands in Middlesex; and that a title depending upon such an exchange was one which would be forced upon a purchaser. *Minet v. Leman*, xxxi. 400.

18. *Indefiniteness.* A contract to construct a railway according to a specification to be prepared by the engineer for the time being of a company is too indefinite to be enforced by a court of equity, and the court will not decree the execution of a bond,

agreed upon by the contractors to build such railway on such conditions. *The South Wales Railway Co. v. Wythes*, xxxi. 226.

19. *Alterations of written agreement.* Where in the draft articles of an agreement a mistake of a name has been made, and a bill be filed for the specific performance of those articles, the court may, on consideration of the articles and the proceedings in the case, decree a specific performance of the articles according to what appears to be their intention. *Wilson v. Wilson*, xxxi. 29.

20. *Misapprehension.* In suits for specific performance of contracts, courts of equity have a discretion whether to direct it, or not, but will usually do it unless it be highly unreasonable so to do. And proof that a clause was introduced into the contract inadvertently, and that there was serious misapprehension by one of the parties, may be a good defence for that party. *Watson v. Marston*, xxxi. 167.

21. *Agreement to compromise suit—Wrong method of proceeding.* The plaintiffs filed their bill against A and the executors of B, to charge A and the estate of B with the loss occasioned by a breach of trust on the part of A and B. After replication filed, the plaintiffs and A entered into an agreement to compromise the suit. On drawing up the agreement, the plaintiffs refused to complete, unless the representatives of B were joined as parties. A, on the other hand, insisted that it was no part of the understanding that they were to be parties, inasmuch as the estate of B had become the subject of a decree of the court in an administration suit. The plaintiffs then set down the cause for hearing; whereupon A presented a petition praying that the cause might not be heard, and that, in pursuance of the agreement for compromise, the bill might be dismissed. The court dismissed the petition, with costs, holding, first, that it was wrong in point of form, the proper proceeding to enforce the agreement being by independent bill for specific performance, and not by interlocutory proceeding in the suit; and, secondly, that the agreement appeared to be one which the court could not enforce even on bill filed. *Askew v. Millington*, iv. 165.

22. *Refusal of vendor to appoint valuer—Appointment by court.* A purchased of B certain property, at a price to be fixed by two valuers or by an umpire in case they differed, the umpire to be appointed before proceeding to the valuation. The valuers appointed no umpire, and could not agree. *Held*, that the vendor declining to join in any mode of determining the valuation, and the agreement having been executed to a certain extent, the court would enforce a specific performance, and appoint a valuer. *Jackson v. Jackson*, xix. 545.

23. *Misdescription as a ground for resisting specific performance.* Land was advertised to be sold in lots as freehold, subject to conditions, one of which was, that all objections to the title, not made within a prescribed time, should be considered as waived, and another of which provided, that any misstatements of the quality, tenure, outgoings, or other particulars, should be the subject of compensation. An objection to the title of one lot was taken after the prescribed time, that it was of copyhold tenure. It however appeared, that, under a composition with the lord, the rights of the copyhold were such, as to render the tenure hardly different from that of freehold. *Held*, that the misdescription did not form a ground for resisting a specific performance, although the decision might have been otherwise, had the misdescription been wilful. *Price v. Macaulay*, xix. 162.

24. *Misrepresentation.* Another lot was described in the advertisements, as being sold with a certain reservoir and waterworks, yielding a yearly rental of 60*l.*, exclusively of the land and buildings. An objection was taken after the prescribed time, and was supported by the fact, that this rent arose from supplying with water certain houses, separated from the reservoir by the property of strangers, over which the vendor had no right to carry it, beyond a license from year to year, by payment of a rent. *Held*, that the description contained such a misrepresentation as to preclude the vendor from enforcing a specific performance; and that the objection was not one as to title, and, therefore, was not obviated by the stipulation as to time. *Id.*

25. *Sale by auction—Misdescription.* Where copyhold premises had been let on lease in 1793, and rent had been paid and the possession gone up to the time of the sale by auction, according to the terms of the lease, it is not such a misdescription as will induce the court to refuse to enforce an agreement, if the premises be described at the auction as subject to a lease containing the usual covenants, although the original lease had been lost, and there was no evidence to show who was now liable under the covenants. *Flint v. Woodin*, xiii. 278.

26. *Bill by railway company against both vendor and purchaser of land.* A railway company, having contracted with a party, who, under a contract made some years previously, was a purchaser of land which the company required for the railway, but who had not paid his purchase-money, and appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor and purchaser. *Held*, that, as the purchaser was not, after the lapse of time and under the circumstances, entitled in equity to a decree for specific performance of the contract against the vendor, the bill must be dismissed as against him, with costs; and as against the purchaser, without costs. *The South Eastern Railway Co. v. Knott*, xvii. 555.

27. The rights of parties to agreements to enforce a specific performance in equity are not coextensive; for their respective rights depend upon their conduct, and the conduct of one may give him the right to apply to the court, while the conduct of the other may debar him from that right. *Ib.*

28. *Agreement for sale of land to railway company—Compensation to be settled either by arbitration or jury—Defective execution of power.* A and B, (father and son,) being first and second tenants for life of settled estates, with a joint power of general appointment by deed, agreed with a railway company for the sale of certain parts of the estates, the amount of compensation to be settled "either by arbitration or a jury, as A shall choose." Subsequently, other parts of the estates were agreed to be sold to the company, but the price was not fixed. The company paid a sum of money to A and B upon their receipt, in which it was stated that it was paid "on account of the compensation money to be ultimately fixed, and to be paid by the said company, in respect of the lands, part of our estates, required for the S. W. Railway Company." The company took possession of the several pieces of land, and proceeded with their works. A died before any thing further was done, and without having chosen by which means the compensation should be settled. Upon a bill by B for specific performance, it was *held*, affirming the decision below, that this was not such a contract as this court could enforce, and that it would not aid the defective execution of the power. Per the Lord Chancellor. Distinction in principle between this court aiding the defective execution of a power on the application of a purchaser for value, and on the application of the tenant for life, as against the remainder-men. Where the contract stipulates that the price shall be ascertained by arbitration, this court cannot interfere where the price is not so ascertained. *Quære*, whether this court will aid a defective execution of a power in a case, where the purchaser has a legislative power of taking the lands, and the assistance of the court is not sought by him, but by the donee of the power, to defeat the parties in remainder? *Morgan v. Milman*, xvii. 203.

29. *Misdescription.* At the Auction Mart, in London, the defendant purchased a house at Brighton, simply described as "Lot 1, No. 39, Regency Square." He afterwards discovered that the house was not actually in the square, but in a side street communicating with the square, but it was always named 39, Regency Square. *Held*, that there was no misdescription; and specific performance was decreed against the purchaser. *White v. Bradshaw*, xiii. 296.

30. *Agreement to purchase freehold and leasehold—Amount of each not ascertained.* If a person contracts to purchase certain freehold and leasehold estates, without definitely ascertaining the description of each of the two classes, the contract may be

enforced, if there was no misrepresentation on the part of the vendor, although there proves to be less of freehold than the purchaser supposed. *Monro v. Taylor*, xi. 175.

31. *Agreement to purchase if title made by given day.* If a purchaser contracts to purchase, if a title is made by a given day, but otherwise he will not, a court of equity cannot give relief to the vendor who has failed to give a title, and the purchaser may abandon the contract. *Parkin v. Thorold*, xi. 275.

32. *Intoxication of defendant.* In a suit for specific performance, the intoxication of the defendant at the time of the making of the agreement is not a ground of defence, no fraud being alleged. *Shaw v. Thackray*, xxiii. 18.

33. *Deed of separation.* The court will compel the specific performance by a husband of a deed of separation from his wife, by restraining him from visiting or molesting her contrary to his covenants. *Sanders v. Rodway*, xiii. 463.

34. The court of chancery has jurisdiction to enforce the specific performance of an agreement by which a person has bound himself to execute a deed, although such deed may be a deed of separation between himself and his wife. *Wilson v. Wilson*, xxxi. 29.

35. *Parol agreement to convey land in consideration of marriage.* To a parol agreement by a father to convey property in consideration of the marriage, then contemplated, of his daughter, followed by delivery of possession to the husband after the marriage, the Statute of Frauds cannot be set up by way of defence. Such a contract would be decreed to be specifically performed. *Surcome v. Pinniger*, xvii. 212.

36. A bill for specific performance dismissed without costs, the terms of the agreement not being capable of any certain construction. *Tatham v. Platt*, xv. 190.

37. If time is no part of the essence of a contract, then a reasonable time must be given for specific performance. *Parkin v. Thorold*, xiii. 416. See also xi. 275, and *Pegg v. Wisden*, xv. 12.

38. *Proceeding by claim.* Specific performance of a contract for the sale of a barge, stores, &c., decreed in equity upon a claim. *Claringbould v. Curtis*, xi. 197.

39. Leave given to file a claim to enforce the specific performance of a verbal agreement to purchase land, containing a statement of facts showing part performance. *Burnley v. The Eastern Counties Railway Co.* xv. 158.

40. A special claim may be filed for specific performance of a contract to grant a lease. *Anonymous*, xv. 477.

41. *Agreement in writing to demise—Parol agreement to pay premium—Statute of Frauds.* A filed a claim for specific performance of a contract by B, alleging that the defendant had, by agreement in writing, contracted to demise a house to the plaintiff for a certain term, at a stated rent, and that the plaintiff had agreed by parol, at the same time, to pay to the defendant a certain premium. The claim prayed that the defendant might grant a lease, the plaintiff offering to pay the premium according to the parol agreement. Held, on appeal, overruling the decision of the court below, (xi. 110,) that the Statute of Frauds did not present any obstacle to specific performance if there were no fraud. *Martin v. Pycroft*, xv. 376.

42. *Practice.* At the hearing of a claim for specific performance, the original contract, if disputed, must be proved and produced. *Marshall v. Davies*, i. 113.

43. *Rents and profits—Lasting repairs.* In a suit for specific performance, instituted by a vendor, who has remained in possession, it is unusual and improper (unless in a special case) in decreeing specific performance to direct in the account of rents and profits that the vendor shall be charged with rents and profits which, but for wilful default, he might have received. In such a decree it is irregular, excepting upon a special case, to direct the allowance to the vendor for expenses of lasting repairs, or of income tax in respect of such part of the property for which the vendor is charged an occupation rent. *Sherwin v. Shakespeare*, xxvii. 358.

See *Litchfield v. Brown*, xxiii. 198; *Meynell v. Surtees*, xxxi. 475; VENDOR AND PURCHASER.

STAMPS.

I. WHEN NECESSARY.

II. SUFFICIENCY OF STAMP; MISCELLANEOUS CASES.

I. *When necessary.*

1. *Sales of lands—Deed of partition.* The 48 Geo. III. c. 149, s. 22, provides that in all cases of sale of any lands, &c., where a duty is imposed on the conveyance thereof, in the schedule to the act annexed, in proportion to the amount of the purchase or consideration money therein expressed, the full purchase or consideration money paid, or agreed or secured to be paid for the same, shall be truly expressed on the principal deed, whereby the lands, &c., shall be conveyed. The 55 Geo. III. c. 184, s. 8, enacts that all the powers and provisions of the 48 Geo. III. c. 149, shall be extended to that act, so far as they are applicable; and by the schedule imposes an *ad valorem* duty proportionate to the consideration money, whatever its amount may be, upon any "conveyance" . . . "upon the sale of lands," and also imposes an *ad valorem* duty upon any deed of partition, where any sum amounting to 300*l.*, or upwards, is paid for equality of partition. *Held*, that the 22d section of the 48 Geo. III. c. 149, incorporated into the 55 Geo. III. c. 184, applies only to sales of lands, &c., properly so called, and does not extend to a deed of partition between several members of a family, by which the entirety of certain lands was conveyed to one of the parties in lieu of his undivided share in those and other lands, and in consideration of a sum of money paid by him for equality of partition. *Henniker v. Henniker*, xvi. 196.

2. *Memorandum admitted in evidence.* A written memorandum, signed by the defendant, acknowledging the terms of an antecedent agreement, or expressing the same consequence only as the law would imply from the agreement it acknowledges, is admissible in evidence without an agreement stamp. *De Porquet v. Page*, i. 265.

3. *Marriage settlement.* The 13 & 14 Vict. c. 97, which makes all settlements in which any definite sum of money, or any definite share in the funds of any company is settled, liable to an *ad valorem* stamp, does not include the assignment of a policy of life assurance to trustees as a marriage settlement. *Sanville v. The Commissioners of Inland Revenue*, xxvi. 484.

4. *Schoolmaster's prospectus.* The prospectus of a schoolmaster is only a proposal, and does not come within the Stamp Act. If a father accedes to the terms of the prospectus and sends his sons to the school, then there is a contract. *Clay v. Crofts*, vi. 485.

5. *Agreement to pay interest less than 20*l.** An agreement in writing by the defendant, in consideration of the plaintiff discounting for him a bill of exchange for 100*l.*, if the bill were not paid at maturity, to pay the plaintiff interest at the rate of 1*s.* in the pound per month till the whole was paid, requires no stamp, the subject-matter being the interest, which was not of the value of 20*l.* *Semple v. Seinau*, xx. 452.

6. *Agreement for sale.* Wherever a debtor has goods to sell, and the creditor says, "Deliver to me goods in satisfaction of your debt," the short transaction is, that the goods are sold, and the amount of the debt is taken as payment for them, and no stamp is necessary to a written agreement for such sale. *Chatfield v. Cox*, xi. 401.

7. *Promissory note, or agreement.* A document in the following form: "Borrowed, this day, of J. H., 100*l.* for one or two months; check, 100*l.* on the Naval Bank. (Signed) J. D." *Held* to be a mere acknowledgment, and not to require a stamp either as an agreement or a promissory note. *Hyne v. Dewdney*, xi. 400.

8. *Brief—Counsel's fees.* It is not necessary to affix the penny receipt stamp on a brief where counsel signs his name, acknowledging the payment of the fee. *In re Beavan*, xxvii. 199.

9. *Equitable assignment.* An equitable assignment, not being "an order for payment out of a particular fund," does not require a stamp. *Diplock v. Hammond*, xxvii. 202.

10. *Receipt.* A document, not purporting on the face of it to be a receipt for the payment of money, may be shown to be a receipt by evidence *aliunde*, and thus be brought within the stamp laws. *Regina v. Overton*, xxiv. 567.

11. Where it was proved to be the course of business between two parties, upon the payment of money in discharge of debts due from one to the other of them, merely to get the signature of the party receiving the amount, to an entry in a book containing the date, the name of the creditor, and the amount of the debt, such entry was held to be a receipt within the meaning of the stamp laws, and required a stamp. *Ib.*

12. *Agreement, or evidence of one.* In support of the plaintiff's claim for work done by him for the defendant, the following document written by the defendant, and signed by the plaintiff, was offered in evidence: "I agree to build up eight cabins, &c., for the sum of 40*l.*" Held, that it required a stamp either as an agreement, or as evidence of one. *Hegarty v. Milne*, xxv. 346.

13. *Security for repayment of money.* Where A had entered into a bond as surety for B, and B, by a deed, assigned personal property to A for the purpose of indemnifying him against any liability by reason of his having become surety for B in the bond, it was held, that the deed required an *ad valorem* stamp as a "security for the repayment of money to be thereafter lent, advanced, or paid," within the meaning of the 55 Geo. III., c. 184, schedule, "Mortgage." *Canning v. Raper*, xvi. 183.

14. *Newspaper liable to stamp duty.* Held, per Pollock, C. B., Platt, B., and Martin, B., on an information against the defendants for penalties and newspaper duties, under the 6 & 7 Will. IV. c. 76, schedule A, that the criterion of a paper being a newspaper liable to stamp duty was the period of its publication; and that no paper was to be deemed a newspaper unless it were published at an interval of or less than twenty-six days. *Dissentiente Parke, B.*, who held, that the paper in question was a newspaper, its main or general object being to give to the public information as to recent events. *The Attorney-General v. Bradbury*, vii. 550.

15. *Transfer of good-will.* The transfer of the good-will of a trade is an assignment of property, within the Stamp Act, 55 Geo. III., c. 184, and requires an *ad valorem* stamp, accordingly. *Potter v. The Commissioners of Inland Revenue*, xxvi. 441.

II. Sufficiency of Stamp; Miscellaneous Cases.

1. *Denoting stamp—Bond.* A, B, and C bound themselves by a bond in the sum of 600*l.* to a joint-stock company. The bond recited that A and B had agreed to join with C as his sureties, subject to the conditions thereafter contained, in consideration of the company then advancing C the sum of 300*l.* The bond contained the following conditions: that if any of the said bounden parties should pay to the company the principal sum of 300*l.* by three equal yearly payments of 100*l.* each, (on specified days,) or so much of the said payments as should be owing on the day of the decease of C, which should first happen, and should, in the mean time, until the principal sum should so become due, and until it should be all paid, pay the company interest at the rate of 5*l.* per cent. upon the said principal sum of 300*l.*, in equal half-yearly payments, (on specified days,) and that they also should in the mean time, and until the principal sum of 300*l.* should become due, and until the same, with interest, should be fully paid, well and truly pay the annual premiums which should, during the continuance of the loan, become payable on a certain policy of assurance, under the hands of three of the directors of the company, whereby the funds of the company were on payment by C, or his assigns during his life, of the annual premium of 23*l.* 14*s.* 7*d.*, made liable to pay the company's executors, &c., after his decease, the sum of 499*l.* 10*s.*, which instrument had then been deposited as a collateral security for

the payment of the principal sum of 300*l.* and interest thereon, and on the premiums which might be due and unpaid, provided the company might consider the policy as subsisting, notwithstanding any premium might not be paid. And if C should not, during the continuance of the said loan, do any act by which the policy might be avoided, and in case either A or B should during such time die or go abroad, if within a time therein mentioned either of them should obtain and substitute a new surety in the place of such surety so dying, &c., who should enter into a like bond, or in case A or B should give such additional security for the said principal sum, or so much as should then remain unpaid, and the interest thereof, or should forthwith pay upon demand the principal sum and interest, or so much as should be due, then the said bond was to be void, otherwise it was to remain in full force: provided that in case any of the events mentioned in the conditions indorsed on the policy, should happen during the deposit of the policy, it should be considered as wholly void; and, lastly, that if default should be made in payment of the interest, or of either of the instalments, or of the premiums, according to the said stipulations, the whole of the principal should, thereupon, become payable. *Held*, per Pollock, C. B., Alderson, B., and Platt, B., that the effect of the bond was to secure the payment of the principal of 300*l.* with interest only, and that the stamp of 6*l.*, which covered the principal sum, was proper. *Held*, per Parke, B., that the payment of the premiums also was secured by the bond. *Held*, that documents stamped with a "denoting" stamp, by the commissioners, under the 13 & 14 Vict. c. 97, s. 14, cannot be objected to when tendered in evidence as being improperly stamped. *Held*, also, that where, in an action on a bond, the instrument is objected to at the trial as being improperly stamped, and subsequently, but before the argument of the case in *banc*, it is stamped with a denoting stamp by the commissioners, such stamping does not remove the objection to the sufficiency of the stamp. *The Prudential, &c. Association v. Curzon*, xvi. 543.

2. *Indenture—One stamp.* In an indenture between certain encroachers on a common, as parties of the first part, and certain parties of the second part in trust for the commoners, a proviso was inserted in favor of the parties of the first part and their wives. *Held*, that one stamp was sufficient for all these purposes. *Doe d. Croft v. Tidbury*, xxiv. 340.

3. *Mortgage—Ad valorem stamp—Commissioner's stamp.* A mortgage deed which contained a covenant by A to invest 1,800*l.* stock in B's name was stamped with an *ad valorem* stamp of 2*l.* 5*s.*, and also with the commissioner's pink stamp, denoting that the duty chargeable had been paid. *Held*, that though the amount secured might be uncertain, yet as the stamp was sufficient for the 1,800*l.* the mortgage was available to that extent under the statute, and that the commissioner's stamp was immaterial. *Morgan v. Pike*, xxv. 281.

4. *Mortgage—Covenants to pay premiums on policy assigned.* A, being indebted to the defendant, mortgaged certain furniture to him, and assigned a policy of insurance thereon, with a proviso for redemption, and covenants for payment of the premiums on the policy, &c. In case of A's neglecting to pay the premiums, the policy and the mortgage should be security to the defendant for payments thereof by him, which should be considered principal moneys and bear interest, &c. *Held*, that such payments by the defendant were only charges on the mortgage, and not "security for the repayment of money to be thereafter lent or paid to an amount uncertain and without limit," requiring an additional stamp. *Lawrance v. Boston*, viii. 494.

5. *Agreement, and not receipt.* The following document was held admissible in evidence stamped as an agreement and not as a receipt: "I have received your cheque for 39*l.* 10*s.* 3*d.*, being the payment for an overdue bill and interest, in the hands of the Derby and Derbyshire Bank, and I hereby undertake to procure and hand the said bill over to you, and I have now given you Messrs. Dixon's order for 500 tons of iron." *Von Dadelszen v. Swann*, i. 459.

6. *Memorandum held to be distinct agreement—Number of words.* An agreement

have been treated as a nullity, as it was capable of being stamped at any future time. *Delay v. Alcock*, xxix. 83.

12. Objection of want of stamp cannot be raised on a special verdict. *Londesborough v. Mowatt*, xxviii. 119.

STATUTES.

I. GENERAL PRINCIPLES OF CONSTRUCTION.

II. CONSTRUCTION OF PARTICULAR STATUTES.

I. General Principles of Construction.

1. *Clauses rendering deed void for want of indorsement—Public concern.* The effect to be given to such clauses as that rendering deeds void for want of indorsement or other formal matters, depends much on the purpose of the act in which they are contained; and if the act be one of general public concern, they are to be construed largely, to defeat the mischief which the act is intended to prevent; but if the act be not such, then the effect to be given to such provisions is to be limited by the purpose for which they are inserted. *Jortin v. The Southeastern Railway Co.* xxxi. 320.

2. *Intent of legislature.* In the construction of statutes not only the words, but also the intent of the legislature as collected from the cause and necessity of the act, must be considered. *Hawkins v. Gathercole*, xxxi. 305.

3. *Construction most favorable to liberty.* Where a statute affecting the liberty of the person is susceptible of two different constructions, that one will be adopted which is most favorable to liberty. Per Maule, J. *Johnson v. Harris*, xxviii. 376.

4. *Act founded on report of commissioners.* Per Pollock, C. B., and Parke, B. Where an act of parliament is supposed to have been founded on a report of commissioners appointed by the crown, that report ought not to be referred to in a court of justice as a guide in construing the statute. *Martin v. Hemming*, xxviii. 544.

5. *Repeal of private act.* A private act of parliament, although declared to be a public act, cannot, by any implication, repeal a former private act; and such appeal can only operate, if there be in the subsequent act words which will operate as an express repeal of the former act. *The Trustees of Birkenhead Docks v. The Birkenhead Dock Co.* xxiii. 389.

6. *Meaning of words.* In construing an ordinary act of parliament, every word must be understood according to its legal meaning, unless the context shows that the legislature has used it in a popular or more enlarged sense; but in a penal enactment, where it is sought to depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a larger or more popular sense must plainly appear. *Stephenson v. Higginson*, xviii. 50.

7. *Repeal of statute.* After a statute has been repealed, it cannot be acted upon in respect of a proceeding under it, commenced before its repeal, and in this respect there is no valid distinction between matters of form and substance. Where, therefore, between the finding of an indictment for non-repair of a road and plea pleaded, the statute upon which alone the indictment could be supported, was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the court arrested the judgment. *Regina v. Denton*, xiv. 124.

8. *Winding-up acts—Retrospective operation.* The 12 & 13 Vict. c. 108, (which came into operation on the 1st of August, 1849,) enacts, that the Joint-stock Companies Winding-up Act, 1848, (11 & 12 Vict. c. 45,) shall not apply to railway companies incorporated by act of parliament. The 13 & 14 Vict. c. 83, (passed on the 14th of August, 1850,) provides, that notwithstanding the provision in the 12 & 13 Vict. c. 108, that act, as well as the 11 & 12 Vict. c. 45, shall apply to any incorporated railway company, in respect of which an order for winding it up may have been made

previous to the passing of the act of 1849, and that the proceedings for winding up the same shall proceed and be carried on under the Winding-up Acts of 1848 and 1849, or either of them. *Held*, that this clause was retrospective in its operation, and rendered valid proceedings for the purpose of winding up an incorporated railway company taken before the 14th of August, 1850. *M'Kenzie v. The Sligo and Shannon Railway Co.* xiv. 37.

9. *Ambiguity.* Ambiguous words occurring in an act of parliament ought not to be extended to institutions which are well known to exist, but are not named in the act. *In re The St. James's Club*, xiii. 589.

10. For construction of poor laws, see *Regina v. Greene*, xi. 341.

11. *Primâ facie prospective.* Statutes are *primâ facie* prospective only, not affecting existing contracts, at all events those on which actions have been commenced. *Doolubdass v. Ramloll*, iii. 39.

12. *Railway acts.* For principles of construction applicable to Railway Acts, see *Eton College, Ex parte*, i. 51.

13. *Statute creating monopoly, construed strictly.* A statute creating a monopoly, and imposing a penalty for an infringement of its provisions, is to be considered a penal enactment, and ought to receive a strict construction. Per Lord Campbell. *Regina v. Reed*, xxviii. 133.

14. *Statute enlarging right of remedy, effect of, on previous agreement.* A subsequent statute enlarging the right of remedy cannot apply to or affect an agreement for the disposition of a case in court, where, by reasonable implication, the terms of the agreement negative the exercise of such remedy; and this even although the agreement had not been signed by the judge at the time of the taking effect of the statute. *Hughes v. Lumley*, xxviii. 233.

II. Construction of particular Statutes.

1. *Inclosure act—Power to convey coke along railway.* An inclosure act reserved to the lord his rights to mines and minerals in certain lands, and liberty to make ways along certain commons, and to do every act for working and carrying away the mines and minerals and quarries within the said commons, and for carrying the "coals and produce of any other mines and minerals from or under any other lands." *Held*, that this gave the lord power to convey coke along a railway which he had made on the commons, coke being a produce of a mine, and the word "other" meaning not other than coals, but other than the mines and minerals mentioned in the former clause. *Bowes v. Ravensworth*, xxix. 247.

2. "*Verdict*"—13 & 14 Vict. c. 61, s. 12. *Quære*, whether the word "verdict," in the 12th section of the 13 & 14 Vict. c. 61, means a verdict at the trial of the cause only, or includes a verdict on a writ of inquiry. *Prew v. Squire*, v. 391.

3. "*Twenty miles*" to be measured in straight line. The "twenty miles" mentioned in 9 & 10 Vict. c. 95, s. 128, are to be measured in a straight line, and not by the nearest public mode of access. *Lake v. Butler*, xxx. 264. See also *Stokes v. Grissell*, xxv. 336.

4. *Act authorizing taking of water from river—Subsequent act requiring obtaining authority of owner.* A company was authorized by act of parliament to take water from a certain river, on paying compensation for it. A subsequent act provided that nothing in that or the former act should authorize the company to purchase, take, &c., any land or water, or right in respect thereof, belonging to the Duke of C., without his written consent under his privy seal. Said river did so belong. *Held*, that the company did not, by the exercise of the powers conferred by the first act, acquire any right as against the Duke of C. to the water of the river, without obtaining the authority in the manner provided by the last-mentioned act. *The Prince of Wales v. The Bristol Waterworks Co.* xxx. 565.

5. *Act authorizing erection of market-house—Singular may mean plural.* Where a market company obtained a special act authorizing them to erect a "market-house" on land described in deposited plans, and they erected a second building on land compulsorily taken, but contained in the deposited plans, it was held that, as by the general act, "the singular may mean plural," and the company were the best judges of what buildings they needed, they had not exceeded their powers, and that the enactments of their special act did not require a reference to the preamble to explain them, which preamble, if considered, would limit the rights of the company. *Richards v. The Scarborough Public Market Co.* xxiii. 343.

6. *Municipal Corporations Act, 5 & 6 Will. IV. c. 96—Borough fund.* The provisions of this act do not so clearly forbid the application of a surplus borough fund to opposing the incorporation of a water company, the purposes of which are dangerous to the interests of the borough, as to warrant the court in granting an injunction to restrain such application. *The Attorney-General v. The Mayor, Aldermen, and Burgeses of Wigan*, xxiii. 358.

7. *Trustees for sale of building land—Implied power.* An act of parliament, after reciting that certain lands in the neighborhood of Leeds were in strict settlement, (and that the ultimate remainder-man was an infant,) and that many persons were desirous of erecting buildings on the said lands, and that it would be advantageous to the parties interested in the lands, if the same could be sold, and the proceeds be invested in other real estate, to be settled to the like uses, vested the lands in certain trustees on trust to sell the same. The act contained no express power to expend any portion of the purchase-moneys in setting out the lands or in making roads. Held, that, having regard to the objects of the act, namely, the sale of the property as building land, such power ought to be implied. *Cookson v. Lee*, xxiii. 400.

8. 7 & 8 Vict. c. 15, s. 21—*Machinery not in motion* "for any manufacturing process." The machinery of a cotton factory was worked by a steam-engine, which drove a horizontal shaft, passing along the lower floor of the factory. This horizontal shaft moved several vertical shafts which passed through the upper floors, and worked the machines by which the cotton was manufactured in the different rooms of the factory. One of these vertical shafts had its fencing removed for the purpose of repair, and all the machines which were worked by this shaft were at rest; but the vertical shaft itself revolved, and the process of manufacture continued to be carried on in the other rooms of the factory. Held, that this vertical shaft was not in motion "for any manufacturing process" within the meaning of sect. 21 of 7 & 8 Vict. c. 15. *Coe v. Platt*, xviii. 505.

9. 15 & 16 Vict. c. 76—*Appearance.* Where an appearance *sec. stat.* has been entered before the 24th of October, when the 15 & 16 Vict. c. 76 came into operation, the 27th and 28th sections of that act do not apply. *Goodliffe v. Neaves*, xiv. 419; *Pigot v. Jackson*, xiv. 421.

10. *Special demurrers—Common-law Procedure Act.* Special demurrers, pending at the time when the Common-law Procedure Act came into operation, are not affected by its provisions, but must be decided according to the previous law. *Pinhorn v. Sonster*, xiv. 415.

11. 15 & 16 Vict. c. 86. The 52d section of 15 & 16 Vict. c. 86, applies to abatements which occurred before the act came into operation. *Lowes v. Lowes*, xiii. 438.

12. *Directory clause.* The clause in a local inclosure act, "that two awards shall be made by J. C. within six years from the passing of the act," is directory only. *Doe d. Roberts v. Mostyn*, xi. 504.

13. *Stat. 13 & 14 Vict. c. 35.* The terms "motion or petition of course," in the 19th section, mean that no service is requisite, but the same must be mentioned to the court. *In re Harrold*, v. 224.

14. *Watermen's Company Act—Steam tug.* The 7 & 8 Geo. IV. c. 75, s. 37, (The Watermen's Company Act,) enacts "that if any person, not a freeman, &c., shall act

26. For construction of statutes as to fellowships in Trinity College, see *Ex parte Edleston*, xxvii. 439.

27. *Pirates*. As to who are "pirates" within 13 & 14 Vict. c. 26, see *The Magellan Pirates*, xxv. 595.

28. *Steam Navigation Act—Admiralty regulations*. As to the kinds of vessels to which the admiralty regulations issued under the 14 & 15 Vict. c. 79, are applicable, and the effect of that statute on the duties of parties navigating vessels, see *Morrison v. The General Steam Navigation Co.* xx. 455.

29. As to stat. 2 & 3 Vict. c. 85, s. 1, relating to the Court Baron of the Honor of Pontefract, and the issuing of replevins therefrom, see *Hewell v. Eastwood*, iii. 562.

STOCK-JOBGING.

Jobbing in railway shares does not subject a broker to the penalties or forfeiture imposed by stat. 7 Geo. II. c. 8. *Williams v. Trye*, xxiii. 501.

STOPPAGE IN TRANSITU.

See *SALE*.

SUBROGATION.

Insurance. The parish church of Boucherville in Lower Canada, having been in great part destroyed by a fire, which was occasioned by the negligence of the respondents' servants, and being at the time insured by a policy effected by the *curé* upon the church and sacristy; the *curé* and one of the *marguilliers-en-charge*, by a notarial instrument, transferred to the appellants, ("The Quebec Fire Assurance Company," who had granted the policy,) in consideration of the payment by them of part of the amount of the damage sustained by such fire, the right to sue and claim from the respondents, the amount so paid. *Held*, that this constituted a valid subrogation of the debt due to the insurers in right of the *fabrique*, according to the French law prevailing in Lower Canada. *Held*, also, in an action brought upon the notarial *Acte*, that though the declaration was not strictly in form, yet it was substantially good; for the plaintiffs (the appellants) could not be held to sue as *assurers*, (in which character they had no title;) but as being subrogated to the debt due to the *fabrique* of the church by the defendants, (the respondents,) by reason of the payment made on their behalf in respect of the damage occasioned by them. *Semble*, by the old French law, the *curé* and *marguilliers* together could not convey by way of assignment without the consent of the *Bureau*, though they might subrogate a debt due to them in their official character. *The Quebec Fire Assurance Co. v. St. Louis*, xxii. 73.

SUNDAY.

Sunday, enlistment on. An enlistment on Sunday is not void under 29 Car. II. c. 7. *Wolton v. Gavin*, ii. 153.

SURETYSHIP.

I. DUTIES OF CREDITORS, OBLIGEES, AND PRINCIPALS.

II. RIGHTS OF SURETIES AND GUARANTORS.

III. GENERAL LIABILITY OF SURETIES.

IV. DISCHARGE OF SURETIES AND GUARANTORS.

I. *Duties of Creditors, Obligees, and Principals.*

1. *Delay of debtor—Creditor bound to make inquiry as to*. Where the dealings are such as would fairly lead a reasonable man to believe that a debtor must have used

fraud to obtain the concurrence of his surety, the creditor is bound to make inquiry. *Owen v. Homan*, xxv. 1.

2. *Creditor taking an indemnity, bound to explain to surety.* A party being a creditor, and taking an indemnity, is bound to explain to the surety all circumstances within his knowledge which it is necessary for the surety to know, whether asked to do so or not; and the omission to state them impairs the indemnity both at law and in equity. *Small v. Currie*, xxiii. 633.

3. *Obligation of principal to explain to surety.* There is no special obligation on a principal to give to his surety on an indemnity bond any explanation further than what ought to be given in any other case, where any other person takes any security from any one, and the fact that the principal is a solicitor makes no difference. *Ib.*

4. *Effect of withholding facts from the surety in the absence of actual fraud.* A creditor, who takes a guarantee, is not bound to disclose to the surety every fact within his own knowledge which might affect the surety, or his willingness to enter into the contract; and such mere non-communication of facts will not, in the absence of actual fraud, affect the validity of the guarantee. *The North British Insurance Co. v. Lloyd*, xxviii. 456.

5. A principal obtained from the plaintiffs a loan of 10,000*l.*, for a certain period, on the deposit of shares, the principal agreeing to give further security, or pay off a portion of the loan, in the event of the value of the shares becoming depreciated below a certain sum. At the period for repayment, such depreciation had taken place, but the loan was renewed for a further period on the same terms, on the deposit of additional shares and the acceptance of B., the brother of the principal, for 2,000*l.* Before the expiration of the time, B. applied to the plaintiffs to be released on obtaining the guarantee of the defendant and three other persons in 500*l.* each. The plaintiffs assented; and a guarantee was drawn up, not referring to B.'s acceptance, but reciting the consideration for the guarantee to be the original loan, and the plaintiffs' agreeing not to require any further security in the event of the depreciation of the shares, as provided for by the original agreement. The defendant had no notice of the transaction between the plaintiffs and B. *Held*, that the defendant was, nevertheless, liable to the plaintiffs on the guarantee. *Ib.*

6. *Surety on relieving officer's bond—Guardians' neglect to disclose officer's indebtedness.* In an action on a bond against the surety of a relieving officer, it was pleaded and proved that at the time of the making of the bond the officer was indebted in a considerable sum to the guardians, who did not disclose the fact. *Held*, that as the officer was not then a defaulter, but only indebted, as he would often naturally be in the discharge of his duties, this was no material fact. *The Guardians of Stokesley Union v. Strother*, xxiv. 183.

II. Rights of Sureties and Guarantors.

1. *Mortgage—Right of surety to redeem.* A principal and sureties joined in a mortgage of land, containing powers of sale, and a proviso, that, as between the principal and sureties, the principal and the land should be primarily liable. The principal afterwards mortgaged the land and bonds to the mortgagee for a further advance. *Held*, that the sureties were entitled to redeem the land and bonds on payment of the sum secured by the first mortgage. *Bowker v. Bull*, i. 126.

2. A surety has a right to the benefit of the security held by the creditor. *Yonge v. Reynell*, xv. 237.

3. *Reservation in composition deed—Surety's right to be indemnified by debtor.* A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. *Close v. Close*, xxvii. 535.

4. Where one of the creditors who acceded to a composition deed was also a residuary legatee of a surety for the compounding debtors to another creditor, and one of the compounding debtors happened to be the surety's executor, it was *held*, that the residuary legatee's accession must be taken to have been in respect of his direct debt only, and did not preclude him from insisting on the surety's estate being indemnified by the debtors. *Ib.*

5. *Interest—Right of surety to.* A surety who is indemnified against all loss by his principal, and who is compelled to pay the debt of his principal, is entitled to interest upon the amount so paid, though interest was not expressly mentioned in the contract between them, and though there was not any demand of interest, and though the claim in respect thereof was not made until many years after payment. *Petre v. Duncombe*, i. 320.

6. *Question for jury.* And where the principal had on one occasion allowed the surety interest at the rate of 5*l.* per cent. on a sum thus paid, it was *held* no misdirection to leave it to the jury to say whether they would not give the surety interest at that rate in respect of all sums paid by him for the principal under the same contract. *Ib.*

7. *Costs.* Where a guarantor has suffered judgment on a guarantee to go against him by default, and execution has been levied on his goods, the original writ being the first notice he had of the precise amount for which he was liable, he may recover against his principal the costs of that writ, but not of the subsequent proceedings. *Pierce v. Williams*, xxvi. 538.

III. General Liability of Sureties.

1. *Threat to sue—Promise by surety to pay the debt soon.* A surety, in answer to a letter informing him that proceedings were contemplated against him and his principal, stated, through his solicitor, that he would in a post or two pay the amount and interest due on the joint security. The surety died, and the creditor sued the administratrix of the surety, and it was *held*, on appeal, reversing the decision of the court below, (xi. 200,) that the surety had neither in law nor in equity, rendered himself severally liable. *Jones v. Beach*, xvii. 427.

2. *Guaranty—Joint liability.* If two persons guarantee the payment of a certain sum, each one half of the same, they are not jointly liable for the whole amount. *Fell v. Goslin*, xi. 554.

IV. Discharge of Sureties and Guarantors.

1. *Neglect of obligee.* To discharge a surety for the due performance of duties, there must be on the part of the obligee such an act of connivance or gross negligence as amounts to a wilful shutting of the eyes to the fraud, or something approximating to it. *Dawson v. Lawes*, xxiii. 365.

2. *Neglect to file warrant of attorney given by principal debtor.* A father became surety for his son's debt on a current account with his banker to the extent of 1,000*l.* Subsequently, the son, requiring a further advance of 300*l.*, with the father's knowledge, gave a warrant of attorney to cover the whole debt to the bank, and an agreement was entered into, that the warrant of attorney should not affect the guaranty, but that the bank should, on request of the father, enter up judgment and levy execution on the warrant of attorney against the son, for the whole debt. The warrant of attorney not having been properly filed, was void against the assignees of the son on his becoming bankrupt. *Held*, that this being by the neglect of the bank, discharged the suretyship of the father. *Watson v. Alcock*, xix. 64, 239.

3. *Giving time to debtor.* A creditor may give time to his principal debtor, and yet effectually reserve his right against the surety. *Owen v. Homan*, xxv. 1.

4. *Amalgamation of railway companies not a discharge.* Under stat. 10 & 11 Vict. c. 174, s. 10, a person who was surety by bond to one of the companies, before amalgamation, for the conduct of an employee, was held liable to the new company for breaches of the bond committed after the amalgamation. *The Eastern Union Railway Co. v. Cochrane*, xxiv. 495.

5. *Dealings between principal debtor and creditor—Concurrence of surety.* If a creditor so deals with his principal debtor as to alter the position of the surety, he discharges the surety; but this principle applies only when the transaction is without the concurrence of the surety. *Woodcock v. The Oxford and Worcester Railway Co.* xxi. 285.

6. *Reservation of creditor's rights against surety.* A transaction, such as taking the promissory note of the principal in a bond, which would otherwise operate as a release of a surety, will not have that effect if the remedy against the surety is reserved. And the question in such cases is, what was the understanding of the parties; and parol evidence is admissible to show the understanding. *Wyke v. Rogers*, xii. 162.

7. *Construction of reservation.* The reservation of the creditor's rights against the surety may be construed in subordination to what shall be found to be the general intent of the parties. *Owen v. Homan*, iii. 112.

8. For observations as to the effect upon the liability of the surety, by the creditor having precluded himself from suing the principal debtor except in certain events, see *ib.*

9. *Release of principal debtor without reservation, but with privity of surety.* The principal debtor assigned his property and took a deed of release from his creditors, no reservation being made in the deed of the rights of any creditor against the surety; the deed was executed with the privity of the surety and on the understanding, as was shown by the evidence, that the rights against said surety were not to be prejudiced thereby. *Held*, that the surety was not released. *Ex parte Harvey*, xxvii. 272.

10. *Release of principal from all actions—Reservation of right to sue persons jointly liable.* The obligee of a bond executed a deed to the principal, without the knowledge of the surety, releasing him from all actions, &c., but expressly reserving the right to sue all persons jointly liable, and stipulating that the deed should be no release to such actions. *Held*, a covenant not to sue, and not a release; that the surety was not discharged, his remedy against his principal remaining unaffected. *Price v. Barker*, xxx. 157.

11. *Official bond, continuance of—Change of tenure of office.* The Municipal Corporation Act, 5 & 6 Will. IV. c. 76, s. 58, directs the council of every borough, every year to appoint a treasurer, and to take such security for the due execution of his office as they shall think proper. The treasurer, by section 60, is to account to the council, at such times during the continuance of his office, or within three months after the expiration of his office, and in such manner as the council shall direct. By the 6 & 7 Vict. c. 89, s. 6, the treasurer, instead of being appointed annually, is to hold his office during the pleasure of the council, but no alteration is thereby made in the nature or duties of the office. M. had, before the 6 & 7 Vict. c. 89, been elected treasurer of a borough for a year, and was ordered by the council to render an account of cash in his possession at every quarterly and adjourned meeting, and at any special meeting, if required. The defendant entered into a bond as surety for the due performance of his duty by M. "during the whole time of his continuing in the said office in consequence of the said election, or under any annual or other future elections of the said council." *Held*, first, that the council might legally take such security to remain in force under any number of successive elections; and, secondly, that the liability of the surety was by the terms of the bond extended to a continuance in office by M., under an election during the pleasure of the council; and that there was no alteration in the time or mode of accounting, by reason of his holding the office for an indefinite period, which would discharge the surety. *The Mayor, &c. of Ber-*

wick upon Tweed v. Oswald, xvi. 236. See also *Oswald v. The Mayor, &c. of Berwick upon Tweed*, xxvi. 85.

12. *Discharge by new bond.* To a declaration in covenant on this bond, the defendant pleaded, that after the making of the bond, and before any of the breaches of covenant alleged, the said M., and others as his sureties executed and delivered to the plaintiffs another bond, (to the same effect as that declared upon,) in full satisfaction and discharge of the said bond in the declaration mentioned, and of all covenants, &c., therein contained, and that the plaintiffs then accepted the said other bond in full satisfaction and discharge of the said bond in the declaration mentioned, and of all covenants, &c. *Held*, on demurrer to this plea, that the second bond was not good either by way of accord and satisfaction, or of release. *Ib.*

13. *Continuance of liability.* An official bond was given, that the incumbent should duly account for moneys, &c., "so long as he shall continue to hold such office." Defendant pleaded that the appointment was for one year. Replication, that the incumbent remained in office after the year, and omitted to account, &c. *Held*, upon demurrer, that the averment in the plea of the time for which the appointment to the office was made, had the same effect as if it had been recited in the condition of the bond, and that, in accordance with previous authorities, the liability of the sureties does not continue beyond the period of one year, and that the plea, therefore, was a good answer to the action. *Kilson v. Julian*, xxx. 326.

14. *Bond of collector of income-tax—Recitals in—Sureties not estopped by.* The defendants, as sureties for one J. L., executed, on the 6th October, 1846, a bond to the plaintiffs, who were commissioners under the Income-tax Acts, by which bond, after reciting that J. L. had been duly appointed collector of the duties granted by those acts assessed within the parish of M., and that duplicates of the assessments had been delivered to J. L., with a warrant for collecting the same, the defendants became bound for the payment of all such sums assessed and collected for the year ending April, 1847, or to be assessed and collected in such parish by J. L. as such collector as aforesaid. A duplicate of the assessment of duties under schedule (A) of stat. 5 & 6 Vict. c. 35, made on persons in M. for three years ending April, 1847, had been delivered to J. L. by the plaintiffs, together with a warrant for collecting the same; but no such duplicate of assessments under schedule (D,) nor warrant for collecting, had been delivered to J. L. On the 14th October, 1846, J. L. died, having received previously some of the duties, under schedules (A) and (D) for the year ending April, 1847, for which he had given the usual receipt as collector. *Held*, that the defendants were not liable in respect of the duties received under schedule D, as, for want of the duplicate and warrant, J. L. had not at the time authority to receive the same. *Held*, also, that the defendants were not estopped by the recital in the bond from denying that J. L. was authorized to collect such duties. *Kepp v. Wiggett*, i. 365.

15. *What is a continuance in office.* R. was appointed overseer, and gave bond for the faithful discharge of his duties, during the continuance of his said appointment. After holding the office for several years, the vestry with R.'s consent resolved that he should continue in the office at a reduced salary, part of the duties of the office having been transferred to another person. *Held*, that this was a continuation of the office, and the sureties were liable on the bond. *Frank v. Edwards*, xvi. 477.

16. *Assistant overseer's acceptance of office of overseer not a resignation.* The acceptance of the office of overseer does not operate as a resignation of the office of assistant overseer, under 59 Geo. III. c. 12. And even assuming that those two offices are incompatible, where such assistant overseer continues to perform the duties of assistant overseer after his appointment as overseer, and is guilty of defalcations, the sureties to the bond taken under the provisions of that statute are liable. *Worth v. Newton*, xxvi. 553.

17. *Appointment of assistant overseer.* By a resolution of a vestry R. L. was elected "assistant overseer" at a salary of 27l. a year. The defendants executed a

surety bond for the good conduct of R. L., but no warrant of appointment was executed till after a subsequent meeting of the vestry, where it was resolved that the "permanent overseer's salary," (meaning the salary of R. L.,) should be raised. *Held*, that no appointment was made pursuant to the first election, and that the defendants were not liable for a breach of the bond. *Holland v. Lea*, xxiv. 525.

18. *Surety for a certain time—Default after that time.* A and B formed a partnership for a term of years, C becoming surety for A to B for said term; the business was carried on a year and a half after the expiration of the term, C never having been consulted thereon, but being cognizant of the fact that the affairs had not been wound up at the end of the term. *Held*, that the surety was not liable for a default of A which occurred at the end of the year and a half. *Small v. Currie*, xxvii. 304.

19. *Surety for party as agent—Change in mode of compensation.* A company appointed L. their coal agent, with a fixed salary, and W. as surety, executed a bond conditioned for L.'s honest conduct during his continuance in such agency. L. some-time afterwards agreed with the company to receive a commission on the amount of his sales instead of his salary, and this change was held to release W. from his responsibility on the bond. *The Northwestern Railway Co. v. Whinray*, xxvi. 488.

20. *Alteration in mode of accounting by agent.* The plaintiffs appointed W. M. their agent for the sale of bottles on commission. The defendant signed the following guaranty: "I hereby agree to guarantee W. M.'s intromissions as your agent, to the extent of 500l." The original agency account between the parties was subsequently changed into a regular accommodation drawing account. The defendant had no knowledge of and never inquired as to the original, or subsequent terms of dealing. *Held*, (Pollock, C. B., *dissentiente*,) that the alteration in the mode of accounting and paying did not discharge the surety. *Stewart v. M'Kean*, xxix. 383.

21. *Increase of salary of agent, he assuming new liabilities.* In a bond for the faithful discharge of the duties of an agent of a bank, it was provided "that he should have no other business of any kind, nor be connected in any shape with any trade, &c., nor be security for any individual or copartnership in any manner of way whatsoever." The bank subsequently, without the knowledge of the sureties, increased the salary of the agent, he undertaking to bear one fourth part of all losses which might be incurred by his discounts. *Held*, such an alteration of the contract, and of the liability of the agent, that the sureties were discharged, notwithstanding the loss arose, not from discounts, but from improper conduct of the agent. *Bonar v. Macdonald*, i. 1.

22. *Insolvency of principal—Order for protection.* A surety, for the grantor of an annuity, who has become insolvent, and has obtained a final order for protection under the 5 & 6 Vict. c. 116, s. 10, is not protected from being sued on the default of the grantor for instalments accruing due subsequently to the filing of the petition, by 7 & 8 Vict. c. 96, s. 25, his liability to pay not being a debt within the meaning of that section. *Thompson v. Whatley*, ii. 190.

23. *Party induced to become surety by fraud—Interference of equity with surety's property.* Where it was probable that a surety was induced to undertake the responsibility, sought to be enforced against her, by fraud; and where it was doubtful whether she had not been discharged from this responsibility by dealings which had taken place between the plaintiffs and the principal debtors, the court of chancery would not interfere with the surety's possession of property settled to her separate use, for the benefit of the creditor, and an order for a receiver was discharged. *Owen v. Homan*, iii. 112.

SURRENDER.

1. *Term in gross—Presumptive surrender.* If a term in gross exists on an estate, and has not been attendant upon the inheritance, no surrender will be presumed, and such a term is liable to an extent; but the judgments having been satisfied by pur-

chase of part of the estates extended, the tenancy by *elegit* is gone, and the parties entitled may enter. *Hele v. Bexley*, xxi. 457.

2. C. being, under a deed of settlement of 1813, tenant for life, with remainder to such of his children as he should appoint, but covenanting that he was seised in fee, sold the estate in 1840 to the defendant, who had no notice of the settlement; and the residue of two terms was assigned to a trustee for the defendant, to attend the inheritance. These terms had been created for mortgage purposes, and in 1773, the mortgage debt having been satisfied, were assigned in trust to attend the inheritance, for the benefit of the then owner in fee. The estate had been mortgaged in 1836, but in none of the deeds nor in the settlement of 1813 was any notice taken of the outstanding terms. In 1844, C. duly exercised his power of appointment limiting the estate after his death, to the plaintiff, in fee. In an action of ejectment, it was *held*, first, that the court could not presume a surrender of the terms, which was not stated as a fact in the case; for that, even assuming the decision in *Doe v. Hilder*, 2 B. & AL. 782, to be right, (which the court greatly doubted,) the presumption, if to be made at all, must be made by the jury, and not by the court. *Cottrell v. Hughes*, xxix. 352.

3. *Subsisting term*. Secondly, that as the terms were on the 31st December, 1845, attendant on the inheritance by express declaration, and would, if subsisting, have afforded to the defendant such protection against the settlement of 1813 as a court of equity would not have restrained him from setting up in a court of law, they were within the exception of the 8 & 9 Vict. c. 112, s. 1, and must be considered as subsisting terms. *Id.*

SURVIVORSHIP.

Money invested in public funds. Where money is invested in the funds, in the joint names of two persons, the survivor is, at law, the absolute owner, whatever the intention of the investment may have been. *Crossfield v. Such*, xxii. 555. See *Underwood v. Wing*, xxxi. 293.

TELEGRAPH COMPANY.

Railway telegraph companies. The European and American Electric Printing Telegraph Company's Act, which provides that the company may lay their pipes, &c., under any highways, &c., but that nothing contained in the provisions shall give them power to dig under any railway or canal, but that it shall be lawful for the company to carry their wires directly across any railway or canal, gives the company no right to dig under and directly across a railway at the place where it crosses a common highway. *The Southeastern Railway Co. v. The European, American, &c. Telegraph Co.* xxiv. 513.

TENDER.

See *Cooch v. Malby*, xxviii. 192.

THELLUSSON ACT.

See *WILLS*.

TIME.

1. *When essence of contract*. Although at law the time specified in a contract for the purchase of land for the completion of title is an essential part of the contract, yet such is not the doctrine of equity, and it will only be so held in cases of direct stipulation or of necessary implication. *Parkin v. Thorold*, xiii. 416.

2. *Essence of contract—Reasonable time*. A tenant held under an agreement, giving him the option to purchase the estate of his landlord, on giving three months' notice; and he accordingly gave such notice on the 14th of August. On the 4th of

September the vendor urged him to complete the purchase, and on the 2d of November gave him notice, that unless he completed within six weeks he should consider the contract as abandoned. The purchaser went on with the examination of the title, but did not complete before the six weeks had expired. The vendor then treated the contract as abandoned. *Held*, first, that time was not of the essence of the contract, and that if it had been it would have been waived by the conduct of the parties. Secondly, that the six weeks limited by the defendant was not a reasonable time. *Pegg v. Wisden*, xv. 12.

3. *Reasonable time—When it begins to run.* Reasonable time begins to run only from the time when some one interested in the matter calls for something to be done respecting it. *Graham v. The Van Diemen's Land Co.* xxx. 574.

4. *An ingredient in question of injunction.* Time is an ingredient to be considered in determining a question of injunction, although the application be on behalf of the attorney-general. Per Sir G. J. Turner, L. J. *The Attorney-General v. The Sheffield Gas Consumers' Co.* xix. 639.

5. *Computation of time.* Under a statute authorizing the renewal of a writ at any time before its expiration "for six months from the date of such renewal," the court doubted as to whether the day of the renewal was to be computed as a part of the six months. *Anonymous*, xxviii. 337.

6. *Fraction of a day—Settlement.* The general rule of law, that the fraction of a day is not to be regarded, applies to the computation of a year for the purpose of conferring a settlement by renting a tenement under the 1 Will. IV. c. 18. *Regina v. St. Mary, Warwick*, xviii. 309.

7. *Extent for crown debt—Bankruptcy.* One was adjudged a bankrupt and his assignee appointed; later on the same day a writ of extent issued against him for a crown debt. *Held*, that the extent operated from the first moment of the day, and the title of the crown prevailed. *Edwards v. Regina*, xxv. 519; affirming *Regina v. Edwards*, xxiv. 440.

8. *"Week."* The word "week," interpreted to mean the ordinary reckoning from Sunday to Sunday. *Bazalgette v. Lowe*, xxxi. 338.

TITHE.

1. *Power of tithe commissioners—Rival claimants.* Under the provisions of the Tithe Commutation Act, the tithe commissioners have no power to decide the title to tithes as between rival claimants. *Shepherd v. The Marquis of Londonderry*, x. 391.

2. *Award of rent-charge in lieu of tithes.* Where at the time of the making an award of a rent-charge in lieu of certain tithes under the act, a suit in equity was pending for an account of the same tithes, in which the question was as to the title of the claimant to receive the tithes, it was *held*, that the validity of the award was not thereby affected, such suit not being one "touching the right to any tithes," and "whereby the making of the award shall be hindered," within the meaning of the 45th section of the said act. *Ib.*

3. *Question of title between impropriators and vicar—Power of tithe commissioners.* A writ of *mandamus* to tithe commissioners stated certain differences between land-owners of a parish and its vicar, and commanded them to determine them. The return stated the facts at great length, and finally set out an award, finding all the tithable lands in the parish subject to tithes in kind, stating who were the impropriators, awarding rent-charges, &c. Upon demurrer to the return, it was *held*, that the question raised by the whole record was purely one of title between the impropriators and the vicar, and that no difference existed between the vicar and land-owners by which the making of the award was hindered, nor any which the commissioners had power to hear and determine. *Semble*, that the writ itself showed the dispute to be one as to title. *Regina v. The Tithe Commissioners for England and Wales*, x. 408.

4. *Extinguishment—Jurisdiction of tithe commissioner.* If it is claimed that tithes

on certain lands have been extinguished by virtue of the Inclosure Act, the decision of a tithe commissioner cannot be conclusive on the question of exemption, because, by statute, his jurisdiction is taken away in all cases where the tithes have been thus extinguished, and an inferior magistrate's decision as to his own jurisdiction can never be final. *Bunbury v. Fuller*, xxiv. 425.

5. *Annual payment in lieu of tithes.* The case of a money payment, in lieu of tithes made upon an annual value, is not like that of an ordinary composition, and it requires strong evidence to make out that such a payment is to be treated as a composition; and if the annual payment is less than the annual value, the mere circumstance of the receipt of the annual payment will not establish it as a composition. *Letts v. The London Corn Exchange Co.* xii. 156.

6. *Tithes payable by railway company for houses removed by them—Assessment.* The clergy of London were entitled to 2s. 9d. in the pound of the rent of all houses, &c., as and for tithe. The Blackwall Railway Company's Act empowered that company to remove certain houses, and it declared, that for indemnifying the rectors, &c., against such loss as might accrue to them therefrom, the company should pay tithes for the houses quitted by the occupiers, "according to the last assessment thereof," and such sums should diminish in proportion to the tithes actually payable for new houses erected and occupied on ground which should be so cleared. In respect of all the houses taken by the company, with the exception of two, annual payments had been taken in lieu of tithes, at a rate, in each instance, below 2s. 9d. in the pound on the annual value agreed between the rector and the occupiers. The rector claimed to be paid 2s. 9d. in the pound upon the annual value of all the premises taken by the company. *Held*, reversing the decision of Wigram, V. C., that where there had been an agreed rent, but the rector had received less than 2s. 9d. in the pound, he was not now entitled to receive 2s. 9d. in the pound; that the object of the act was only to give indemnity to the rector; and that the term "assessment" had reference to the arrangement throughout the parish, whereby the amount of tithes to be paid had been understood, agreed, and settled. *The London and Blackwall Railway Co. v. Letts*, viii. 1.

7. *Held*, also reversing the decision of Wigram, V. C., that the amount of tithe payable by the company was to be credited with the tithes actually payable to the rector in respect of new houses, and not merely with the sums actually received by the rector in respect of such new houses. *Ib.*

8. *Held*, affirming Wigram, V. C., that the word "assessment" did not mean the assessment to the poor-rate. *Ib.*

9. *Modus or payment in lieu of tithes.* In a question raised under the Tithe Commutation Act, 2 & 3 Will. IV. c. 100, the jury found that 20l. had been paid quarterly during the statutable period, not for the tithes alone, but partly for tithes and partly for glebe; and it was proved, that after the disabling statutes the rector had been in possession of glebe lands. *Held*, first, that by such finding it was clear that the sum of 20l. was not payable in lieu of tithes. Secondly, that in such finding and evidence there was no sufficient proof of any valid *modus* or payment in lieu of tithes. *Young v. The Master, &c. of Clare Hall*, viii. 337.

10. *Evidence that vicarage was endowed with hay-tithe—Burden of proof.* In all but four townships of a parish, the lay rector was entitled to tithes of corn and hay. In debt by the vicar, for the hay tithes of those four, his right to a corn-tithe was admitted, though no formal endowment was proved. Terriers from 1696 to 1778 gave the vicar tithes of corn and hay. No payment or claim of hay-tithe was proved prior to 1803; when the vicar claimed hay-tithe, which was paid by the occupiers of three of the townships, but in the fourth the payments were made subject to the result of a case laid before counsel. These payments were afterwards returned, but there was one unconditional payment. The lay rector had never received or claimed the hay-tithe. The *Valor Ecclesiasticus* of the 26 Hen. VIII. stated the vicarage to

be endowed with the tithe of corn, but did not mention hay-tithe. *Held*, that there was evidence to warrant the jury in finding that the vicarage was endowed with the hay-tithe; that the burden of proof with respect to non-payment was upon the defendant, and that he had failed to establish a non-payment for the period prescribed by the 2 & 3 Will. IV. c. 100. *Pearson v. Beck*, xx. 439.

11. *Commutation*. Some proceedings taken before the tithe commissioners, after the commencement of the action, as to the commutation of tithes for the four townships, were given in evidence, to show that exemption by non-payment was not then claimed. *Held*, that the evidence was admissible, although entitled to very little weight. *Ib*.

12. *Tithes as a chattel*—3 & 4 Will. IV. c. 27. The act 2 & 3 Will. IV. c. 100, is unaffected by the provisions of the act 3 & 4 Will. IV. c. 27, the interpretation clause of the latter act, although enacting that the word "land" shall in its meaning extend to tithes, has reference to an estate in tithes, and not to tithes as a chattel, and the second section therefore does not embrace the case of a render of tithes as a chattel, by the person bound to pay to the tithe owner. *The Dean of Ely v. Bliss*, xix. 190.

13. *Bill for account of tithes—Validity of award*. In a suit for an account of tithes, the defendants set up an award, which declared that a certain sum should be paid in lieu of tithes, provided the whole lands were subject to tithes; but if only subject to tithes according to a specified terrier, then a different sum was awarded. The defendants also set up at the hearing the statute 53 Geo. III. c. 127, as a bar to the recovery of tithes for more than six years. The statute was not pleaded by the answer of the defendants. *Held*, that the award, not being final, was void, but that the plaintiffs were only entitled to an account of tithes for six years before the filing of the bill. *Goode v. Waters*, i. 181.

14. *Merger of tithe*. The intent of the "Tithe Commissioners Amendment Act" was to preclude all questions of merger of tithe where declarations of merger had been made with the consent of the commissioners. *Walker v. Bentley*, xv. 170.

15. If lands have once become exempt from tithe, twenty years' subsequent perception of tithes from the same lands will not render them tithable. *Bunbury v. Fuller*, xxiv. 425.

TOLLS.

The Ramsgate Harbor Act, (32 Geo. III. c. 76,) imposed certain "rates and duties" on the owners of vessels entering or passing the harbor. A vessel having passed the harbor on her outward and also on her homeward voyage, a claim for two payments under that act was made upon the owner in respect of each voyage. He made both payments under protest, and sued in the county court for the money paid in respect of the last voyage, on the ground that the act did not entitle the trustees to a second payment under these circumstances. *Held*, that these rates and duties were tolls, and that the title to a toll was in question, within the meaning of the 9 & 10 Vict. c. 95, s. 58. *Adey v. The Deputy Master of Trinity-House*, xvi. 124.

TRADE MARKS.

1. *Two manufacturers having same name—Selling in own name*. Where the manufacturer of an article of trade sells it under his own name, the manufacturer does not thereby acquire such an exclusive right in the use of the name or title under which the article has been sold as to prevent the use of it, without fraud, by another person having the same name, in the sale of a similar article manufactured by himself. *Burgess v. Burgess*, xvii. 257.

2. *Breach of decree—Acquiescence*. Acquiescence on the part of plaintiffs who have obtained an injunction restraining the use of a trade mark, in order to constitute a valid defence to a motion by them to commit for breach of the injunction, must be

such as to amount almost to a license by them to the defendants to use the trade mark. *Rodgers v. Nowill*, xvii. 145. See also s. c. xvii. 83.

3. *Misrepresentation of an article as being patented—Use of trade mark by a former servant.* A contrived a grate which he termed "A's Patent Kitchener," but no patent was ever taken out. B, formerly a servant of A, secretly took a list of his customers, and also plans and drawings of all his models and works, and used them in constructing an exactly similar article, which he sold under the name of "A's Patent Kitchener;" but there was no proof that he represented the articles sold by him as having been actually made by A. Plaintiff suffered four months to elapse without taking any steps. *Held*, that the misrepresentation of the article as being patented was so far fraudulent; and that looking also to the lapse of time, the court would not interfere summarily by injunction to prevent defendant from using plaintiff's name in such manner; therefore the bill was retained for six months, with liberty to bring an action in the mean time. *Flavell v. Harrison*, xix. 15.

4. *Secret in trade—Use of by an employee, &c.* A party who has a secret in a trade, and employs persons under contract, express or implied, or under a duty, express or implied, can restrain by injunction such of those persons as have gained a knowledge of the secret from setting it up against the employer. *Morison v. Moat*, vi. 14; ix. 182.

5. *Resemblance of marks.* In an alleged infringement of a right to trade marks, the court must ascertain whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colorable, and the resemblances such as are obviously intended to deceive the purchaser. *Taylor v. Taylor*, xxiii. 281.

6. Where there is a very strong resemblance in matter, color, and arrangement of trade marks, the court will presume that it is not fortuitous, but that it was intentional, with a view to mislead purchasers. *Edleston v. Vick*, xxiii. 51.

TREASURE TROVE.

The place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner. The plaintiff, having picked up from the floor of the shop of the defendant a parcel containing bank-notes, handed them over to the defendant to keep till the owner should claim them. They were advertised by the defendant, but no one appearing to claim them, and three years having elapsed, the plaintiff requested the defendant to return them, tendering the costs of the advertisements, and offering an indemnity. Upon the defendant's refusal, an action was brought in the county court, and judgment given for the defendant. *Held*, on appeal, reversing the judgment below, that the plaintiff was entitled to the notes as against the defendant. *Bridges v. Hawkesworth*, vii. 424.

TRESPASS.

I. FOR INJURIES UNDER PROCESS OF LAW.

II. MISCELLANEOUS CASES.

I. *For Injuries under Process of Law.*

1. *Poor-law commissioners, orders of—Union of parishes—Action against magistrates.* The poor-law commissioners, in an order providing for the administration of the poor-laws, treated B. and D. as two distinct townships. Those acting under this order assessed a contribution on the overseers (one of whom was the plaintiff) of the parish of B. cum D., treating the two as one township. The defendants, who were magis-

trates, caused plaintiff's goods to be taken in distress to enforce this contribution. *Held*, that the existence of a legal obligation to pay the contribution was a necessary preliminary condition to their having any authority to enforce payment; and that, if no such obligation existed, the magistrates had acted without jurisdiction, and were liable in trespass. *Held*, also, *dubitante* Alderson, B., that although the order of the commissioners would have been wrong, if those places constituted one township, still, that the order, until removed by *certiorari* and quashed, was valid *ad interim*, by virtue of the 4 & 5 Will. IV. c. 76, s. 105, and that the township of B. cum D. was liable to contribute. *Newbould v. Colman*, iii. 455.

2. *Arrest in action not brought till six months after act committed—Officer.* The defendant, Barnes, having obtained a warrant to search the plaintiff's house, and to apprehend him on a charge of felony, the warrant being headed "To the constable of D., in the county of W.," delivered it to the defendant, Barton, a county constable, appointed under the 2 & 3 Vict. c. 93, who executed it within the parish of D., by apprehending the plaintiff. *Held*, first, that trespass was the proper form of action; secondly, that the parish constable of D., and not the defendant, Barton, was the proper party to execute the warrant, but that Barton was protected, the action not having been brought against him within six months, pursuant to the 24 Geo. II. c. 44, s. 8, and that the other defendant was liable. *Freegard v. Barnes*, xiv. 394.

3. *Existence of warrant admitted by replication.* In trespass for breaking and entering the plaintiff's house and taking his goods, defendant pleaded a justification under a *fi. fa.* and warrant of execution against the goods of one G. H., which warrant was delivered to the defendant, a bailiff, to be executed, and that under the authority of the same the defendant entered, &c. The plaintiff replied *de injuriâ*, admitting the writ, the making of the warrant, and the delivery thereof to the bailiff. *Held*, that the existence of a warrant was admitted by the replication, and that the defendant was not bound to prove it. *Hewitt v. Macquire*, vii. 571.

4. *Allegation that defendant continued on plaintiff's premises eight days, by what evidence supported.* If a declaration states, in an action for trespass, that the defendant broke and entered the premises of the plaintiff, and continued there the space of eight days, it is sufficient to prove an entry on the first day named, and a subsequent reentry, though the defendant once left the premises without intending to return. *Percival v. Stamp*, xxiv. 399.

5. A sheriff who remains in possession under a writ of *fi. fa.* more than a reasonable time, is liable to an action of trespass. *Ash v. Dawney*, xvi. 501; and see note.

II. Miscellaneous Cases.

1. *Against railway company for killing sheep.* Trespass will not lie against a railway company, whose train, driven according to the general directions of the company, ran over and killed some sheep which had strayed on the line in consequence of the defective fences of the company. *Sharrod v. The London and Northwestern Railway Co.* iv. 401.

2. *Mortgagee out of possession and not having entered, cannot maintain trespass.* A mortgagee out of possession, and not having entered on the land mortgaged previously to the trespass upon it, nor having a judgment by default, or a verdict in ejectment in his favor, is not entitled to maintain an action of trespass. *Turner v. Cameron's Coalbrook Steam Coal, &c. Railway Co.* ii. 342.

3. *Justification under assignment of lease of minerals—Dispossession.* Trespass for breaking and entering the plaintiff's closes and digging minerals therein. Pleas, first, not possessed; and secondly, a plea justifying the trespass by the defendant as assignee of a lease of the minerals, and of the right to work them for ninety-nine years, granted by the owner of the fee in 1821. Replication, that the right to make an entry did not first accrue to the defendant or those through whom he claimed within twenty

years next before the entry by the defendant, and that the defendant's right was, therefore, barred by the 3 & 4 Will. IV. c. 27. It appeared that in 1821, while B. was in possession as tenant from year to year of a farm, including the close in question, the owner of the fee by indenture demised the coal lying beneath the farm to B. and P. for ninety-nine years, with liberty to work the same. The interest of B. and P. under this demise became vested by various mesne assignments in the defendant, who, in 1847, (during the term,) worked the coal. Up to 1847 no coal had ever been worked under the demise. *Held*, first, that B. must be presumed to have been in possession of the minerals, as well as of the surface, when the lease for ninety-nine years was granted, which thus became a lease in possession and not a mere *interesse termini*, and that this possession of the minerals continued and passed to the defendant without any actual entry under the lease of 1821. Secondly, that the possession of B. enured for the benefit of himself and P. Thirdly, that the second plea confessing that the plaintiff was *de facto* in possession when the trespasses were committed, would be satisfied by a dispossession of the lessees within twenty years before the defendant entered to commit the trespasses in question, and that the defendant might rely on the right of entry which accrued on such dispossession, and not upon a right of entry accruing as upon a grant of an *interesse termini* in 1821. *Keyse v. Powell*, xviii. 411.

4. *Plea of justification—Possession of close—Cricket ground.* Trespass for assault. Plea, that the plaintiff was wrongfully and unlawfully in a certain close of the defendant Bagge without, &c., whereupon the said defendant, and the other defendant, as his servant, and by his command, requested the plaintiff to depart, and because, &c., (justifying the assault.) Plea, also, that before, &c., eleven members of a certain cricket club, called the Lynn Club, to wit, &c., and eleven members of a certain other cricket club, called the Litcham Club, to wit, &c., were lawfully possessed of a certain close, and were lawfully playing a game of cricket in and upon the said close; that the plaintiff was wrongfully and unlawfully in and upon the said close, and interrupted, hindered, and prevented the playing of the said game, whereupon the defendant Bagge in his own right, and by the command and authority of the ten other members of the Lynn Club, and the said eleven members of the Litcham Club, requested the plaintiff to depart out of the said close, and to desist from interrupting the playing of the said game, which the plaintiff refused to do, whereupon the defendant Bagge in his own right, and by the command, &c., and the other defendant, as the servant, &c., removed the plaintiff from and out of the said close, &c. Replication, to the first of the above pleas, that the same close was the close and soil of the plaintiff together and along with the said Bagge and the other members of the Lynn Club, as joint tenants thereof, and that the plaintiff was then as such joint tenant possessed, &c., and that the defendant Bagge had nothing in the said close except as joint tenant with the plaintiff, &c. And as to the other plea, *de injuria*. It appeared at the trial that whilst the game of cricket was being played between eleven members of the Lynn Club, (the defendant Bagge being one,) and eleven members of the Litcham Club, the plaintiff, who was a member of the Lynn Club, but not one of the eleven players, took the place of one of the players, and thereupon a misunderstanding arose, which led to the assault complained of in the forcible removal of the plaintiff from off the space of ground upon which the match was played, and which was tabooed off for the purposes of the game, and within which only the players were properly at liberty to go. The close in question was occupied at an annual rent under an agreement between the owner of the soil and the Lynn Cricket Club, of which the defendant Bagge was the president. A verdict was found for the plaintiff. *Held*, that the agreement under which the close was occupied, established the issue on the first of the above pleas, as to the plaintiff being jointly possessed of the close. *Held*, also, that the issue on the other plea was properly found for the plaintiff, the ground of the justification pleaded being that the twenty-two members of the Lynn

and the Litcham clubs were possessed of the close, and that the trespass had been committed in the exercise of such right. *Holmes v. Bagge*, xviii. 406.

5. *Possession sufficient to maintain trespass.* If R. makes a deed of assignment of the goods in a certain house to the plaintiff, to hold upon trust to permit and suffer R. to hold the goods and premises until demand of the payment of money to become due, the assignment passes a sufficient right to the possession of the goods to entitle the plaintiff to maintain trespass for the taking of them. *White v. Morris*, xi. 515.

6. *Revocation of authority.* Where the owner of premises, who has employed an auctioneer to sell his goods thereon, revokes his consent to the auctioneer remaining on the premises, the latter has no right to continue there, though he has incurred expenses in allotting the goods, and though he remains only to complete the sale by delivering the goods to the purchasers. *Taplin v. Florence*, iii. 520.

7. *Trespass in search or pursuit of game.* To constitute the offence of trespassing upon land in search or pursuit of game, within sect. 30 of stat. 1 & 2 Will. IV. c. 32, there must be a personal entering or being on land; that land may be a highway. Defendant, being on a highway with a gun, sent his dog into the land of A., lying on either side of the road. A pheasant flew out, and he fired at him. *Held*, that he was properly convicted, under sect. 30, of being upon A.'s land in search of game. *Regina v. Pratt*, xxx. 304.

8. Trespass will lie against a corporation. *The Eastern Counties Railway Co. v. Broom*, ii. 406.

9. In actions for trespass to land, the *locus in quo* should be designated by abutments, or other description, as it was at the time of the trespass, and not at the time of declaration. *Humfrey v. The London and Northwestern Railway Co.* xii. 554; s. c. xx. 384.

10. *Measure of damages.* An assignment was made by B. of all his goods and chattels to secure a debt, subject to a proviso in the deed of assignment, that every thing therein contained should cease and be void upon payment of the debt on a day named, or at such earlier day as the parties should appoint, by a notice in writing, interest in the mean time to be paid. There was also a stipulation that until default in payment of the debt or the interest, it should be lawful for B. to hold, use, and possess the said goods and chattels without any manner of hinderance or disturbance. *Held*, that B. was entitled to maintain an action of trespass in respect of a seizure of the goods and chattels by the assignees, a sufficient notice not having been given as required by the above proviso; but the proper measure of damages in the action was not the value of the goods seized, but B.'s limited interest in the goods at the time. *Brierly v. Kendall*, x. 319.

TRIAL.

1. *Special jury—Mistrial by common jury.* Defendant obtained a rule for a special jury, which was nominated and reduced, but no jury process issued. Afterwards plaintiff obtained a judge's order, by which the cause was to be tried as a common jury cause, and come on in its turn in the common jury list, but defendant was to be at liberty to try it before a special jury if he could procure their attendance on that day. The cause was tried by a common jury as undefended. *Held*, that the trial was irregular. *Montagu v. Smith*, viii. 329.

2. *Order to try issue by tales.* On motion, the court ordered that the judge might have power to try an issue by a tales, after it had been directed to be tried in a certain county by a special jury of that county. *The Freeman and Stallingers of Sunderland v. The Bishop of Durham*, v. 126.

3. *Too many jurors.* At the trial of a cause by a special jury, it having been discovered during the examination of the first witness that there were thirteen jurors in the box, the judge offered to dismiss one, but the defendant's counsel refusing to consent, and it being impossible to ascertain which of the jurors was sworn last, he

discharged the jury, directed the special jurymen to be called over again, and tried the cause by the first twelve that answered. *Held*, regular. *Muirhead v. Evans*, iii. 587.

TRINITY COLLEGE.

If a junior fellow of Trinity College, Cambridge, accepts the office of Regius Professor, he ceases to be a fellow, except in name only, and his subsequent election as senior fellow is void. *Ex parte Edleston*, xxvii. 439.

TROVER.

1. *Trover for fixtures.* Trover will not lie for fixtures which a tenant has left annexed to the freehold after he has quitted possession, with the leave of his landlord, for the purpose of enabling him to make terms as to their purchase by the incoming tenant. *Ruffey v. Henderson*, viii. 305.

2. *Effect of recovery in trover.* Judgment recovered (though without satisfaction) against one in an action for a conversion of goods by wrongfully selling, is a bar to an action for money had and received for the proceeds of the same sale, against another, whether a party to the conversion or not. *Buckland v. Johnson*, xxvi. 328.

3. *Semble*, per Jervis, C. J. That a recovery in trover for the conversion of goods vests the property in the goods in the defendant from the time of the conversion. *Ib.*

4. *Sale by assignees of bankrupt of goods mortgaged to bankrupt, a conversion.* A mortgaged certain goods to B to secure payment of a certain sum on a day fixed, or before on notice and interest till default, A to be allowed to hold and enjoy the goods. He became bankrupt before the day of payment, and the defendants, his assignees, sold the goods, which B had previously assigned to the plaintiffs. *Held*, that although the right to the possession of the goods was vested in A until the day of payment, (defeasible by non-payment of the principal and interest according to the provisions of the deed,) yet that the sale of the goods before that day put an end to the term, and that the assignees had thereby been guilty of a conversion for which the plaintiffs were entitled to maintain trover. *Fenn v. Bittleston*, viii. 483.

5. *Possession sufficient to support trover—Estoppel—Dissolution of partnership.* The plaintiff and defendant had been in partnership as paper makers and iron merchants; the deed of dissolution recited an agreement that the defendant should have all the stock in trade in the business of paper makers, but the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.* which was to remain in the paper mill for a year, and the plaintiff was to have all the stock in trade in the iron business. The deed also recited, that in pursuance of that arrangement, paper of that value had been delivered to the plaintiff, and the same then was in the paper mill as the plaintiff acknowledged; and then followed an assignment to the plaintiff of all the stock in trade in the iron business, and to the defendant of all the stock in trade in the paper-making business, "except the 898*l.* 4*s.* 11*d.* worth of paper so delivered to the plaintiff as aforesaid." No actual delivery or separation of this portion of the paper took place; but there was evidence of a conversion of the whole by the defendant. *Held*, that the defendant was estopped from denying a delivery to the plaintiff; and there having been a conversion of the whole, that the plaintiff had sufficient possession to support an action of trover. *Wiles v. Woodward*, iv. 510.

6. *Plea of not guilty.* In trover, the plea of not guilty admits the right of property to be in the plaintiff. *Jones v. Davies*, vi. 566.

7. *Payment of expenses on goods after action.* Defendant converted certain japanned skins of the plaintiff, supposing them to be his own, whereupon the plaintiff brought trover; after action, defendant, without plaintiff's request, paid the japanner the costs of japanning them,—the japanning being done upon plaintiff's orders. *Held*, that the plaintiff was entitled to recover the full value of the goods in their japanned

state, and that the defendant was not entitled to deduct the sum he had paid the japanner. *Salmon v. Horwitz*, xxviii. 175.

8. *Deposit of goods—Setting up right of true owner.* Judgment having been obtained against the plaintiff, he executed a bill of sale of his plate to M. to defeat the execution. M. afterwards took an assignment of the judgment, and issued an execution against the plaintiff and seized his goods, whereupon the latter, for the purpose of defeating the execution of M., deposited the plate with the defendant. *Held*, in an action of trover for the plate, that the defendant was entitled to set up the right of M. to it. *Cheesman v. Excell*, iv. 438.

9. *What constitutes a conversion.* In an action of trover, the evidence was, that the plaintiff placed certain pieces of timber and spars on the defendant's wharf; that the defendant removed them; and, upon their being again placed on his land, he covered them over with earth and soil, and afterwards directed workmen to dig a pit at the spot where the timber was so buried, and, in digging the pit the timber was cut through, the ends of the pieces of timber being left in the soil, and the pieces cut away being afterwards washed by the tide into the Thames; and it was *held*, that there was not sufficient evidence of a conversion to entitle the plaintiff to a verdict on the plea of not guilty. *Simmons v. Lillystone*, xx. 445.

10. In order to constitute a conversion, there must be an intention to take the property in the goods themselves, or to deprive the plaintiff of the property. *Ib.*

11. A having lawfully received certain bills of exchange from B, a trader, C came to him, and stating that he was acting on behalf of Messrs. Y. & Co., creditors of B, demanded the bills from A, and upon his refusal, said that B was about to be made a bankrupt, that the bills must be given up, and that if they were not, A would be compelled to give them up by the commissioner, and the expense would cost A 200*l.*, and the commissioner would be very angry. A was at the time ill in bed, and, being greatly alarmed, gave up the bills. *Held*, that this was no conversion by C, as trespass would not have been maintainable for the taking under these circumstances. It appeared, however, that afterwards, and before C had handed the bills to his principals, he was informed that the plaintiff was entitled to the bills, and possession of them was demanded on behalf of the plaintiff, but, notwithstanding this, he delivered them to Messrs. Y. & Co. *Held*, that this was a conversion. *Powell v. Hoyland*, ii. 362.

12. There is no conversion of goods for which trover will lie, unless there be a repudiation of the right of the owner, or the exercise of a dominion over them inconsistent with that right. *Heald v. Carey*, ix. 429.

13. A, residing in Paris, despatched seven cases of goods by a railway, *viâ* Dunkirk, to London, deliverable to B, or order. One of the cases arrived at Dunkirk damaged. C, the agent of the railway and of the Dunkirk and London steamboats in connection with it, had the damaged case inspected according to the law of France, and consigned it to the defendant, the broker for the steamboats in London, to hold at the disposal of B, or order. B accepted a bill of lading for the case. On its arrival at London, no one having claimed the case within the time specified in the bill of lading, the defendant paid the duty on it and removed it into a warehouse of D, and D removed it into another of his warehouses, without the defendant's knowledge. There it was burned by an accidental fire. *Held*, that, whether the defendant was bound to pay, or justified in paying the duty, or not, there was no conversion by him. *Ib.*

TRUSTEE PROCESS.

See GARNISHMENT.

TRUSTS AND TRUSTEES.

- I. CREATION OF TRUSTS.
- II. VESTING ORDER.
- III. APPOINTMENT AND REMOVAL OF TRUSTEES.
- IV. RIGHTS, POWERS, AND DUTIES OF TRUSTEES.
- V. LIABILITIES OF TRUSTEES.
- VI. BREACHES OF TRUST.
- VII. PRACTICE.
- VIII. MISCELLANEOUS CASES.

I. *Creation of Trusts.*

1. Trusts may be constituted not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtained possession of the property affected by the trust, provided they had notice of it. *Pooley v. Budd*, vii. 229.

2. The declaration of trust by a trustee in a deed, without the expression of an agreement, amounts to a contract between the trustee and the *cestuis que trustent*. *Richardson v. Jenkins*, xix. 37.

3. A lent B 100*l.* in October, 1843, on which occasion B wrote and signed the following document: "Received of A, for the use of C, 100*l.*, to be paid to her at A's death, but the interest at 4*l.* per cent. to be paid to A." Underneath was written, "I approve the above," which was signed by A. This document was given to A. The money was not paid to A in her lifetime. In June, 1845, A died. *Held*, that B was a trustee for C of 100*l.* at the death of A. *Moore v. Darton*, vii. 134.

4. *Intention to create.* A testatrix, by her will, gave 2,000*l.* stock to two trustees, in trust, to pay the dividends to the plaintiff for her separate use; and after making her will, she expressed her intention of giving a further sum of 2,000*l.* to the plaintiff upon the same trusts. One trustee died during the life of the testatrix; the surviving trustee transferred two separate sums of 2,000*l.* stock, at two different times, into her own name, and gave the plaintiff a power of attorney to receive the dividends upon both sums. There was evidence to prove that the trustee knew of the desire of the testatrix to give the second sum of 2,000*l.* to the plaintiff, and that the trustee had expressed her intention of carrying that desire into effect. The trustee afterwards became of unsound mind. *Held*, that the second sum of 2,000*l.* so transferred by the trustee was sufficiently impressed with a trust in favor of the plaintiff. *Gray v. Gray*, xiii. 154.

5. *Secret trust—Socialist school.* A devise and bequest of the testator's residuary estate to two persons, with an oral intimation given by the testator to one (if not both) of the devisees, that he had confidence in them, and was satisfied they would carry out his intentions, which they well knew, and an assent by one of the devisees to this intimation—*held*, to be an undertaking by the devisee that he would carry out the intention, and to be therefore a gift upon a secret trust. And it appearing that the trust was for the foundation of a Socialist school, and either charitable or illegal, the court declared it void as to the real estate, mortgages, and chattels real, and directed an inquiry into the nature of the trust contemplated. *Russell v. Jackson*, xvii. 587.

6. Where it appeared that the gift was made upon the assent and consequent undertaking of one only of the devisees in trust to perform the illegal or void trust, the other devisee could not take the estate beneficially. *Ib.*

7. In such a case, if the extent of the property intended by the testator to be subjected to the secret trust be uncertain, it lies with the trustee who has taken the estate by means of his assent to the testator's design, to show to what part of the property the trust does not extend. *Ib.*

8. *Complete declaration, not revocable.* P., being indebted to J. in a sum of \$00L to be repaid by instalments, drew up, but did not sign, a memorandum, which was signed by J., by which J. directed the instalments to be invested as therein mentioned, and the dividends to be paid, after the decease of J., to and among the children of P. M. and E. his wife; and when the youngest attained the age of twenty-one years, then the whole fund was to be divided among such children. If any child died before the youngest attained twenty-one years, his share was to go to the survivors in the same manner. This memorandum was never made known to the parties interested, but only to P. and J. Afterwards J. executed another memorandum, in effect revoking the direction in the first memorandum for investing the instalments and directing payment of the instalments to herself. *Held*, that the first instrument amounted to a full and complete declaration of trust, and was, therefore, not revocable. *Paterson v. Murphy*, xvii. 287.

9. *Payments.* P., the trustee, had paid several instalments to the testatrix after the date of the second memorandum. *Held*, that the *cestuis que trust* under the first memorandum could not recover these payments in the present suit, which was a suit by P., the executor, for the administration of the estate of J. *Ib.*

10. *Life assurance—Good trust, primâ facie—Void against creditors.* A person, being at the time indebted, effects a policy of assurance on his own life. By deed he assigns the policy to a third party, by way of mortgage, and causes the mortgagee to write to him a letter, declaring that, after payment of the mortgage debt and interest, he held the surplus upon trust for M. The mortgagor then writes a letter to M., explaining this arrangement for her benefit, and inclosing the mortgagee's letter. *Held*, that this would be *primâ facie* a good trust for M.; but it would be void against creditors of the insured party whose debts were due at the time of the declaration of trust. *Magawley's Trust*, in re, vii. 268.

11. *Copyhold—Legal estate.* Where an act of parliament declared that a moiety of certain copyhold estates should be vested in trustees for uses mentioned, it was *held* that the legal estate was vested in the trustees. *Dixon v. Wilkinson*, xxi. 450.

12. *Precatory trust—Indefiniteness.* Gift by will to trustees to sell and invest, and pay the annual income to the testator's widow, during widowhood, "for the maintenance, education, and support of herself and her children;" with the following words—"and I do particularly recommend, desire, and direct my said wife, at her decease, by will or otherwise, to divide or dispose of what money or property she may have saved from the said yearly income among all my children, in equal shares." *Held*, too indefinite as to the subject-matter to constitute a trust for the children in any savings made by the widow. *Cowman v. Harrison*, xvii. 290.

13. *Parol declaration of trust.* The reputed parent of an illegitimate child placed a sum of money in a bank, in the name of the uncle of the child, and stated at the time to a clerk at the bank that he intended the money for the child. *Held*, on claim after the parent's decease, that a parol declaration of trust had been created in favor of the child. *Petty v. Petty*, xxi. 511.

14. *Declaration of trust by husband in favor of wife—Promissory note.* M. allowed his wife to have a separate banker's account, to which moneys belonging to her settled to her separate use, and also moneys not so settled, were paid in. M. also allowed her to draw checks upon such account in her own name. She from time to time paid such checks to her husband, who always gave her a memorandum at the time, and at the end of the year gave a promissory note, including all the amounts so received. *Held*, that such notes operated as a good declaration of trust by the husband in favor of the wife. *Murray v. Glasse*, xxi. 51.

15. *Partnership.* A trust may well be created in the absence of any expression importing confidence. See this principle applied to a case of partnership, in *Page v. Cox*, xvii. 572.

II. Vesting Order.

1. Petition for the appointment of new trustees and a vesting order under 13 & 14 Vict. c. 60. The trust fund was a sum of stock, and no administration in England had been taken out to the surviving trustee. The court refused to make the order. *In re Frost's Trust*, ii. 40.

2. Petition by tenant for life, for a vesting order, to vest property in a new trustee appointed in the place of a trustee out of the jurisdiction, must be served on the remainder-man. It must be proved by affidavit, *inter alia*, that the power has been properly exercised, and that the proposed trustee is a fit and proper person. *In re Maynard's Settlement Trusts*, xv. 17.

3. Where one of several trustees of real estates is out of the jurisdiction, and it is sought to get another trustee appointed in his place, and to vest the trust property in the new trustee and the continuing trustees, the proper course is, not to apply for a vesting order for that purpose, but for an order appointing a proper person to concur with the continuing trustees in conveying the property, so as to vest it in themselves and the new trustee. *In re Plyer's Trust*, v. 232.

4. In cases where new trustees are appointed under the Trustee Act, 1850, the real estates subject to the trust ought to be conveyed to them by deed, and the vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance. *Langhorn v. Langhorn*, xiii. 216.

5. Where the petition prayed the appointment of new trustees, and a conveyance of the trust premises to them, the court declined to make the order as prayed, but directed the usual vesting order as to the property; it was *held*, also, that the court had power to make the vesting order in such cases. *Re Manning*, xxiii. 523.

6. A petition, under the Trustee Act, 1850, praying that the legal estate of an infant in certain freehold hereditaments, which had been sold by one of the masters in chancery under a decree of the court, might be vested in the respective purchasers of different lots of such hereditaments, to the ordinary uses to bar dower, was granted. *Davey v. Miller*, xxi. 126.

7. Whether, under the 7th section of the Trustee Act, 1850, real estate can be ordered to go to uses to bar dower in favor of the *cestui que trust—quare*. *In re Howard*, xi. 94.

8. *Sale under a decree.* Where a sale has been ordered, by decree, of property in which infants and possible unborn children are interested, though such decree was made before the passing of the Trustee Act, 1852, and though the purpose of the sale is not confined to the payment of debts, the court has authority, under both the Trustee Acts of 1850 and 1852, taken together, to make a vesting order. *Wake v. Wake*, xix. 226.

9. *Dividends.* Two representatives of a sole trustee, deceased, in whose name a sum of stock was standing, refused, for more than twenty-eight days after request in writing, to receive the dividends. *Held*, that the court had power to vest the right to receive these dividends in the petitioner, under sect. 23 of the Trustee Act, 1850, although that section seemed to apply in words only to the case of a sole trustee so refusing. *Held*, also, that the order might be made to refer to arrears of dividends as well as future payments. *Re Hartnall's Will*, viii. 171.

10. *Constructive trust.* Sale under decree for sale, for the purpose of paying costs, of certain real estate, to which infants were beneficially entitled in case they survived their mother and attained twenty-one. *Held*, that the infants were not constructive trustees, and that a vesting order in favor of the purchaser could not be made under the Trustee Act, 1850, sects. 29, 30. *Weston v. Filer*, xiii. 473.

11. *Mortgaged premises.* Where a mortgagee in fee died intestate as to the mortgaged premises without having entered into possession or into receipt of the rents and profits, and the heir at law of such mortgagee was not known; the case does not come within the 19th section of the Trustee Act of 1850, and the court will not make an order vesting the legal estate of the mortgaged premises in the personal representative of the deceased mortgagee. *In re The Estate of Meyrick*, iv. 144.

12. *Disobedience of one trustee.* In case of the disobedience of one of two trustees to an order of court to transfer stock to the credit of the cause, the Trustee Act gives the court no power to order that the co-trustee shall have the sole power of making the transfer. *Mackenzie v. Mackenzie*, xi. 39.

13. *On what evidence made.* A debtor in India, who owned certain shares in a bank in England, wrote to the officer of the bank to transfer the same to one of his creditors. On proof of the signature of the foreign debtor, of the debt, and of the sale, an order was made under the Trustee Act to vest the shares in another person for the purpose of enabling the purchaser to obtain a full transfer of them. *In re Major Angelo*, xiii. 367.

14. A vesting order, under sect. 10 of the Trustee Act, 1850, is inapplicable where one only of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the other trustees remaining. *In re Watt's Settlement*, iv. 67.

III. Appointment and Removal of Trustees.

1. Where all parties interested had consented before the master, to the appointment under the Trustee Act of new trustees of certain articles of settlement; it was *held*, that they must also consent before the court. *Thomas's Trust*, ii. 111.

2. The court will order the appointment of new trustees in the place of retiring, or lunatic trustees. *Davidson, in re*, vii. 161.

3. New trustees may be made under the Trustee Act of 1850, with the consent of the parties, without a reference. *In re Battersby's Trust*, xiii. 389.

4. *Lunatic trustee.* Order made under the Trustee Act, 1850, appointing a new trustee and vesting the trust premises in him jointly with the continuing trustees, in a case where one of three trustees was lunatic, and though the will contained a power to appoint new trustees. *In re Davies*, vii. 8.

5. The master made his certificate appointing new trustee, and on petition for confirmation, it was *held*, that the application must be by motion. *Re Farmer*, xii. 330.

6. The court will not, as a general rule, receive the evidence of the solicitor in the matter, as to the fitness of persons proposed to be appointed new trustees. *Grundy v. Buckeridge*, xxi. 457.

7. The trustees under a will, declining to act and disclaiming, and the real estate vesting in the heir, it was *held*, that the disclaiming trustees were, nevertheless, "existing" trustees, so as to authorize an order appointing the new trustees in their "place or stead," within the meaning of the 32d section of the Trustee Act, nor was the heir a trustee within the meaning of the section. *Re Tyler*, viii. 96.

8. Money in trust was appointed to three daughters equally. F., one of the daughters, in her marriage settlement, assigned her share in trust to C. and T. T., who had never accepted the trust, executed a deed of disclaimer, upon which B. and J. were appointed trustees, and C. assigned the trust fund to them. On a bill filed by B. and J. against the trustees of the original fund, for payment of F.'s share, it was *held*, that B. and J. were duly appointed trustees; that the *cestuis que trust* and T. were not necessary parties to this suit; that F.'s share ought to be transferred to the trustees; that the costs of the suit ought to be paid out of the trust funds; and that the defendant was not entitled to any costs of the objection for want of parties, but that the plaintiffs were entitled to their costs out of the trust funds. *Noble v. Meymott*, vii. 94.

9. By the municipal corporation act, the power to appoint new trustees is given to

the lord chancellor, and by a private act the estate is vested in the trustees duly appointed. A reference was made to the master to approve of eight new trustees. He did so, and his report was confirmed. *Held*, a valid appointment by the lord chancellor. *Doe d. Child v. Willis*, ii. 356.

10. A new trustee will be appointed by the court without a reference, on proof of his fitness, and on his consent. *Robinson's Trust*, ii. 111.

11. By the terms of a settlement, power was given to appoint a new trustee in the place of any trustee who should become incapable to act. *Held*, that the word "incapable" had reference to personal incapacity, and that the power could not be exercised where a trustee, having become bankrupt, had been indicted for not surrendering, and had gone abroad. *In re Watts's Settlement*, iv. 67.

12. Where a trustee, a bankrupt, had not surrendered, and was proclaimed, the court refused to appoint a new trustee in his place under a power, in which were the words, "refuse or become incapable to act." *Turner v. Maule*, v. 222.

13. Where it has for a long time been uncertain whether A, one of two trustees, were living or not, A cannot, on the death of the other, be considered sole trustee, he not yet having been heard of. *In re Randall*, xxi. 258.

14. In case of a settlement containing a proviso, that in case either of the trustees should die, or become unwilling to act, the acting trustee, or trustees, or the executors or administrators of any surviving trustee, may nominate a person or persons in his or their place, a surviving trustee has power to nominate a sole trustee, and the appointment by recital is good. *Miller v. Priddon*, xi. 74.

15. If a testator devises his real estate to one trustee, and the trustee dies intestate, the court may appoint two trustees, and, if the property is very small, may make the appointment without any affidavit of the fitness of the trustees, there being no objection made. *Ex parte Tunstall*, v. 113.

16. For a form of order for the appointment of a new trustee, and also a person to complete the assurance of the estate to the new trustee, see *In re Hey*, xii. 205.

17. The court has no jurisdiction, under the Trustee Act, 1850, to appoint a new trustee of a term of which there is no subsisting trustee. *In re Hazeldine*, xiii. 375.

18. If a trustee goes out of the jurisdiction, an order may be made appointing new trustees. *In re Harrison's Trusts*, xv. 345.

19. The court will not remove a trustee simply because he resides, for the time being, out of the jurisdiction; in such case, however, guardians may be appointed to act in his place. *Re Mais*, xii. 306.

20. New trustees are persons absolutely entitled to stock in the funds, within the Trustee Act, 1850, and may apply to the former trustee for a transfer. On his refusal, the court will appoint a person to transfer in his place. *Russell's Trust*, i. 225.

21. Under the 31st section of the 1 Will. IV. c. 70, the vice-chancellors have jurisdiction to appoint new trustees, in the place of the judges of the court of Chester, of a charity cast upon such judges by virtue of their office. *In re Robinson's Charity*, xix. 544.

22. The original trustee of a settlement, desiring to be discharged, under a power authorizing "the surviving or continuing trustees or trustee, or the executor or administrator of the last acting trustee, to appoint any other person in the stead of the trustee or trustees so dying," &c., will not be allowed by one deed to appoint two other persons to be trustees. *Stones v. Rowton*, xxi. 440.

23. Where a peer of parliament had been ordered to execute a deed charging certain estates and property with a jointure, of which estates and property he had been declared a trustee, so far, for his wife, on his refusal to execute, a person was appointed to do so in his place and stead. *Wellesley v. Wellesley*, xxi. 437.

24. Where the trusts are onerous, and other persons cannot be found to undertake them, the court will appoint one of the *cestuis que trust* to be trustee. *Ex parte Clutton*, xxi. 186.

25. Where a deed appointing A to be trustee provided that, if A should become incapable of acting, then another person should be appointed in his place, and A went abroad to reside permanently, a new trustee was appointed in his place. *Mesnard v. Welford*, xxi. 503.

26. *Semble*, the vice-chancellors have jurisdiction to hear petitions and make orders for the appointment of new trustees of municipal charities. *In re The Northampton Charities*, xvii. 52.

27. Persons entitled to six seventh parts of a trust fund applied to have a new trustee of the fund appointed. *Held*, that, *primâ facie*, all the persons beneficially interested must be before the court, and that, though circumstances might render such an application impossible, yet no such impossibility being suggested, these persons were not entitled to apply, and the court declined to make the order asked, without service on the person entitled to the remaining one seventh part. *In re Richards's Trusts*, xix. 319.

28. Where the will of a testatrix appointed A and B trustees, and also contained provisions for the appointment of other trustees in case of their death, or declining to discharge the trust; it was *held*, that in case of the death of A, though happening in the lifetime of the testatrix, B had authority under the will to appoint a new trustee, and that in case of his own refusal to act, he might appoint a new trustee in place of himself. *In re Hadley's Trust*, ix. 67.

29. The Trustee Act of 1850 was not intended to give the court jurisdiction to remove a trustee desirous of continuing to act in the trust; it is confined to the appointment of new trustees, but does not authorize the court to appoint a new trustee where there is a legal power of appointment vested in a party willing to exercise it. *In re Hodgson's Settlement*, iv. 182.

30. *Bill to remove trustee—Motion to transfer fund into court—Service of notice of.* The prayer of a bill for the removal of a trustee, was, that he might be removed, and the trust fund transferred into the names of new trustees, and that the parties beneficially interested for life and in remainder in the fund, "might, upon being served with a copy of the bill, be bound by all the proceedings in the cause." Upon notice of motion to transfer the fund into court, which had been served upon the trustees only, it was *held*, that the parties beneficially interested ought to be served with the notice of the application before the court could make the order. *Lewellin v. Cobbold*, xxiii. 48.

31. *Bankrupt trustee.* Under the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 186, s. 130,) every vice-chancellor has jurisdiction to remove a bankrupt trustee, and appoint a new one in his stead. *In re Heath*, xv. 387.

IV. Rights, Powers, and Duties of Trustees.

1. Where trusts are to invest in any of the public stocks or funds, or on real securities, railway debentures, though real securities, are not real securities within the terms of this trust. *Mant v. Leith*, x. 123.

2. *Acceptance of doubtful trust.* Where a trustee accepts the trust of a fund, with the knowledge that it is doubtful whether it ought to be held upon such trust, he is nevertheless entitled to come to the court for its direction whether the trusts ought to be executed. *Held*, by Turner, L. J.; Knight Bruce, L. J., entirely dissenting. Where trustees accept such a trust, with knowledge of the doubt, and with the same and no more knowledge, are called upon to part with the fund, by the *cestuis que trust*, they are bound in morality to do so; and an adverse claimant would have no claim against them personally after they had parted with the fund in conformity with the trusts on which they accepted it—per Knight Bruce, L. J. *Neale v. Davies*, xxvii. 301.

3. *Power to sell land—Specific performance.* A trustee, having power to sell land

in order to raise 600*l.* and the expenses, put it up to sale in two lots, and sold the first for 600*l.*, and the second for 510*l.* The second lot consisted of more than three acres of land, and was described in the particulars of sale as readily convertible into building ground. *Held*, that the sale of the second lot was not improper, and that the purchasers must pay the costs of a suit for specific performance brought against them by the trustee. *Thomas v. Townsend*, xiii. 294.

4. *Right to purchase property.* If a trustee has a power or a trust to sell property, he must *bonâ fide* have some one to deal with in the sale of it. If an attorney or agent can show he is entitled to purchase property, notwithstanding his character of attorney or agent, yet if, instead of openly purchasing it, he purchases it in the name of a third person, as his trustee or agent, without disclosing the fact, such purchase is void. *Lewis v. Hillman*, xviii. 34.

5. *Power to concur in a partition.* *Semble*, that a devise on trust to sell and dispose of property, consisting partly of an undivided share, does not authorize the trustees to concur in a partition. But where trustees had, under such a trust, concurred in a partition which was shown to be beneficial to the *cestuis que trustent*, who were infants, the court, on a claim to which the infant *cestuis que trustent* were parties, made a decree that the lands should be taken to be divided according to the partition already made. *Brassey v. Chalmers*, xxxi. 115.

6. *Bequest of leasehold premises—Life insurances.* A testator bequeathed leasehold premises, held for lives, to trustees upon trust, out of the rents and profits respectively, to pay and perform the rents and covenants, and if they thought it advantageous, that they should endeavor to effect renewals of the subsisting leases, or any of them, as they should think proper; and if they in their discretion should think fit or expedient, but not necessarily or peremptorily, effect and keep on foot insurances on the lives of the *cestuis que vie*, or any of them, and should effect such insurances in such sum as in the opinion of the trustees should be sufficient to enable them whenever a life dropped to effect a renewal, and should out of the rents and profits, or by mortgage thereof, or of any part thereof, raise money sufficient to effect the renewal of the leases so often as advisable. The testator died in 1849, leaving a son and two daughters, the latter of whom had issue. He was possessed of divers leasehold estates held at different rents, for various terms of years, if certain persons should so long live. Renewals of these leases had been made, but none of them contained any clause of renewal. Upon a special case under 13 & 14 Vict. c. 35, it was *held*, that a trust had been created, and that there was an imperative duty to renew if reasonable terms could be obtained; that they were not to sacrifice the tenants for life to the persons entitled in reversion; that they had a discretion to exercise in order to keep the estate in its present condition; that the trustees had a discretion to raise money by insuring the lives, or by mortgage of the rents and profits, and that they were bound to exercise their discretion. *Mortimer v. Watts*, ix. 126.

7. *Devise of copyhold—Refusal of trustees to be admitted tenants—Fine.* The tenant of a copyhold devised it to three trustees, appointing them his executors; they acted as such. Two of them refused to be admitted tenants, and executed a deed, stating their desire that the third should hold as sole trustee, and "granted, released, and confirmed" it to him. The lord claimed a treble fine. *Held*, that the deed should be construed as a disclaimer by the two of their rights; that their acting as executors did not prevent its operation; that the third trustee became sole tenant, and owed only a single fine. *Wellesley v. Withers*, xxx. 162.

8. *Power of trustees under marriage settlement to invest in land—Copyholds.* Trustees under a marriage settlement, having no power to invest in land, purchased copyholds with the trust money, the husband and wife agreeing that the trustees should have power to sell, and indemnify themselves. The trustees were also charged with other breaches of trust. The surviving trustee proceeded to sell the copyholds, which were worth much more than the original purchase-money, and claimed to

indemnify himself out of the surplus. He was restrained from selling until it was ascertained when it would be for the benefit of the persons interested not *sui juris* that the sale should take place. *Quære*, whether he would be allowed so to indemnify himself? *Wiles v. Gresham*, xxi. 105.

9. Trustee may sue for use and occupation in his own right, and not as survivor, for rent accruing after the death of the co-trustee. *Wheatley v. Boyd*, xii. 552.

10. *Removal of college.* A college, governed by a committee of trustees chosen out of subscribers and donors, and not fixed to any locality, may be removed, at the discretion of a majority of the trustees, to such place as shall be best calculated to advance the objects and design of the institution; and notwithstanding such transfer, the rents and income of the trust property may be applied for the institution under the direction of the committee of management. *In re The Manchester College*, xix. 404.

11. *Sale by surviving trustee—Bequest.* A testator having given a residuary bequest to two trustees, directing that a certain sum of money, for the benefit of his daughter, "be raised out of his estate by sale or otherwise at the discretion of his said trustees," the only surviving trustee may alone exercise the trusts contained in the will and make a good title to the premises. *Lane v. Debenham*, xxi. 187.

12. *Power of sale under marriage settlement—New trustees.* A marriage settlement contained a power for the two trustees and the survivor of them, and the executors or administrators of such survivor, to sell certain estates with the consent of the husband and wife. The settlement contained no power of appointing new trustees. One trustee died, the other trustee went to reside abroad, and, upon a bill filed for that purpose, two new trustees were appointed under an order of the court. *Held*, that the trustees appointed by the court had no right to execute the power of sale. *Newman v. Warner*, vii. 182.

13. When a trustee retires, and new trustees are appointed by the court, the retiring trustee is entitled to have the accounts taken. *Nott v. Foster*, i. 125.

14. *Power to give receipts.* In case of a devise to A and B, upon trust to raise money by sale or mortgage, with directions to invest the money and to pay the income to C for life, and after her death as she should appoint; and the will contains no power for the trustees to give receipts, and A and B mortgage the estate to C, who assigns it to D, then the power of A and B to give receipts is implied and D is entitled to the mortgaged premises as against the persons claiming under the trusts of the will. In such case, if D pays the money to A and B he is not bound to see to the application of the same; and if the mortgage to C is regular on the face of it, then D cannot be affected by any breach of trust in which A, B, and C are implicated. *Lock v. Lomas*, xi. 154.

15. *Release of trustee by deed.* A trustee paying the trust money in strict accordance with the tenor of the trusts, is not entitled to a release by deed; *secus*, if he is called upon to depart from the strictly expressed trusts. *King v. Mullins*, xix. 143.

16. Where a trust was created by parol for A. for life, and to provide for her funeral expenses, remainder to her two children, and the tenant for life, and remainder-men called for payment, it was *held*, that the trustee might lawfully insist on a release under seal. *Ib.*

17. *Execution of the trust, and when, and in what manner, it will be enforced.* The trustees of a benefit building society having, through a shareholder as their agent, purchased an estate out of the funds of the society, and paid a sum of money on account of the deposit, filed their bill against their agent, who had himself obtained a conveyance of the estate, which he refused to convey to the trustees of the society, to compel him to convey the estate to them upon the trusts and for the purposes of the society. Upon a demurrer for want of equity and for want of parties, it was *held*, that the trustees had power to institute this suit to obtain a conveyance, though the purchase which had been made was alleged to be illegal and contrary to the act of

parliament and the rules of the society; and that a suit instituted by the trustees authorizing the purchase, on behalf of themselves and all the other members and shareholders of the society, was sufficient; that it was not necessary to bring all the members before the court to consent to the purchase, and that the jurisdiction of this court was not ousted by the appointment of a separate jurisdiction for the regulation of the affairs of these societies. *Mullock v. Jenkins*, ix. 30.

18. New trustees of stock appointed under the 13 & 14 Vict. c. 60, have the right only to call for a transfer from the old trustees, or, if they should be incapable or refuse to make such transfer, to exercise the powers of the act which provides for such cases. *In re Smyth's Settlement*, iv. 107.

19. A trustee, who is also mortgagee of the trust property, has, as mortgagee, a title paramount, and a right to assert that title adversely to the trust. *The Attorney General v. Hardy*, iv. 44.

20. *Trustees for sale of building land—Implied power.* An act of parliament, after reciting that certain lands in the neighborhood of Leeds were in strict settlement, and that the ultimate remainder-man was an infant, and that many persons were desirous of erecting buildings on the said lands, and that it would be advantageous to the parties interested in the lands, if the same could be sold and the proceeds be invested in other real estate, to be settled to the like uses, vested the lands in certain trustees on trust to sell the same, either together or in parcels; the purchase-moneys to be paid into the Bank of England. The act contained no express power to expend any portion of the purchase-moneys in setting out the lands or in making roads. *Held*, that, having regard to the objects of the act, namely, the sale of the property as building land, such power ought to be implied, and that the trustees and their agents ought to be allowed all sums properly expended by them in making roads to the several allotments, and in bringing the land into a fit state for the market. *Cookson v. Lee*, xxiii. 400.

21. Where, in the exercise of a discretion given to trustees, there appears an absence of indirect motive, an honesty of intention, and a fair consideration of the case, the court will not examine into the accuracy of the conclusion come to by the trustees. Trustees are not bound to set forth the particular grounds of selection; and, *semble*, it is prudent not to do so; but where reasons are stated which do not justify the conclusion, or where it is admitted that they have acted upon an erroneous principle, the court will interfere. *In re Wilkes's Charity*, vii. 73.

V. Liabilities of Trustees.

1. *When liable to action for money had and received.* Where parties stand to each other in the relation of trustee and *cestui que trust*, and the trustee is under no other legal liability than that which arises from that relation, no action at law for money had and received can be maintained against him though he has money in his hands, which, under the terms of the trust, he ought to pay over to the *cestui que trust*, but which he still holds in the character of trustee only. *Edwards v. Lowndes*, xvi. 204.

2. *Scotch marriage contract—Bankruptcy of husband.* A domiciled Scotchman intermarried with an Englishwoman in London; a contract of marriage was entered into in the Scotch form; they went to reside in Scotland, but subsequently came to reside permanently in England, where he engaged in trade, and became a bankrupt, having received a great portion of the property of his wife from the trustee of her father's will. Upon a bill by his wife, asking that the trustee might make good the sums paid, it was *held*, that he was not liable to make good any money paid upon the joint receipt of the husband and wife; but that the assignees of the husband could give no valid discharge for the property of the wife, and that he must make good such sums of money as he had paid to them, and also a sum lost. That all unpaid property of the wife, including the sums to be made good, belonged to her, subject to the life-estate

of the husband. That the life-interest of the husband could not be impounded to secure the provisions he had, by the marriage contract, agreed to make for his wife and children. That the property, so far as it was not affected by the marriage contract, was the property of the wife, and must be settled for the benefit of herself and her children. *Duncan v. Cannan*, xxiii. 288.

3. Payment to one of two trustees binds both. *Husband v. Davis*, iv. 342.

4. *Unauthorized investment on mortgage—Liability to refund—Concurrence of cestui que trust.* Where trustees, who had no express authority to invest trust funds upon mortgage, so invested the same at the instance of some of the *cestuis que trust* for life, and a loss was occasioned, the trustees were held liable to make good the loss to the trust in the first instance, but such *cestuis que trust* were declared liable to the extent of their actual receipts to recoup the trustees. *Raby v. Ridehalgh*, xxxi. 459.

5. *Option of trustees as to investment.* Trustees under a will had an option to invest the testator's estate either in 3*l.* per cents., or on real security, but neglected to do so, leaving the fund in some other state of investment. *Held*, overruling a decree at the rolls, that the *cestui que trust* had not the option of charging them with the money and interest, or to claim the amount of 3*l.* per cents., because the *cestui que trust* never had the right to compel the purchase of 3*l.* per cents., and that the trustees were chargeable only with the money and interest. *Robinson v. Robinson*, ix. 69.

6. *Interest.* The trustees having this option to invest either in 3*l.* per cents. or on real security, it was *held*, overruling the same decree, that the tenant for life was entitled to interest for one year after the death of the testator at 4*l.* per cent. on the money the property would have produced if sold at the end of that year, until the produce was invested in the 3*l.* per cents. not exceeding the amount of interest actually received. *Ib.*

7. *Turnpike bonds.* Turnpike-road bonds, secured by a mortgage or charge on tolls and toll-houses, are real estate, and held so to be, overruling the same decree; and although the tenant for life was declared entitled to the interest on them, the court, considering the social changes resulting from the formation of railways, directed a reference to the Master to inquire whether it was expedient to leave assets so invested. *Ib.*

8. *Payment out, without petition.* A party having paid in money, in obedience to a decree of the court below, and the decree being varied in such a way that he is entitled to have that money paid out, the same can be directed in the order on the appeal to be so paid out without any petition being presented for that purpose. *Ib.*

9. *Semble*, that where trustees are bound to invest in 3*l.* per cents., and 3*l.* per cents. have fallen instead of risen in value, they are chargeable with the money and interest, instead of 3*l.* per cents., at the option of the *cestui que trust*. *Ib.*

10. *Balances improperly retained or trust-money lost—Rule as to investments.* The court also, after reviewing the former decisions, laid down the following propositions: First, where trustees improperly retain balances or cause or permit trust-money to be lost, they are chargeable for the same with interest at 4*l.* per cent. Secondly, where trustees have money in their hands, which they are bound permanently to invest for the benefit of their *cestui que trust*, the rule of the court is, generally, that they shall invest in 3*l.* per cents.; therefore, if they neglect to do so, and there is no express direction not to do so, or there is an express trust that they shall do so, in the latter case, and *semble*, as to the two former cases, it is in the option of the *cestui que trust* to charge them either with the principal sum retained and interest, or with the amount of 3*l.* per cents., which would have been purchased if the investment had been made. Thirdly, where trustees lend, or use trust-money in trade, they are chargeable not only with the money and interest, but with the profits made in the trade, the interest generally being 5*l.* per cent. *Ib.*

11. Trustees are liable for not taking proper steps to get the trust fund transferred into their names. *M'Gachen v. Dew*, xv. 97.

12. *Investment, by request of cestui que trust, in improper securities—Costs.* Where a trustee, at the request of the *cestui que trust*, invested the fund on improper securities, and the latter brought a suit against the former to have the fund replaced, no costs were given, as between the plaintiff and defendant, and the costs of parties entitled in remainder were to be paid by the plaintiff. The trustee was ordered to make good the dividends which would have accrued, had the fund remained on the original investment. *Mant v. Leith*, x. 123.

13. *Suggestion by trustees that administrator of cestui que trust obtained administration unfairly—Costs.* A suggestion by the trustees of a fund, that the administrator of one of the *cestui que trusts*, who, in that character, was entitled to a distributive share of the fund, had unfairly obtained the letters of administration under which he claimed such share, is no defence in this court to the claim of the administrator; nor is it a defence for trustees to suggest that a deed, under which the plaintiff derives his title from the *cestui que trust*, was founded on mistake, or is otherwise subject to be displaced; for it is contrary to the course of the court to direct an inquiry as to the validity or invalidity of a deed, upon a suggestion in the answer of defendants, the trustees of the fund to which it relates, where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the defendants; and the fact of a bill having been filed to set aside the deed under which the claim is made, or exclude the fund in question from its operation is not a ground upon which the trustees can resist the legal title to receive the fund; for the court cannot give the plaintiff in such other suit the benefit of an injunction to protect the fund upon the suggestion in the answer of the trustees; but the existence of such other suit entitles the trustees to retain such a portion of the trust fund as may be sufficient to answer their costs of such other suit. It is not, necessarily, sufficient, to entitle trustees to their costs of a suit, that they have acted under the advice of counsel. *Devey v. Thornton*, xii. 197.

14. *Trust deed of transfer of debt.* Where it was provided in a trust deed of transfer of a debt due from H. and Co., that the trustees, H., one of the said firm of H. and Co. and N., might, with the consent of the *cestui que trust*, summon H. and Co. to pay the debt by giving H., or any one of the partners, a certain notice, and the firm stopped payment, whereupon, with the consent of the *cestui que trust*, N. called on H. for payment, which being refused, he filed a bill against H. and the *cestui que trust*, not joining the other partners, it was held that H. was liable. *Norton v. Steinkopf*, xxiii. 242.

15. *Trustees of marriage settlement—Husband's bankruptcy and composition with creditors.* Where the trustees of a marriage settlement neglected to perform their duties with regard to the same, and the husband became bankrupt, paid a percentage to his creditors as a composition, thus obtaining the annulling of the fiat, and the trustees consented thereto, but received no benefit from the composition, and afterwards obtained the wife's consent that the money should not be called in, and the whole was ultimately lost, though it was proved that the percentage might have been obtained at the time of the composition, it was held that the trustees were liable for the whole amount of the settlement. *Wiles v. Gresham*, xxxi. 237.

16. *Liability for interest.* The measure by which the court ought to charge a trustee with interest is, to ascertain what interest he has received, or ought to have received, or that he is estopped from saying that he did not receive. *The Attorney-General v. Alford*, xxxi. 466.

17. Where a bill was filed against a trustee twelve years after the death of the testator, the trustee not having disclosed his trust, it was held, there being nothing more than great negligence proved, that the trustee was not chargeable with 5l. per cent., nor on the principle of annual rests. *Ib.*

18. *Payment to wrong person.* Where a trustee of a will had, in case of a will of doubtful construction, but acting under advice of counsel, paid over certain property

to the wrong person, he was ordered to pay the amount and costs of suit to the person rightfully entitled. *Boulton v. Beard*, xxvii. 421.

VI. Breaches of Trust.

1. The presumption is, that where trustees have a discretion to apply the benefit of the trust either in a way which the law allows or which the law disallows, they will act in a lawful manner. *The Mayor, Aldermen, &c. of Faversham v. Ryder*, xxvii. 367.

2. *Concurrence of cestui que trust in sale.* On a sale by a trustee, he stipulated, that his receipt should be deemed an effectual and conclusive discharge, and that the purchaser should not require the concurrence of the heir or *cestui que trust*. A decree was made for specific performance and reference as to title. The Master found in favor of the trustee; and upon exceptions, the purchaser contended, that the rule as to the concurrence of the *cestuis que trust* being one for their protection, it was a breach of trust to stipulate that they should not concur; but the court held the point concluded by the decree. *Wilkinson v. Hartley*, xv. 135.

3. *Bond—Assignment—Deposit of bond as security for debt.* A gave B a bond for the payment of a sum of money; on the marriage of B the bond was assigned to C by way of settlement for the separate use of B. B and her husband joined in receiving some of the money on the bond. Afterwards A died and B became her personal representative. The trustee did not call in the funds, inasmuch as B was A's representative. B afterwards deposited the bond with her husband's bankers as security for his debts. Held, that C was not guilty, under these circumstances, of wilful default. *Thackwell v. Gardiner*, xii. 285.

4. *Unitarians.* In 1710 a charity was founded by certain Presbyterians in Dublin, for the support of the Protestant dissenting interest. In the course of time it got principally into the hands of Unitarians. Held, affirming the decision of the Lord Chancellor of Ireland, first, that Unitarians are not entitled to be considered as objects of the trust. Secondly, that Trinitarian trustees, who had concurred in the breaches of trust, should be removed, as well as Unitarian trustees. *Drummond v. The Attorney-General*, ii. 15.

5. *Security for money lent—Parties to conveyance.* A testator gave to his wife the interest to arise from a sum of stock for her life, and afterwards he gave the principal to a trustee for the benefit of certain persons mentioned. The widow joined in selling out part of the stock, and lending it to the trustees, on the security of a deposit of the deeds of an estate, belonging to him; the trustee became a bankrupt, without replacing the money lent to him. Held, that the deposit was a personal security to the widow in respect of the breach of trust; that the money was not invested on the security of the property, and that it could be sold without the *cestuis que trust* being parties to the sale. *Groom v. Booth*, xxi. 430.

6. Where the trust deed is not sealed by the trustee, his breaches of trust do not create specialty debts against his estate. *Richardson v. Jenkins*, xix. 37.

7. For a statement of facts under which no inquiry for wilful default ought to be instituted against the trustees of a settlement, see *Conpe v. Carter*, xv. 591.

8. Trustees who, without sufficient cause, doubted the identity of their *cestui que trust*, and, in breach of trust, paid over the trust fund to others, were ordered to make good the same, and pay the costs and interest at 5 $\frac{1}{2}$ per cent, the accounts to be taken with rests. *Ex parte Croxton*, vi. 93.

9. *Trust-money lent on second mortgage.* Trustees lent trust-moneys on a second mortgage of house property greatly out of repair, and the principal part was lost. Held, that they were liable as for a breach of trust, notwithstanding a trustee indemnity clause declaring they should not be liable for the insufficiency or deficiency in value of any securities, except through their wilful default. *Drosier v. Brereton*, xix. 276.

10. In charging trustees for breaches of trust and the costs of suit, it is immaterial how the trust was created, and whether for valuable consideration, or by the voluntary gift of the trustees themselves. *Ib.*

11. *Trustees under marriage settlement empowered to invest in real security—Advancement of money on mortgage.* In a marriage settlement of stock the trustees were empowered to invest in real security. Contemporaneously with the execution of the settlement a memorandum was indorsed upon it, and signed by the intended husband and wife, requesting the trustees to advance the money, or any part of it, to the owners or lessees of V. Gardens, upon mortgage, either as first, second, or third mortgage. B., (who was the settler,) G., and H. were the then owners of this property, which at that time was subject to two mortgages. The trustees immediately advanced the money to B., G., and H., but no written security was taken until a year and a half after the advance, at which time B. had surrendered his interest in the property to G. and H., who then executed a mortgage of the property to the trustees, with the usual covenants for repayment of the loan. The security proved wholly insufficient. *Held*, that the trustees had committed a breach of trust, and were bound to make good the loss, and to bring the fund into court. *Fowler v. Reynal*, vii. 270.

12. If a trustee allows trust funds to remain in a trading firm for a long series of years at simple interest, he is personally liable for the losses resulting from this breach of trust. *Jones v. Foxall*, xiii. 140.

13. *Investment on leasehold for lives in Ireland.* Under a power to trustees of a settlement "to lay out and invest the trust moneys upon government or real securities in England, Ireland, Scotland, or Wales," the trustee invested part of the trust moneys on leaseholds for lives in Ireland, with a covenant for perpetual renewal, subject to a head rent. The property at the time of the investment was subject to certain charges, after payment of which, barely sufficient surplus rents were left to pay the interest on the mortgage debt, and afterwards it became much depreciated in value, and insufficient to answer the debt. *Held*, in a suit instituted by one of the *cestuis que trust* to make the trustee liable for the loss arising from the investment, that leaseholds for lives in Ireland, with a covenant for perpetual renewal, if the same had been of adequate value, would not have been a breach of trust, but that having regard to the value of the property, the investment was a breach of trust. *Macleod v. Annesley*, xix. 247.

14. *Acquiescence in improper investment by cestui que trust.* It is not necessary that acquiescence on the part of a *cestui que trust* in an improper investment should be evidenced by writing if otherwise proved. Observations on the 15 & 16 Vict. c. 86, s. 42. *Ib.*

15. *Debt assigned in trust to call in and accumulate.* In 1826, a debt due from a firm at Calcutta, was assigned to trustees in England, in trust to call in and invest on Indian securities, and accumulate. The debtors became bankrupts in 1830, and the trustees not having, in the mean time, taken proper steps to call in the money, a considerable portion of the debt was lost. *Held*, that they were liable for the breach of trust, and ought to make good the accumulation which would have been produced; secondly, that one of the trustees who had been abroad with his regiment during that period, was equally liable; but, thirdly, that they were to be excused during such a reasonable time as was necessary in order to communicate between England and India. *Byrne v. Norcott*, xvii. 495.

16. *Costs.* Generally, where trustees are guilty of a breach of trust, they must pay the costs of a suit to repair it. *Ib.*

17. *Policies on life to be held in trust as appointed by deed or will.* Where a father, by indenture of 1821, declared policies on his life to be held on trust for such one or more of his eight daughters as he should appoint by deed or will, and in 1832 appointed the bonuses on two of the policies to three of his daughters, and then he and these appointees applied part of the price of these bonuses to keeping the six policies

on foot, and used the rest, &c., on a bill filed by two daughters, not *sui juris*, in 1832, to set aside the appointment of that year, it was *held*, first, that the transactions amounted to a clear breach of trust; but, secondly, that the two appointments, of October and December, 1832, forming part of one transaction, must stand or fall together; and therefore, thirdly, the bill was dismissed, with costs, with liberty to the plaintiffs to file such other bill as they might be advised. *Harrison v. Randall*, viii. 209.

18. Where one of two trustees commits breaches of trust and dies, leaving the other surviving, his estate is liable. *Richardson v. Jenkins*, xix. 37.

19. *Assignment by wife as administratrix without husband's concurrence.* In 1817, a gentleman, then an infant, married a lady of full age, who was, as the administratrix of her uncle with his will annexed, possessed of certain sums of stock and of negro slaves, to the income of which she was, under the will, beneficially entitled, for life, with remainder to her children. In 1818, the husband being still an infant, and it being by a common error assumed that the uncle had died intestate, and that the lady was, as his next of kin, absolutely entitled to his property, the funds were transferred into the names of four trustees, and a settlement was executed, by which the slaves were assigned to the same trustees in trust for sale, and it was declared that the trustees should stand possessed of the funds transferred and of the proceeds of the sale of the slaves, in trust for the lady for life, and after her decease for the husband, and after that for the children. The husband and wife, however, in 1819, notwithstanding the settlement, themselves sold the slaves for 3,922*l.*, which the husband received, and thereout paid 3,500*l.* to one of the trustees, who appropriated the money to his own use; but he represented that he had invested it in the purchase of 4,869*l.* consols in the names of the four trustees. In 1821, the husband, having attained to his full age, disclaimed the settlement, and in a suit instituted in 1822, by an infant child of the marriage, the four trustees, on the information of the defaulting trustees, by their answer admitted that they were possessed of the trust funds, including the 4,869*l.* consols. An arrangement was come to, the husband received a specified sum, and the rest of the trust funds were, with the approval of the court, in 1824, settled by a deed, on the assumption that all the trust funds were in the trustees. In that deed, the original trustees covenanted to transfer the funds, specifying as part the 4,869*l.* consols, into the names of the continuing and two new trustees. After the execution of this deed, and before any improper delay in effecting the transfer, the misappropriation of the 3,500*l.* by the defaulting trustee became known, and he became a bankrupt. Proof was duly made under his bankruptcy by the surviving trustees. Upon a bill, filed in 1848, by the lady against the original and subsequently appointed trustees, seeking to charge them with the moneys arising from the sale of the negro slaves, it was *held*, first, that a wife is incapable of assigning by deed, even as an administratrix, without the valid concurrence of her husband; and that, as the husband was in 1818, an infant, the assignment was a nullity. Secondly, that, inasmuch as the trustees took no title under the assignment of 1818, they could not sell the slaves under it; and that they were consequently guilty of no default in not doing so. Thirdly, that the sale of the slaves having been in fact effected by the husband and wife, the payment of the 3,500*l.* to the defaulting trustee was the voluntary act of the husband; and that, in the absence of very special circumstances, the other trustees were not guilty of default in permitting the misapplication of the money, and were under no liability in respect of the purchase-money of the slaves. Fourthly, that the incorrect representation made by the trustees in their answer in the suit in 1822, that the 4,869*l.* consols was standing in their names, was an admission of a fact by which, it being the admitted error of all parties, the trustees were not bound. So much of the bill as sought to charge the trustees with loss in the transaction was dismissed with costs. *Derbishire v. Home*, xix. 325.

20. A trustee who has neglected to accumulate the surplus income of a child is guilty of a breach of trust and chargeable with annual rests. But he is entitled to the costs of the suit out of the estate. *Knott v. Coltee*, xiii. 304.

21. *Breach of trust—Assurance effected by one trustee on his own life.* W J. W., one of two trustees of a marriage settlement, committed breaches of trust, and afterwards effected, with the sanction of the master, a policy of assurance on his own life, in accordance with a proposal previously made for making good the trust fund. Before the transaction was finally approved of and reported by the master, W. J. W. died insolvent. *Held*, that the proceeds of the policy were applicable, first, for making good the defalcations of the trustee, and for payment of costs, and that the surplus belonged to the representative of W. J. W. as assets for his creditors. *Ward v. Ward*, xxiii. 442.

22. Long enjoyment of a trust fund, if wrongful, creates no right; as time affords no sanction to established breaches of trust. *Drummond v. The Attorney-General*, ii. 15.

23. *Loss by breach of trust not a specially debt.* By deed of indorsement under seal, appointing new trustees, and executed by them, a trust fund was assigned to the new trustees, "to hold unto them, their executors, administrators and assigns, as their own money, property and effects, but nevertheless upon the trusts and for the ends, intents, and purposes declared by the within indenture," but there was no declaration of trust by the trustees. *Held*, that a loss which occurred by a breach of trust did not constitute a specialty debt. *Adey v. Arnold*, xv. 268.

24. *Semble*, a declaration by trustees in a deed executed by them, that they will apply a trust fund in a particular manner, will be construed to amount to a covenant; and any loss to the trust fund arising from a breach of trust will constitute a specialty debt. *Ib.*

VII. Practice.

1. *Money paid into court upon trusts of will.* Where, under the Trustee Indemnity Act, money is paid into court "upon the trusts of a will," it involves the general administration of the estate, and the court will not order it to be transferred to a particular account, except at the request, and on the responsibility, of the trustee. *Re Wright's Trusts*, xix. 303.

2. *Trust fund.* A trust fund paid into the court of chancery, under the Trustee Relief Act, after the death of the *cestui que trust*, ordered to be paid to the administrator of the *cestui que trust*, under a grant of letters of administration by the arch-deaconry court, obtained after the fund was in the court of chancery. *In re Spencer*, xii. 247.

3. *Payment of fund into court—Lien for costs.* Where the residue of a trust fund, under a composition deed, has been duly invested by the trustees, and they claim a lien thereon for their costs under the deed, and there is no imputation of misconduct on their part, or of the fund being in danger, the court will not, on motion by a creditor who was a party to the deed, and had accepted a dividend under it, order the fund to be paid into court. *Chaffers v. Headlam*, xxi. 493.

4. *Costs.* A trust fund had been paid into court under the Trustee Relief Act; the tenant for life petitioned for payment of the dividends to her. *Held*, that the costs of the application must come out of the income, and not out of the *corpus*. *In re Bangley's Trust*, xiii. 28.

5. *Power to invest in French funds—Foreign trustees.* By a deed-poll declaring the trusts of certain sums of stock, power was reserved to the trustees to invest the trust moneys in the French funds. The trustees, although applied to by the tenant for life to make such investment, refused to do so, and paid the trust funds into court under the Trustee Relief Act. Upon a petition presented by the tenant for life, praying for the appointment of three foreigners resident in Paris as trustees in the room of the old ones, and the transfer of the trust funds to them accordingly, the court refused to make the order. *In re The Trust Estate of Armand Guibert*, xiii. 872.

6. *Affidavit.* It is not necessary, except under special circumstances, to set out in

was vested in trustees upon trust to pay the dividends to A, a married woman, for her life, for her separate use, without power of anticipation, and, after her decease, to pay the capital to B. On the petition of A and B, the court ordered the transfer of a portion of the stock to B, and a sale of such other portion as would be sufficient to purchase a government annuity equal to the dividends of the two sums of stock, and that the sum thereby produced should be laid out in the purchase of such annuity to be settled on A, for her separate use, without power of anticipation. *Dodd v. Wake*, xi. 6.

5. *Creditor's suit—Misappropriation of trust funds.* In a creditor's suit four persons claimed against a testator's estate, for misappropriation of trust funds. A claimed to be a specialty creditor under a trust deed, which was never executed by the testator, although he acted in the trusts. *Held*, that A was only a simple contract creditor. *Jenkins v. Robertson*, xix. 547.

6. B claimed as a specialty creditor under a trust deed, by which it was "declared" by the parties that the money should be on certain trusts. *Held*, that the omission of the word "agreed" did not prevent there being a contract on the part of the trustee. *Ib.*

7. C claimed under a trust deed by which the testator was a trustee jointly with another person, who survived him. *Held*, that the testator's estate was liable for the breach of trust committed by him, and that C was a specialty creditor. *Ib.*

8. D claimed under a bond. *Held*, that as the testator's heirs were bound, D was entitled to priority over the other specialty creditors out of the assets arising from real estate. *Ib.*

9. The suit was instituted by A, the simple contract creditor, and the assets were insufficient to satisfy the specialty debts. *Held*, nevertheless, that the plaintiff was entitled to his costs out of the estate, as between solicitor and client. *Ib.*

10. *Assignment by lady, on eve of marriage, of her reversionary interest in stock—False recitals.* A young lady, a few months after she came of age, and on the eve of her marriage, with her father's concurrence, but without the knowledge of her intended husband, made an absolute assignment of her reversionary interest in a sum of stock to the trustee thereof, by a deed, which recited a contract for sale of such stock to the trustee, and the payment of the purchase-money, and upon this deed was indorsed a receipt for the purchase-money, signed by the lady, no purchase-money having been in fact paid. *Held*, that the falsehood of the recitals in the deed alone would have been sufficient to prevent the court from supporting it as a security, to the amount of the consideration expressed, for a larger sum due from the lady's father to the trustee for money advanced for her education. *Lewellin v. Cobbold*, xix. 43.

11. Where trustees, having a power of sale, disclaim, the court can exercise the discretion of the trustees, and sell if necessary. *Browne v. Paull*, xiii. 43.

12. *Marriage settlement—Advancement.* Under a marriage settlement, stock was vested in trustees, in trust to pay the interest and dividends to the wife for life, remainder to the husband for life, with a power to them and the survivor to appoint the principal among the children of the marriage. The wife died, and the husband appointed a third part thereof absolutely and at once, in trust for an infant child, payment to be postponed till twenty-one. The court, on the application of the infant that the trustees might apply a sufficient part of the capital of his share of the stock in payment of the expenses incurred, and to be incurred for his education as a cadet, and his advancement in India, granted the prayer of the petition, so far as related to payment of part of the expenses incurred, and as to the expense of education and residence as a cadet at Addiscombe, and ordered the rest of the petition to stand over. *Lane, in re*, xvii. 162.

13. *Power of sale—Defective title.* In case of a power of sale to two trustees and the survivor, his heirs, &c., a title dependent on a sale by the devisee in trust of the survivor is too doubtful to be enforced on a purchaser; but the defect may be cured

21. Persons who deal with trustees at a considerable distance of time, without an apparent reason for raising money, must be considered under some obligation to inquire into the *bona fides* of the trustees. *Ib.*

22. Distinction between a trustee raising money after a distance of time, where he is merely a trustee, and where the trustee is also entitled to the estate, subject to the charge. *Ib.*

USAGE.

1. *Must have a legal origin.* A usage must have a legal origin, and where it appears that a particular usage could not have had a legal origin, acts done in conformity to it will be illegal. Per Lord Campbell, C. J. *Campbell v. Hewlitt*, xii. 375.

2. *By-law inferred from.* Long usage warrants the inference of a by-law delegating the power of electing the wardens of the Mercers' Company of London to a small and self-elected portion of the whole body. Such a by-law held valid. *Regina v. Powell*, xxv. 53.

3. *Evidence of, as to delivery orders.* Under a contract to sell and deliver goods in a warehouse in Liverpool, the giving of a delivery order of "about" the quantity is a sufficient delivery, evidence of a known usage of warehouse-keepers not to accept delivery orders in any other form being admissible. *Moore v. Campbell*, xxvi. 522.

4. *Right to take water by inhabitants of township.* A right claimed by the inhabitants of a township to enter upon the land of a private person and take water from a well therein, for domestic purposes, is an easement and not a *profit à prendre*, and may, therefore, properly be claimed by custom. *Race v. Ward*, xxx. 187.

5. *Charter-party—"Full and complete cargo"—Custom of Trinidad—Broken Stowage.* By a charter-party, made in London, it was agreed that the plaintiff's ship should proceed to Trinidad and there receive "a full and complete cargo of sugar, molasses, ^{and} _{or} other lawful produce." There was no stipulation as to "broken stowage." The vessel was laden at T. with sugar and molasses, packed in hogsheads and puncheons, and would not contain any greater quantity of sugar and molasses packed in the same manner; but a space of "broken stowage" remained, which might have been filled with sugar in tierces, and other produce; small packages also might have been placed between the hogsheads and puncheons. Upon action brought on the charter-party for not loading the agreed cargo, the defendant proved at the trial that according to the custom of T. a full and complete cargo of sugar and molasses, packed in hogsheads and puncheons constituted a full and complete cargo of sugar and molasses. *Held*, affirming the judgment of the court below, (xxix. 456,) that the custom was applicable to the state of facts; that it was a reasonable custom; and that it was not a custom controlling, altering, or inconsistent with the contract, but merely explanatory of it, and was therefore admissible in evidence to show that the defendant had loaded a full and complete cargo of sugar and molasses within the meaning of the charter-party. *Cuthbert v. Cumming*, xxx. 604.

6. See also *Slim v. The Great Northern Railway Co.* xxvi. 297; *Couturier v. Hastie*, xvi. 562.

USURY.

1. *Avoidance of transaction valid in its inception.* *Semble*, a transaction not void in the first instance, and from which the borrower has the power to free himself by the payment of the principal, and legal interest, within a limited time, is not afterwards to be avoided because the borrower cannot, after the limited period, free himself without paying more than 5l. per cent. *Long v. Storie*, x. 182.

2. *Frugal investment association—Periodical divisions of profits.* B. became a member of the Frugal Investment Association, the objects of which were to advance the society's funds to its members, to accumulate them, and to divide the profits periodically. For each share taken he was to pay an agreed premium, and so much a month

as redemption money, for which he had an immediate advance of the value of his share, on giving security for the repayment of it, with the premium and redemption money. *Held*, that the transaction, being between partners, was not usurious. *Burbridge v. Cotton*, viii. 57.

3. *Bonus—Trustees—Life assurance.* Sir J. O., being in debt, conveyed his life interest in an estate, in trust to convey the same to certain creditors. It was afterwards agreed between the trustees, Sir J. O., and the creditors that the trustees should hold the rents to divide the same (after payment of charges on the estate) into two shares proportionate to the debts specified in two schedules, the portion appropriated to the first schedule to be paid to the creditors equally in discharge of their debts, and after satisfying the debts and interest as to such creditors to apply a competent sum in effecting and keeping on foot policies on the life of Sir J. O., on behalf of the creditors in the second schedule mentioned; any addition by way of bonus to the sums assured to belong to the said creditors in addition to their debts, and in proportion to them, notwithstanding the principal and interest thereof might be discharged; and in consideration thereof, all the creditors gave Sir J. O. leave to live any where without molestation by them, provided that if any creditor should molest him, his debt should be considered as released. The trustees effected assurances; and after the death of Sir J. O. received the sum assured and also a bonus, the whole of which was claimed by Lady O., the widow, on the ground of the transaction having been usurious as to the creditors in the second schedule. *Held*, That the transaction was not usurious, and also that no action at law would lie at the suit of Lady O. against the trustees. *O'Brien v. Kenyon*, iv. 431.

4. *Bills of exchange not running more than three months.* The statute 3 & 4 Will. IV. c. 98, s. 7, which exempted from the provisions of the Usury Act (12 Anne, stat. 2, c. 16, s. 1.) bills of exchange not having more than three months to run, is not repealed by the statute 2 & 3 Vict. c. 37, s. 1, which, and the statutes continuing it, exempt from the operation of the usury laws, all bills not having more than twelve months to run and all contracts above 10*l.*, provided there be no security upon land. Therefore, bills not having more than three months to run, though for more than 5*l.* per cent interest, and though there be further security on land, are not void. *Clack v. Sainsbury*, viii. 408.

5. *Discount of promissory note—Agreement as to.* A declaration stated an agreement of the plaintiff to discount defendant's promissory note at three months, and of the defendant, in case of non-payment of the note at maturity, to pay interest at the rate of 5*l.* per cent. per month, and alleged the discounting, non-payment, and failure to pay monthly instalments of interest. The plea set forth that it was corruptly agreed to discount at an inordinate rate, setting forth the facts, as to the rate of discount and interest. It further alleged a confession and registry of judgment by the defendant, to bind his lands, &c., to secure payment to the plaintiff of the loan and interest. *Held*, that the plea was bad, the agreement relied upon not being usurious; and that, as the transaction was based on a promissory note, the whole transaction was rendered legal by the 3 & 4 Will. IV. c. 98, s. 7. *Semple v. Cornewall*, xxix. 436.

6. *Partnership—Forbearance—Shift and chevisance of commission—Evidence—Onus probandi.* Debt by the public officer of a banking copartnership for work and labor, commission, money lent, interest, and on an account stated. Fourth plea, as to 390*l.* 13*s.*, parcel, &c., that it was corruptly agreed between the defendant and the banking copartnership, that they should lend him from time to time such sums as he should require, by paying certain checks of the defendant, upon the terms that while the said copartnership should forbear to demand payment of the sums so lent, they should charge the defendant partly for interest and partly under the shift and chevisance of commission for their work and labor, more than 5*l.* per cent., to wit, 10*l.* per cent., and that the company did lend the defendant divers sums, and did charge a large sum, partly by way of interest and partly by way of shift and chevi-

sance of commission, exceeding the rate of 5*l.* per cent. The plea then identified the sum of 390*l.* 13*s.*, parcel, &c. The fifth plea was similar, but addressed only to the commission and interest. *Held*, upon special demurrer, that the usurious agreement was pleaded with sufficient certainty, and that the party setting up usury as a defence need only bring the case within the operation of the statute of Anne, the onus being on the opposite party to show that the case was taken out of the operation of that statute by the statute of Victoria. *Derry v. Toll*, i. 440.

7. *Deed of reversion.* By a deed dated in 1819, A, in consideration of 500*l.* paid to him by B, conveyed a reversion of real estate, expectant on the death of C, to a trustee, upon trust, if C should die within five years, to raise and pay to B the sum of 1000*l.*; and, if C should live beyond five years, to raise and pay to B, the sum of 1,500*l.* At the date of the deed, C was sixty-one years of age. C died in 1844. *Held*, that the deed of 1819 was void for usury. *The Earl of Mansfield v. Ogle*, xxxi. 857.

8. *Deed for benefit of creditors.* A deed by which creditors may receive more than their due may not be void for usury, under some circumstances, as when there is a valuable consideration received by the debtor. *O'Brien v. Osborn*, xiii. 420.

9. *Bankers—Mortgage on land to secure balance of account.* A gave to bankers a mortgage nominally for 5,500*l.*, but in reality for securing the balance to become due on his overdrawn account. The bank having threatened a sale, the amount claimed by them was paid under an arrangement, which left open only the question what was justly due to them on the balance of the account. Differences having arisen as to the amount due, A filed his bill for an account, not raising any question of usury, and a decree was made at the hearing for an account as between banker and customer. It turned out that the account comprised bills carrying more than 5*l.* per cent. interest and charges for commission. At the hearing for further directions the plaintiff raised the question of usury, and Vice-Chancellor Stuart disallowed some charges as usurious, but allowed others to which the plaintiff objected as usurious. *Held*, that having regard to the arrangement, the frame of the bill, and the nature of the decree at the hearing, it was not competent to the plaintiff to raise the question of usury on further directions. *Semble*, he could not in any case have objected to the charges for interest and commission as usurious, for that a mortgagor impeaching a security for usury can only be relieved on payment of what is justly due; and if the contract was that he should pay what was due on a banker's account, he must, according to the above rule, pay what is due according to the account, as usually kept between banker and customer. *Thomas v. Cooper*, xxxi. 526.

10. *Deposit of title deeds as collateral security—Statute of Frauds.* A deposit of title deeds as collateral security for money advanced upon a promissory note at 6*l.* per cent., per annum, and payable on demand, and a subsequent verbal agreement to execute a mortgage of the property comprised in the title deeds so deposited; it was *held*, first, that the original deposit of the title deeds was void under the statute of Anne, and, consequently, insufficient to create a security by way of mortgage. *Held*, also, that a bill for a foreclosure or sale, could not be sustained under the circumstances. *Semble*, the whole transaction is not avoided by the Statutes of Usury, but only so far as relates to the land. *Held*, lastly, that taking the bill *pro confesso* will not take the agreement out of the Statute of Frauds. *James v. Rice*, xxiii. 567.

11. 12 Anne, stat. 2, c. 16—*Premium—Compensation.* The plaintiff covenanted (before the statute 17 & 18 Vict. c. 90, repealing the usury laws) to lend the defendant 15,000*l.* at certain periods, within a year from the date of the agreement if required by the defendant; and the defendant covenanted to pay the plaintiff, by way of premium, 1*l.* per cent. per annum upon the whole 15,000*l.* for three years from the date of the agreement, whatever might be the sum of money advanced, and also interest at 4*l.* per cent. on all sums advanced. *Held*, (Platt, B., *dissentiente*.) that the contract was not on the face of it usurious within the 12 Anne, stat. 2, c. 16, as the 1*l.*

per cent. premium must be considered as a compensation for the liability of the plaintiff to be called on by the defendant from time to time to make the advances, and that the advance of some money was not a condition precedent to the right to the premium. *Fussel v. Daniel*, xxix. 369.

VAGRANCY.

Vagrant Act, construction of. The 5 Geo. IV. c. 83, s. 4, (the Vagrant Act,) does not render any suspected person who may be found frequenting a street with intent to commit felony liable to be punished as a vagabond unless the street leads to some river, canal, &c., or is itself a place of public resort, or is adjacent to a place of public resort. Therefore, where a commitment stated "that A being a suspected person did, on, &c., at, &c., in the county of M., unlawfully frequent a certain street, to wit, a street called Regent-street, with intent to commit a felony," it was held, that A was entitled to be discharged on a writ of *habeas corpus*. *Ex parte Jones*, x. 529.

VENDOR AND PURCHASER.

- I. CONSTRUCTION, CONDITIONS, AND ENFORCEMENT OF CONTRACT.
- II. MISDESCRIPTION AND MISREPRESENTATION.
- III. OF NOTICE TO PURCHASERS, MORTGAGEES, &C.
- IV. INTEREST ON PURCHASE-MONEY.
- V. MISCELLANEOUS CASES.

I. Construction, Conditions, and Enforcement of Contract.

1. *Copyholds intermixed with freeholds—Timber.* Lands of copyhold and freehold tenure lying intermixed and undistinguishable, were sold with the timber standing on them. The conditions of sale stipulated that the vendor was not to be bound to distinguish the freeholds from the copyholds, and that the timber was to be taken at a valuation made for the purposes of that sale, the value of the timber on each lot being specified. Held, first, that the contract was an entire contract for the sale of land with timber on it—not two contracts, one for the sale of land and another for timber. Secondly, that the purchaser was not entitled to any abatement, though he could not cut a single tree, not being able to distinguish any one tree as standing on freehold ground. Thirdly, that in the case of one lot sold under the same conditions and particulars of sale, and which consisted entirely of copyholds, the purchaser was equally bound to pay the stipulated price for the timber, although he could not cut any of it. *Crosse v. Lawrence*, x. 7.

2. *Title and conveyance to be completed according to conditions of sale.* By a contract of sale, the title and conveyance were to be completed according to the conditions of sale. One of these was: "The property comprised in the particulars is presumed to be correctly described, and the quantity of the land shall be taken as stated, whether more or less, &c." The contract and the particulars described a larger tract than that for which the vendor delivered an abstract of title. Held, that this did not authorize the purchaser to contend that the title had not been made according to the conditions of sale, and that he was bound to complete. *Nicholl v. Chambers*, viii. 423.

3. *Agreement to enter into covenant for production of deeds.* An agreement on the sale of an estate, that the title deeds should be delivered to the purchaser on the completion of the contract; but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator, for the investment of his personal estate in the purchase of lands, to be settled to certain

uses creating estates for life, with remainder over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator. *Held*, that the agreement to enter into a proper and sufficient covenant for the production of the deeds, did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the word "sufficient" was connected with the word "proper;" that the extent and sufficiency of the covenant must in a great degree depend on the mode in which the conveyance was taken; that the releasees to uses do not stand in a worse position than trustees, who, according to the ordinary rule of the court, are required to covenant for their own acts only; and that the court would not compel the purchasers, who were only releasees to uses,—especially after the uses were executed by the statute,—to enter into such covenants. *Onslow v. Londesborough*, xvii. 542.

4. *Ambiguous stipulation.* If a vendor means to exclude the purchaser from that which is matter of common right, he must express himself in terms clear and unambiguous; otherwise the purchaser has a right to that construction which is most favorable to himself. *Rhodes v. Ibbetson*, xxiii. 393.

5. An agreement to purchase amounts to an acknowledgment that the title was, at the time of the agreement, in the vendor. *Doe d. Bourne v. Burton*, vi. 325.

6. *Sale of freehold and copyhold estate—Supplemental agreement.* A became the purchaser of real estate under conditions of sale, which stated that the whole property was freehold except eight acres which were copyhold, but undistinguished except as to not including any of the buildings. A supplemental agreement was afterwards entered into, detailing requisitions as to title, &c., one of which was: "Declaration of identity of lands mentioned in deeds to those now sold." *Held*, on a bill filed by the vendor for specific performance, that the supplemental agreement was a substitution for the original contract, and that A. B. was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises so as to show that the latter did not include any of the buildings. *Dawson v. Brinckman*, iii. 239.

7. *Evidence of contract—Letters.* A vendor, C., wrote to his own solicitor: "H. has agreed to purchase my estate in this county for 60,000*l.*, including the timber. . . . I have shown this to H., and given him a copy, not signed, as a memorandum." A month afterwards, in the course of correspondence concerning the terms of a formal agreement which was to be prepared, the purchaser, H., wrote to the same solicitor of the vendor: "I beg to know when you will forward the agreement to be entered into with C. relative to the purchase I have concluded with him for his estate in this county." *Held*, that these two letters, taken in connection with other correspondence, referred to the agreement and memorandum mentioned in C.'s letter, and with it constituted evidence of a contract, so as to bind both C. and H., and that thereupon H. had a devisable interest in the estate. *Morgan v. Holford*, xvii. 174.

8. *Particulars of sale—Auction.* A. and his agent attended an auction for the sale of a house, at which certain conditions of sale were exhibited, and with which they became acquainted. A. afterwards, through his agent and the agent of the vendor, purchased the same house. *Held*, that the particulars of sale were not incorporated with the purchase, and therefore not binding on the purchaser. *Cowley v. Watts*, xvii. 147.

9. *Conditions of sale—Abstract of title.* By the particulars and conditions of sale, an estate was described as 1015 acres of meadow, pasture, and arable land, and the purchaser was to pay part of the purchase-money on signing the agreement, and the remainder on completion of the purchase, "on the 11th October, from which time the purchaser was to be entitled to the rents and profits;" but if, from any cause, the purchase should not be completed by October 11, the purchaser should pay interest till the completion of the purchase; the vendor was to deliver an abstract of title within fourteen days of the day of sale, and deduce a good title. The estate was

sold by the defendant to the plaintiff on the 9th July, and an abstract of title delivered on the 14th. It then appeared that the estate was subject to two mortgages, and that the mortgagees had not received the usual six months' notice of redemption; that some of the mortgagees were dead; that letters of administration *de bonis non* had to be taken out to one of them; and that a deed of declaration of trust by parties beneficially interested in the mortgage had to be produced and executed. These and other matters rendered it impossible for the vendor to convey by October 11; and the purchase was ultimately completed in the following April. *Held*, that the defendant did deduce an abstract of title and show a good title according to the conditions. *Savory v. Underwood*, xxviii. 152.

10. *Failure of consideration—Sale by mortgagee—Lease.* The defendant, mortgagee of certain premises, sold them at auction as such mortgagee. He sold at the same time a lease of certain other premises belonging to the mortgagor, stating that the legal estate was not vested in him, but only an equitable interest. The purchasers paid a deposit, and the mortgagor refusing to join in the conveyance, brought an action to recover the same, on the ground that the legal estate of the premises comprised in the lease was outstanding. *Held*, that they were not entitled to recover as upon failure of consideration, there being an absolute power of sale as to all the premises, and the conditions of sale having been complied with. *Ashworth v. Mounsey*, xxiv. 457.

11. *Vagueness—Expressions leading to a wrong conclusion.* An annuity was granted for the lives of four persons, and the lives and life of the survivors and survivor of them, secured by a term in a reversion of a freehold estate, and the reversion was offered for sale. One of the conditions of the sale was, that certain evidence that "a life annuity granted to" A. B. had not been paid or claimed for twenty years, should be conclusive evidence that the annuity and term had determined. *Held*, that the condition was not binding, as the condition was one so worded as to lead a purchaser to a definite conclusion contrary to the real facts of the case. *Drysdale v. Mace*, xxvii. 193.

12. Conditions of sale, which state certain facts, and represent that certain acts were done in error, and that the vendors could sell an absolute interest, will not preclude a purchaser from requiring proof of the title. *Johnson v. Smiley*, xxi. 403.

13. *Sale by auction—Conditions of sale—Failure of consideration.* A, being possessed of a plot of land for a term of years, on the 24th of April, 1845, mortgaged the term to B as a security for a loan, with an absolute power of sale on default of payment; and on the same day executed a memorandum of agreement, by which he undertook to deposit with B a lease of another plot, when it should be executed, the draft being already prepared, as further security. A mill, and certain other buildings occupied therewith, stood partly on one plot and partly on the other. In December, 1845, the lease was granted to A, and then deposited with B, according to the memorandum of agreement. In August, 1845, A executed a second mortgage of the term already mortgaged to B, as security to C, for another sum. In March, 1847, A assigned an undivided moiety of the premises comprised in both of the aforesaid leases, including the mill and adjoining buildings, to C, and in September of the same year assigned all his estate and effects to trustees for his creditors. In August, 1848, B and C assigned to the defendant both plots of land, with the mill and buildings thereon, subject to such equity of redemption as then existed. The defendant, in April, 1852, sold the premises by auction, the conditions stating that he sold the whole as mortgagee of A; but that as to the part comprised in the lease of December, 1845, he had only the equitable interest, and the legal estate was not vested in him, and that the purchaser should accept as to this part such title as the vendor was able to deduce and convey. The plaintiffs purchased both plots and paid deposit; but on the abstract of title being furnished, and A refusing to join in the conveyance, they declined to complete, on the ground, that the legal estate in the premises comprised in

the lease of December, 1845, was outstanding, and might be set up adversely to them. They then brought an action for the deposit. *Held*, that they were not entitled to recover as upon a failure of consideration, for there was the same absolute power of sale as to the premises comprised in both leases, the deposit having been upon the same terms as the mortgage; and that, if it were not so, the conditions of sale had been complied with, the defendant having expressly stipulated to sell an equitable interest only. *Ashworth v. Mounsey*, xxiv. 467.

14. *Specific performance—Stamp.* Contract to sell a freehold ground-rent of 20l., arising from a wharf, "subject to an agreement for a lease for a term" of years. The agreement mentioned was unstamped. On a bill for specific performance by the purchaser, it was *held*, that the agreement was part of the subject of the contract, and that the vendor was bound to perfect it by having it properly stamped. *Smith v. Wyley*, xvii. 49.

15. *Time in delivery of abstract not of essence of contract.* An estate was put up to sale by auction on the 22d of July. By the conditions of sale an abstract of title was to be furnished within seven days from the day of sale on the application of the purchaser for the same; all objections were to be taken within eight days of such delivery, or to be considered as waived; the purchase to be completed on the 8th of August. The purchaser's solicitor called for the abstract on the 24th day of July, two days after the sale. The estate was in mortgage, and the mortgagee being abroad, the abstract could not be made in time, but the same was delivered on the 3d of August. The purchaser, thereupon, claimed to rescind the contract, and brought an action for the deposit. The vendor filed a bill for specific performance, to which the purchaser put in a demurrer. *Held*, that time in the delivery of the abstract was not of the essence of the contract. *Roberts v. Berry*, xvii. 400.

16. *Condition that lessor's title would not be shown.* A condition, on the sale of leasehold property, that the title of the lessor would not be shown, and should not be inquired into, *held* to be binding, and the purchaser compelled to perform his contract, although in the investigation, before the master, a serious defect in the lessor's title was discovered. *Hume v. Bentley*, xv. 1.

17. *Sale by trustee under a will—Specific performance—Costs.* On a sale of real estate by a trustee under a will open to suspicion as having been obtained by undue influence, the title was approved, but before the actual completion of the contract the heir at law gave notice that he intended to dispute the will and brought an action against the tenant for rent; the purchaser thereupon refused to complete, and a bill for specific performance was filed, but before it came to a hearing, the action brought by the heir was tried, and a verdict given against the heir; a reference as to title was then directed, and the master having reported in favor of the title, a decree was made for specific performance. On appeal, however, by the purchaser, the lord chancellor (Lord Cottenham) ordered the case to stand over generally, with liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The lord chancellor (Lord Truro) thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed, and also to pay the costs of the suit subsequently to the hearing when the reference as to title was directed; his lordship *held* that at that time there had been such reasonable inquiry into the title as ought to have satisfied the purchaser, and that therefore the consequences of the further proceedings by which the will was established, both in reference to the costs of the suit for specific performance and the payment of interest, must fall on the purchaser. *Grove v. Bastard*, xii. 76.

18. *Agreement by railway company to purchase land, in order to remove objection to bill for branch line—Abandonment of branch, and refusal to perform.* A company had a bill before parliament for making a branch railway, an objection to which would

might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial and not merely idle litigation, refused to decree a specific performance. *Pyrke v. Waddingham*, xvii. 534.

26. A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the court entertains doubts, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded. *Ib.*

27. If the doubts, as to a title, arise upon a question connected with the general law, the court is to judge whether the general law on the point is or is not settled; and if it be not, or if the doubt as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, specific performance will be refused. *Ib.*

28. The rule rests upon the principle, that every purchaser is entitled to require a marketable title. It is the duty of the court, on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen, and were in course of litigation. *Ib.*

29. Where a testator by will disposes to a legatee, of all his real estate of which he may die seised, and subsequently acquires other real estate, and thereafter republishes his will by a codicil, which describes the will only by naming the year of its date, and the legatee, after the testator's death, agrees to convey the last acquired estate, and after probate of the will tenders title without probate of the codicil, and the purchaser objects to the title, denies the validity of the codicil and necessary republication of the will, the vendor must produce the same amount of proof of the validity of the codicil, as is necessary to establish a will against an heir at law and make probate of the codicil in the proper court, and will not be entitled to the damages stipulated to be paid in case of default of the purchaser, the title not being completed till after the hearing of the cause, nor will either party be entitled to costs. *Weddall v. Nixon*, xxi. 9.

II. Misdescription and Misrepresentation.

1. *Misdescription—Auction.* A man purchased at an auction a house, of which he did not know the position, by the description in the particulars of sale, of No. 58 on the north side of Pall Mall, opposite Marlborough House. The same particulars stated the amounts of the rent, rates, and taxes of the house. He afterwards found that the house was not in Pall Mall, but stood behind No. 57 Pall Mall, and was only connected with Pall Mall by a narrow passage leading through the ground floor of No. 57, and communicating with the street by a door numbered 58. He did not make any objection to this, but upon discovering that the cellars of No. 57 extended underneath this passage and under a small part of No. 58, and that the floor of the passage was not very strong, he filed a bill to set aside the contract, and for the return of the deposit, with interest. *Held*, that he was entitled to this relief, notwithstanding that by his conduct he had waived his right to object to the position of the house upon the ground that the passage was not such an access to the house as he was entitled to expect from the description of the property in the conditions of sale. *Stanton v. Tattersall*, xxi. 154.

2. Premises sold at auction were described in the particulars as being customary leaseholds, renewable every twenty-one years. The sixth condition stipulated that errors of description, or any errors inserted in the particulars, should not vacate the sale, but should be the subject of abatement or compensation. It turned out on the investigation of the title, what was previously unknown to all the parties interested, that there was no custom to renew, but that the premises were held for an absolute term of twenty-one years. *Held*, first, that the fact of the property being sold as

equities than those which such occupier may insist on; whatever authority there is on the subject is the other way. *Ib.*

5. *Parol evidence of notice.* The rule is settled as to parol evidence of notice, namely, that a purchaser is not bound to attend to vague rumors—to statements by mere strangers; and that a notice, in order to be binding, must proceed from some person interested in the property. *Ib.*

6. Circumstances where held, (affirming the decision of the court of error and appeal for Upper Canada,) that the purchaser of a lot of land had no notice, actual or constructive, that the vendor was an equitable mortgagee only. *Ib.*

7. *Constructive notice.* The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. *Ware v. Egmont*, xxxi. 89.

8. *Restrictive covenants respecting manner of erecting buildings—Sufficiency of notice.* Where the deed, under which the vendor of land claims, contains restrictive covenants with regard to the manner in which buildings shall be erected thereon, and the deed of agreement containing the restrictive covenant is recited in the conveyance to the purchaser, such purchaser has sufficient notice of the existence of the covenant, and such restriction is binding on the land, though it tends to perpetuity. *Cole v. Sims*, xxiii. 584.

9. *Peculiarities in abstract of title.* Where there are peculiarities in an abstract of title sufficient to put a purchaser on his guard, and cause him to make further inquiry, it is the duty of the purchaser to make such further inquiry. *Ware v. Egmont*, xxiii. 486.

10. *Notice to purchaser that another person is in possession.* A purchaser having notice that another person, or his under-tenant, is in possession of the property, is not justified in presuming the possession of that person to be the possession of the vendor; but is bound to make inquiries of the person who, by himself or his under-tenant, is so in possession, or he will be deemed to have notice of the title of such person. *Bailey v. Richardson*, xv. 218.

11. *Mortgagee purchasing equity.* Mortgagee purchasing an equity of redemption, preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect. *Ib.*

IV. Interest on Purchase-money.

1. Real estate was put up for sale at auction, under the condition that the vendors should confirm the master's report of purchases at an early day, and then that each purchaser should pay his money into court and be entitled to the rents. If the payment was delayed, then interest should be paid at the rate of 5l. per cent. from that day. Through the default of the vendors the master's report was not confirmed for two years. *Held*, that the purchasers were entitled to the rents from the first mentioned date and must pay interest at the common rate of 4l. per cent. *Wallis v. Sarel*, xiii. 138.

2. If purchase-money be invested pending the presentment of account by vendor, interest ceases to run from the time of investment. *Lewis v. The South Wales Railway Co.* xv. 424.

3. It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase-money, and that the purchase-money being retained by him will carry interest to be paid by him to the seller. An agreement, which appears to prevent the application of this rule, will be examined in a court of equity, by its aid, and will or will not be enforced, according to circumstances. *Birch v. Joy*, xviii. 16.

4. B., in March, 1812, contracted for the purchase of an estate from C., for 90,000l.

V. *Miscellaneous Cases.*

1. *Good title.* "A good title" to lands is such a title as a court of chancery would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment by any claimant. *Jeakes v. White*, xiv. 350.

2. *Acknowledgment of deed by married woman.* Where a deed acknowledged by a married woman, under the 3 & 4 Will. IV. c. 74, forms an essential part of a title, a good title is not made out to a purchaser by the mere production of the deed, with an indorsement thereon of an acknowledgment before a judge; proof must also be given of a certificate of such acknowledgment filed of record in the common pleas, pursuant to the 85th section. *Jolly v. Hancock*, xvi. 472.

3. *Sale of leasehold—Vendor not obliged to obtain renewal of lease.* The fact that the vendor of leaseholds was in treaty with the lessors for the renewal of a certain lease before making a contract for the sale of the leasehold, and continued such treaty after the contract, throws no obligation upon the vendor to obtain such renewal for the benefit of the purchaser. *Monro v. Taylor*, xi. 175.

4. *Sale of reversion.* If, before the sale of a reversion, competent persons are not consulted as to its value, the court may set aside the sale on evidence of a great mistake as to the value. *Edwards v. Burt*, xv. 434.

5. Where a vendor took an exception, which contested the validity of his own title, it was held to be irregular. *Bradley v. Munton*, xxi. 555.

6. *Opening biddings.* Leave will not be given to open the biddings until after the master's report on the purchase. *Lovegrove v. Cooper*, xv. 415.

7. *Right to recover deposit money.* If the conditions of a sale be, that the children of the tenant for life, "or their trustees, shall, if required, join in the conveyance, but no objection shall be taken to the title of the vendors on account of the sale taking place in the lifetime of the tenant for life," the purchaser is not obliged to complete the purchase, if it proves that neither the children nor the trustees have any legal capacity to join in such conveyance, although they would have a right to join after the death of the tenant for life; and the deposit money may be recovered back by the purchaser. *Moseley v. Hide*, vi. 247.

8. *Investment of purchase-money.* In case of an agreement between a vendor and a purchaser that the latter should invest the purchase-money pending a dispute, it was held that the vendor was entitled to the benefit of the funds having risen. *Burroughes v. Browne*, xv. 166.

9. *Acceptance of title.* A purchaser, having proceeded to examine the titles with the abstract furnished by the vendor's solicitor, was held to have accepted the title, but circumstances might vary the rule. *Pegg v. Wisden*, xv. 12.

10. *Covenant—Opposite land.* Where the vendor of land covenanted not to build any building except tombs on land opposite to that sold, it was held that the covenant extended only to that land which was exactly opposite to the land sold. *Patching v. Dubbins*, xxiii. 609.

11. *Application of purchase-money by the purchaser—Legacy.* It is settled that where there is a trust for the payment of specified or scheduled debts, a purchaser is bound to see to the application of the purchase-money. When the trust is for payment of legacies simply, the purchaser is bound to see to the application of the purchase-money, because the legacies are specified as distinctly as debts which are scheduled; but if the trust be for the payment of both debts and legacies generally, then the purchaser is not bound to see to the application of the purchase-money in the payment of the legacies, although they are specified in the will, because to do so would involve him in the necessity of seeing to the due application of the purchase-money in the payment of debts generally. *Robinson v. Lowater*, xxiii. 540.

12. *Encumbrance.* An absolute power to charge an estate with a definite sum of money is "an encumbrance" upon the estate. *Evans v. Evans*, xix. 533.

13. *Sale before master—Opening contract—Undervalue.* Where, by an order of court, the master was directed to sell certain lands, which he did at private sale, and all the parties encouraged the adoption of the contract and concurred in allowing the purchaser to enter and exercise acts of ownership, the court will not interfere to set aside the sale, unless there is some evidence of gross undervalue or that the sale is not such as the court will permit any trustee to make of trust property, although a higher purchaser might have been found on further investigation. *Millican v. Vanderplank*, xxi. 171.

14. *Deposit by purchaser with banker—Failure of banker.* If a purchaser, wishing to take immediate possession, accedes to the proposition of the vendor, and deposits, pending the investigation of title, the money with the vendor's banker, paying interest till completion of title, and the banker fails, the loss falls upon the vendor. *St. Paul v. The Birmingham, Wolverhampton, &c. Railway Co.* xxiii. 37.

15. *What title vests.* When the purchaser has contracted to purchase and the vendor to sell an estate, the equitable interest becomes at once vested in the purchaser. *Stone v. Van Heythuysen*, xxiii. 491.

16. *Will—Implied estate tail—Curtesy.* Devise in trust for the testator's daughters, M. and C., for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over implied estates tail to M. and C., with cross remainders in tail. M. died unmarried, and then C., conceiving herself tenant in fee simple, in contemplation of marriage, conveyed her estate, with the concurrence of her intended husband, by lease and release, to trustees and their heirs, in trust for herself until the marriage, and after the solemnization thereof, in trust for herself for life, and then for her children, &c. There was issue of the marriage. *Held*, that the trustees took a base fee, and that the husband was not tenant by the curtesy. *Held*, also, that after C.'s death, her eldest son, having elected to take against the settlement, and barred the entail, could make a good title to a purchaser from him, and such as a court of equity would compel the purchaser to accept. *Stanhouse v. Gaskell*, xvii. 140.

17. *Contract for purchase by lunatic—Recovery of deposit money.* The plaintiff, a lunatic, contracted for the purchase of an estate from the defendant and paid the deposit. The defendant had no knowledge of the lunacy and made the contract *bonâ fide*. *Held*, that the plaintiff was not entitled to recover the deposit money. *Beavan v. M'Donnell*, xxiv. 484.

18. *Devise of lands subject to debts, with authority to sell.* A testator devised land subject to payment of his debts, to A and B, their heirs and assigns, and he authorized his executors thereafter mentioned, with the approbation of his trustees for the time being, to sell any part of his estates. *Held*, that the surviving executor, with the assent of trustees appointed by the court of chancery (in whom the devised lands were vested by a vesting order,) could make a good title. *Brassey v. Chalmers*, xxxi. 115.

19. *Crops on land transferred in fraud of creditors.* A father, in expectation that a judgment would be recovered against him, transferred his farm to his son. *Held*, that if the jury found that the transfer was really made, the growing crops belonged to the son, and could not be seized on execution as the goods of the father. *Stevenson v. Dickenson*, xiv. 510.

20. *Sale of reversion.* A sale by auction is not necessary to sustain a purchase of a reversion, if impeached. *Edwards v. Burt*, xv. 434.

21. *Apportionment of purchase-money.* A purchaser of property included in one contract, may divide the property purchased, and apportion the purchase-money, and he may direct its conveyance to be made by the vendors in such manner as he may deem most expedient, and by one or more deeds. *Clark v. May*, xv. 536.

22. *Devise to trustees—Tenant for life ordered to convey.* A devise to trustees to the use of A for life, with remainder over. The trustees disclaimed. Under a mistaken idea that the trustees had the legal estate, an order of the court was obtained to appoint new trustees, and the heir conveyed to them. A then conveyed his life estate to a mortgagee; and afterwards took a reconveyance from him. *Held*, that A was in by the devise, within the 1 Will. IV. c. 47, and he was ordered to convey to a purchaser. *Beale v. Tennent*, xv. 250.

23. *Void check given for consideration-money.* Where a void check was given by purchasers and received by vendors for the consideration-money for an estate, and presentation of the check was delayed by the vendors until after an event, which never happened, at the request of the authorized agent of the purchasers, and the bankers became bankrupt, it was *held*, that, under the circumstances of the case, there was no laches in the non-presentation of the check, and no payment or equitable satisfaction of the check; and further, that the vendor was entitled, on a bill filed by him for specific performance of the agreement, to a decree for that purpose, and full payment of the consideration-money. *Ward v. The Oxford, &c. Railway Co.* xix. 575.

24. *Inadequacy of value*, though it is not by itself a sufficient ground for avoiding a sale, is yet of great weight when coupled with circumstances of oppression. *Cockell v. Taylor*, xv. 101.

25. See *Mill v. Hill*, xxii. 20.

VENUE.

1. *Where money is obtained by false pretences—Begging letters.* Where the prisoner, in a begging letter, which contained false pretences, and was addressed to the prosecutor, who resided in Middlesex, requested him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the prisoner's address in Kent, it was *held*, that the venue was rightly laid in Middlesex, as the prisoner, by directing the money order to be sent by post, constituted the postmaster in Middlesex his agent to receive it there for him; and there was a receipt of the money order by the prisoner within the county of Middlesex. *Regina v. Jones*, i. 533.

2. *In margin of declaration.* The venue in the margin of a declaration does not import that every local circumstance is in the county where the venue states it to be. The rule that the venue is to be considered as the place indicated in the margin, does not affect the case where local description is necessary. *Simmons v. Lillystone*, xx. 445.

3. *Constables of boroughs—Taking stolen goods within the county but out of the borough.* By sect. 76 of stat. 5 & 6 Will. IV. c. 76, the constables of boroughs have all the privileges that any constable duly appointed then had, or thereafter might have, within his constablewick, by virtue of the common law, or of any statutes made or to be made. By sect. 133, all actions against any person for any thing done in pursuance of the act shall be laid in the county where the fact was committed, and be commenced within six months. In replevin, for unlawfully taking and detaining goods of plaintiff, it appeared that the defendant was a constable appointed for the borough, and took the goods within the county wherein the borough was situate, but without the borough, upon a charge that they had been stolen. *Held*, that he was acting in pursuance of the power given to him by sect. 76, and was entitled to the protection given under sect. 133. *Mellor v. Leather*, xviii. 230.

4. *Change of rules of practice in court of exchequer.* The following rules of practice are laid down as to applications for change of venue, in the court of exchequer. First, it is more convenient as a general rule that the application to change the venue, by rule or summons may be made before issue joined; but this shall not prejudice either party from applying after issue is joined to lay the venue in another county, if it shall

appear that it may be more conveniently tried in such county. Secondly, a defendant in his affidavit to obtain the rule *nisi* to change the venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but he may, if he pleases, rely only on the fact that the cause of action arose in the county to which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shows that the case may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed. *De Rothschild v. Shilston*, xx. 517.

5. *In action for libel.* It is no ground for changing the venue in an action for a libel contained in a letter written and sent to a person in the county to which the venue is sought to be changed, that the defendant (who has pleaded not guilty only) has many witnesses resident in that county, whom he intends to call in mitigation, and that the plaintiff has no witnesses in the county where the venue was originally laid. *Wheatcroft v. Mousley*, xx. 296.

6. *Application for, on special grounds after issue.* Though a defendant may apply for a change of venue on special grounds after issue, and after having been put under terms to try in the county originally laid, yet his having accepted that undertaking will be an answer to the application if made only on grounds which must have been known to him at the time he entered into it. Application so made was refused, though the premises lay in the county to which it was sought to change the venue, a view was necessary, and many of defendant's witnesses lived there. *Semble*, the proper course in such a case is to apply for a view. *White v. Neeld*, xxx. 504.

7. *Hilary rules, 1853.* The rules of Hilary term, 1853, change the practice only as to written rules; and rules by statute, or unwritten rules, not inconsistent with the new rules, remain unchanged. *Begg v. Forbes*, xxvi. 369.

8. The rule, that the venue cannot be changed on the common affidavit after plea, being unwritten, is still in force. *Ib.*

9. The new rule as to change of venue changes the practice, so that the order cannot be made of course, on the common affidavit, but must be made by the court or the judge, on a rule or summons, so that it may be answered in the first instance. *Ib.*

10. *Semble*, that the venue cannot be changed on special grounds till after issue. *Ib.*

11. *Affidavit.* Since the Reg. Gen. H. t. 1853, r. 18, an affidavit, stating the nature of the action, and that the cause of action arose in the county into which it is sought to change the venue, and that the case can be more conveniently tried there, is not the common affidavit, but is sufficiently special to support an order for the change of the venue after plea, the pleadings being before the judge or court. *Ib.* See also *Ramsden v. Skip*, xxii. 496.

12. The venue may be changed in an action upon a specialty, before issue joined, upon an affidavit disclosing special circumstances. *Pashley v. The Mayor, &c. of Birmingham*, xxvi. 293.

13. One of two defendants may, under ordinary circumstances, change the venue without the consent of the other. *Job v. Butterfield*, i. 417.

14. A rule to discharge a rule for changing the venue need not be drawn up on reading the affidavits on which the original rule was obtained. *Ib.*

15. A plaintiff cannot change the venue upon a common affidavit, after obtaining time to plead upon the terms of taking short notice of trial. *Clulee v. Bradley*, xxiv. 357.

VERDICT.

1. *Correction of mistake in.* On the trial of a prisoner for felony, a jurymen, by mistake, delivered the verdict "not guilty," when the jury meant "guilty." The prisoner was discharged, but some of the jury then interposing, he was immediately

brought back, and the jury were again asked what their verdict was. They said "guilty;" the prisoner was, therefore, sentenced. *Held*, that the mistake was corrected within a reasonable time, and that the conviction was right. *Regina v. Vodden*, xxii. 596.

2. *Perverse verdict*. A perverse verdict is where a jury refuses to take the law from the judge, but act, though with honest intentions, upon their own erroneous view of the law. Per Pollock, C. B. *Ib.* *Saunders v. Davies*, xiv. 532.

3. *Special verdict*. A special verdict must find the facts, and not consist of a mere statement of evidence. *Fryer v. Roe*, xxii. 440.

4. *Setting aside for perjury*. Though it is clear that one side or the other has committed perjury, the court will not disturb the finding of the jury. *Solomon v. Todd*, xxiv. 366.

5. *Minds of jurors equally balanced—Burden of proof—Question of title*. Where the jury, on the trial of an issue, directed by the court of chancery, to try the title to land, find for the defendant, the judge instructing them, that if their minds are equally balanced, so that they cannot make them up, then, as the burden of proof is on the plaintiff, they must find for the defendant, on the ground that neither party has made out a satisfactory title,—the court directing such issue does not regard the verdict as establishing the defendant's right, but will order a new trial to settle the question of title, and, as incident thereto, the question of possession. *The Freeman, &c. of Sunderland v. The Bishop of Durham*, x. 210.

6. *Interpleader issue—Title to goods taken on execution—Verdict for plaintiff as to part, and defendant as to the residue—Costs*. In an interpleader issue, the question being, whether goods seized by the sheriff for the defendant, an execution creditor, were the property of the plaintiff, the claimant, the jury found "for the plaintiff for the amount of the goods she was possessed of at A; and for the defendant as to the rest." The value of the whole of the goods had been paid into court, and was greater than the judgment debt. On application of the defendant, it was *held*, that the verdict was erroneous, and could only be set right by a new trial, as it did not specify the value of the goods to which the plaintiff was entitled, and it did not appear whether the residue was more than sufficient to satisfy the debt. But as it did not appear whether the value of the goods found for the defendant were enough to satisfy the judgment, it was by consent referred to the master to ascertain their value, the costs to be apportioned by a judge at chambers. *Allsopp v. Brittain*, xxv. 432.

WAR.

1. *Declaration of—Orders in council*. A Finnish vessel sailed from Hartlepool to Copenhagen with a cargo of coals, which she there discharged, for the use of the British fleet, prior to the 29th March. The ice having broken up, she sailed for Bjorneborg on the 10th April, and was captured on the 12th. War was declared on the 29th March, on which day, also, an order in council was published, "allowing Russian merchant vessels, in any ports or places within her Majesty's dominions, until the 10th May, six weeks from the date hereof, for loading their cargoes and departing from such ports or places." *Held*, that the vessel was not within the protection of this order in council. *The Phoenix*, xxviii. 594.

2. As to the dissolution of a charter-party by the occurrence of war, see *Reid v. Hoskins*, xxx. 406; *Esposito v. Bowden*, xxx. 336.



WARD OF COURT.

As to the effect of the marriage of a ward of court without its sanction, see *Cave v. Cave*, xix. 280; *Martin v. Foster*, xxxi. 379.

WAREHOUSEMAN.

As to the liability of warehousemen for loss of goods in their possession by accidental fire, see *Morewood v. Pollok*, xviii. 341, note.

WARRANT OF ATTORNEY.

1. *Warrant with a defeasance.* A warrant of attorney was given by the defendant, with a defeasance, stating it was security for payment of 800*l.* and interest. Judgment was signed and execution levied for the full amount. At that time the defendant owed the plaintiff 400*l.*, and the plaintiff had joined as surety with him in a note of 400*l.* A. B. paid out the execution and the plaintiff discharged the note. The defendant died in May. A. B. was his executor, and in November applied for a rule to ascertain the amount due on the warrant, and cause the plaintiff to refund the overplus; making an affidavit, that just before his death the defendant told him, A. B., that he owed the plaintiff nothing excepting by reason of the note. There was no affidavit by the defendant's attorney, and no explanation of the delay. The plaintiff and his attorney set forth by affidavits the facts as above stated. *Held*, that there was no ground for the application; that even the affidavit on which it was made was insufficient, but that, at all events, it afterwards was amply answered; and that the rule must be discharged, with costs. *Pettit v. Pettit*, xxv. 401.

2. *Attestation by attorney.* A warrant of attorney, prepared by the defendant, was addressed to H., an attorney, by name. The plaintiff introduced H. to the defendant, who adopted him as his attorney to attest the execution of the warrant of attorney, and H. accordingly attested it. H. afterwards, at the request of the plaintiff, signed judgment and issued execution on the warrant as attorney for the plaintiff. The court refused to set aside the warrant on the objection that the attestation by H. was insufficient. *Levinson v. Syer*, viii. 378; s. c. vi. 353.

3. Lapse of time, or fresh dealing between the parties may, under some circumstances, render valid a warrant of attorney otherwise void by the statute. *Hirst v. Hannah*, xxiv. 186.

WARRANT OF COMMITMENT.

1. *Form of—Schedule of 11 & 12 Vict. c. 43.* Warrants of commitment, &c., are sufficient, if they correspond with the forms given in the schedule to the 11 & 12 Vict. c. 43. *In re Allison*, xxix. 406.

2. The 16 & 17 Vict. c. 30, empowers two justices of the peace to punish, on summary conviction for certain assaults, any person, "sitting at a place where the petty sessions are usually held." *Held*, that a warrant of commitment for such offence, in the form given by the 11 & 12 Vict. c. 43, was good, although it did not state that the justices were sitting at a place where petty sessions are usually held. *Ib.*

3. *Commitment under 4 Geo. IV. c. 34, s. 3.* A warrant of commitment of a servant for leaving his master's employment, under 4 Geo. IV. c. 34, s. 3, is bad, if it does not aver either that the contract was in writing, or that the service had been entered upon. *Ex parte Askeu*, v. 354.

4. A warrant of commitment, under sect. 3 of stat. 4 Geo. IV. c. 34, alleged that the party did misdeemean and misconduct himself in his service, by neglecting and absenting himself from his master's service, without the leave of his master, and without assigning any sufficient reason for so doing. On motion for a *habeas corpus* to discharge him, it was *held*, that the warrant showed no offence, as there might be some lawful excuse for the absence, and that the warrant was therefore bad. Prisoner discharged. *Ex parte Geswood*, xxii. 254.

5. *Discharge on recognizance—Notice—Warrant for rearrest.* A prisoner in custody, under a sentence for a misdemeanor, was discharged on entering into recognizances to prosecute a writ of error with effect. No notice was given to the

prosecutors, nor were the recognizances duly filed. He was therefore recommitted. The judge's warrant under which he was retaken directed his recommitment, stating it to be "in execution of the judgment in the said prosecution." *Held*, that the warrant was good, and that it was not necessary to state on the face of the warrant how long the renewed imprisonment was to continue. *Dugdale v. Regina*, xxix. 134.

6. *Semble*, that without any warrant, the jailer would have been justified in retaking the prisoner as for an escape, as he was improperly at large. *Ib.*

See COUNTY COURT, VII.

WASTE.

1. *Liability of tenant for life to rebuild.* A house was devised to A for life, "he committing no manner of waste, and keeping the premises in good and tenantable repair." A became a lunatic after taking possession; and the house was destroyed by fire. *Held*, that his estate was liable to reinstate the house, and a reference was directed as to the amount to be expended, and from what fund, with liberty to the next of kin to take a case to law. *In re Skingley*, iii. 91.

2. *Waste by rector selling timber for repairs.* A rector may cut timber on the glebe lands for actual repairs, but cannot cut and sell timber even to apply the proceeds to repairs, except in extraordinary cases; and if he does, it is waste, as much as in the case of an ordinary tenant for life. *The Duke of Marlborough v. St. John*, x. 146.

3. *Interim order to stay waste.* Although an injunction *ex parte* will not be granted to stay waste, yet an interim order will be given with leave to discharge it, where the object of the application is to preserve property during litigation. *Anwyl v. Owens*, xix. 610.

4. *Equitable waste—Ornamental timber.* In cases of equitable waste in respect of ornamental timber, a court of equity confines its protection to timber planted or left standing for ornament; and if the settler of the property has defined a standard of beauty or ornament, the court will prevent its being impaired. Therefore, where property was settled to the use of trustees and successive tenants for life, with power to cut timber then standing, not ornamental to the mansion-house or the pleasure grounds attached thereto, or the views or prospects of the same, of which timber it was declared enough should always remain to preserve the beauty of the place unimpaired, the court granted an injunction to restrain the tenant for life in possession from cutting timber which could not be cut without impairing the beauty of the place as it stood at the date of the settlement; but ordered the plaintiffs to give security for any damage he might sustain by being restrained from completing the sale of such timber; and offered the latter a reference to the master to inquire what timber could be cut without impairing the beauty of the place. *Marker v. Marker*, iv. 95.

5. A court of equity will not interfere to make a tenant for life liable in respect of permissive waste. *Powys v. Blagrave*, xxvii. 568.

WATERCOURSE.

1. *Presumptive grant—Change of level of drain.* A pit in plaintiff's close had been, since 1796, supplied with water from defendant's (adjoining) close through a tile drain. The water came from the general surface of defendant's land, which was boggy, and aided in draining it. Defendant, to improve the drainage of his land, changed the level of his drain so that the water ran out of plaintiff's pit. *Held*, that no grant of the flow of the water to the plaintiff was to be presumed, and that the plaintiff had no right of action against the defendant for the diversion of the water. *Greatrex v. Hayward*, xx. 377.

2. *Where flowage is above ground, grant not to be presumed from acquiescence—Riparian proprietors.* The right to have a stream of water which flows above ground running in its natural course, is not by a presumed grant from long acquiescence on the part of the riparian proprietors, above and below, but is *ex jure natura*, and an

incident of property; and an action lies for infringement of this right. *Aliter* in the case of underground water; unless in the case of a subterranean stream whose course is well known. *Dickinson v. The Grand Junction Canal Co.* ix. 513; and see s. c. xix. 287.

3. *Diversion by the digging of a well.* Where water is taken from a river after it has formed part of its stream, not by the reasonable use of it by another riparian proprietor, but by the digging of a well, an action at common law will lie by a riparian proprietor for injury to his right, against the party digging the well; as it also may for the abstraction of water which never did form part of the river, but has been prevented from doing so in its natural course by the excavation of the well; and this whether the water was part of an underground watercourse, or percolated through the strata. *Ib.*

4. *Quære*, if the party digging the well was ignorant and could not by any degree of care have ascertained before making the well that it would have the effect of abstracting the water, and when he discovered that it did, could not have repaired the mischief, whether an action at common law would be maintainable against him? *Ib.*

5. *Right of action by agreement.* Such an action may however be maintained on an agreement not to diminish the supply of water of the river, or on the provisions of a special act of parliament to that effect. *Ib.*

6. *Right of action without actual loss.* In any of the above cases the action is maintainable for injury to the right, though no actual loss may have been occasioned. *Ib.*

7. See *The Duke of Devonshire v. Elgin*, vii. 39; *Northam v. Hurley*, xviii. 164.

WATERMEN'S ACT.

1. *Working steam-tug.* Section 37 of the Watermen's Act (7 & 8 Geo. IV. c. 75,) imposes a penalty on any person (other than a freeman of the watermen's company, or an apprentice to, or widow of a freeman) who shall work or navigate "any wherry, lighter, or other craft," from or to any place or places, or ship, or vessel within the limits of the act. *Held*, that this does not extend to a person who works a steam-tug for the purpose of towing vessels on the Thames. *Reed v. Ingham*, xxvi. 164.

2. *Western barge.* A barge, of the build commonly called a western barge, is not a western barge for the purpose of s. 101 of the Watermen's Act, unless navigated from Kingston or beyond. Therefore, a non-freeman employed as a servant for hire, navigating such a barge within the limits of the act, below Kingston, though starting from a canal into the Thames, is guilty of an offence under s. 37. *Regina v. Tibble*, xxx. 372.

3. *By-law.* The 38th by-law under the Watermen's Act, prohibiting non-freemen from navigating any barge, &c., or other craft on certain parts of the Thames, absolutely, is not therefore bad; it would not apply to rendering assistance to craft in peril, &c.; nor to working without hire in a pleasure craft; but if it did, it would not be therefore bad. *Regina v. Edmonds*, xxx. 379.

WAY.

- I. WHAT IS A HIGHWAY; AND HEREIN OF DEDICATION.
- II. OF PRIVATE, FOOT, AND CARRIAGE WAYS, AND WAYS OF NECESSITY; USER; PRESCRIPTION.
- III. TURNPIKE; TOLLS.
- IV. LIABILITY TO REPAIR WAYS; AND HEREIN OF THE INDICTMENT, INFORMATION, PRESENTMENT, ORDER OF JUSTICES, COSTS, &c.
- V. LIABILITY FOR NON-REPAIR.
- VI. SURVEYOR.
- VII. MISCELLANEOUS CASES.

I. What is a Highway; and herein of Dedication.

1. *New road formed by railway company.* A new road formed by a railway company, leading across the railway on a level into an old highway at one end and a turnpike at the other, held a highway, though the parish might not be bound to repair it. *Fawcett v. The York, &c. Railway Co.* ii. 289.

2. A good right of way for the public, over private property, may exist between a public place, which is a valid *terminus a quo*, and a point which is not a public place; provided they have a right to go beyond such point to a good *terminus ad quem*. *Campbell v. Lang*, xxviii. 80.

3. *Paving act—Bridge.* By an act, the owners of any "land, tenement, &c., situate in any street, square, or other public passage or square," which then was or thereafter might be built upon, were to pay for paving such street, &c. *Held*, that a bridge, which formed part of a public highway through streets communicating with each end of the bridge, and which was built of brick over a canal, and had brick walls from four to five feet high on either side, was not "a passage or place built upon" within the meaning of the act. *Arnell v. The Regent's Canal Co.* xxv. 351.

4. *Dedication—Public user—Evidence of.* Public user of a road for some time is sufficient *prima facie* evidence of a dedication by an owner of the freehold to the public, and it is not necessary to show by whom the dedication was made. *Regina v. Petrie*, xxx. 207.

5. *Thoroughfare.* A public highway may, in point of law, exist by dedication over a place which is not a thoroughfare. *Bateman v. Bluck*, xiv. 69.

II. Of Private, Foot, and Carriage Ways, and Ways of Necessity; Prescription; User.

1. *Private way—Implied grant.* D. was seised in fee of five closes; one of them, named the Rye Holme close, was separated by two of the others from the only available highway. From 1823, the road A. B. was used by the tenants of the Rye Holme, it being the most convenient road to the highway. In 1839, D. sold the Rye Holme to M., and the remainder, over which the road A. B. passed, to E. The deeds of conveyance bore different dates, but were executed on the same day, and the order of priority could not be ascertained. In neither of them was there any special grant or reservation of any particular way, but the conveyance to M. contained the usual words "together with all ways, rights, easements, &c., to the said close belonging or appertaining." The occupier of Rye Holme used the road for several years subsequent to the conveyance. In 1842, E. conveyed to the defendant part of the land, over which the road A. B. passed, at which time the plaintiff was tenant of the Rye Holme under M. In an action to try the right of the plaintiff to use the road, it was *held*, that the plaintiff was entitled to the way by implied grant, if the conveyance to M. was first executed; or, if the conveyance to E. was first executed, that the right of way was reserved to D., and subsequently passed to M., as appurtenant to Rye Holme. *Pinnington v. Galland*, xx. 561.

2. *User as of right for twenty years.* A plea under the statute 2 & 3 Will. IV. c. 71, of a user of a way as of right for twenty years over a close, is not supported by proof of a user of the way for part of the twenty years while M. was the landlord and owner as well of the messuage in respect of which the right was claimed as of the close over which it was exercised, and for the rest of the period when the defendant had acquired the freehold of the messuage. *Winship v. Hudspeth*, xxvi. 481.

3. *Carriage and foot way—Enjoyment for twenty years—Pack way changed to carriage way—Servient tenement in lease.* Case, brought September 1, 1851, for obstructing a carriage and foot way, the plaintiff claiming under an enjoyment of twenty years. Plea, traversing the right of way. On the trial it appeared that there

had been a user for forty or fifty years of a right of way for foot passengers, and for horses across the defendant's land, but not for carts and carriages, none being in use in the district forty years ago; and that from June, 1831, to Lady-day, 1846, the servient tenement had been held under two successive leases for years, exceeding three years each. The claim of the right of way was not resisted by the reversioner within three years after the term granted by the second lease. The court directed the jury, that if a pack way was proved, as civilization advanced, and carts and carriages came to be used, the way would then become a way for carts and carriages; and that the time during which the servient premises were under lease, ought to be excluded from the computation of the twenty years, as well as from that of the forty years under the 2 & 3 Will. IV. c. 71, s. 8. The jury found that there had been an enjoyment as of right for twenty years. Upon motion for a new trial on the ground of misdirection, it was *held*, first, that there was evidence for the jury upon the right as claimed. Secondly, that said section, which excludes the time of enjoyment during a lease exceeding three years in computing the period of forty years, did not apply where the claim was founded on an enjoyment for twenty years only; and that if it did, the condition that the claim should be resisted by the reversioner within three years after the determination of the term, must be applied also. *Palk v. Skinner*, xvi. 112.

4. The plaintiff sold to the defendant two dwelling-houses, a coach-house and stables, and a field, together with all ways usually held, occupied, or enjoyed therewith, with free liberty of ingress, egress, and regress for the defendant, or for cattle and carriages, over the carriage-road leading to the said dwelling-houses and stables. The defendant afterwards made a gate from the field, which abutted upon the carriage-road, into the road at an intermediate part thereof, and drove horses and carriages along the road into the field, and back again. *Held*, that he was liable in trespass, the right of way being a right of way to the dwelling-houses, coach-house, and stables only. *Henning v. Burnet*, xvi. 535.

5. *Way of necessity.* A right of way of necessity, can only arise by grant, express or implied; it does not exist where the title of the parties is by escheat. *Proctor v. Hodgson*, xxix. 453.

6. *Footpath—Construction of local statute.* A. was proprietor of lands adjoining and bounded by two public navigable rivers, X. and Y., which joined each other at a right angle. Certain persons representing the public, claimed a right of way from a neighboring town through A.'s lands in a direction parallel to River X. proceeding to the point of confluence of the rivers. A statute (local and personal) had been passed to improve the navigation of River Y., and, *inter alia*, to form a towing-path on A.'s land adjoining the River Y. up to the confluence, and the trustees of the River Y. were bound to build, and had built, a wall with an iron railing seven feet high, separating the towing-path from the other land of A. A right of way over the wall was reserved to A. by implication, but there was no access over this wall for the public provided, by the statute, nor was there any saving of any public footpath, and the land set apart for the towing-path was to be exclusively appropriated to make such towing-path. *Held*, the statute must not be construed strictly as against the public, and that its provisions were not incompatible with a public footpath existing in the direction alleged, by which the public could go round the end of the wall, and on to the towing-path, and thence to public places. *Campbell v. Lang*, xxviii. 30.

7. A local and personal act passed to make improvements, as between the trustees of a certain navigation and the owner of the lands to be affected by that navigation, must not be construed in such a way as to annihilate rights of the public, which never came into contemplation. *Ib.*

III. Turnpike; Tolls.

1. *Erection of gate—Turnpike act of 1840.* A Turnpike Act of 1840, which was to be in force for thirty-one years, provided that it should not be lawful to continue or erect any turnpike gate across the roads in the town of T., or any other town into which the said roads might pass. *Held*, that the prohibition extended to the erection of a gate within the limits of the town of T. as it existed at any time during the operation of the act, and not merely at the time when the act passed. *Regina v. Cottle*, iii. 474.

2. *"Town."* The word "town," in said act, is to be taken in its popular sense of a collection of houses, their being separated by gardens not preventing them from lying together. *Ib.*

3. The hamlet of W., in the parish of B., was, by a local act, constituted the town of W., and placed under the management of commissioners, and the surveyor of the highways was required to pay a proportion of the highway rates of the parish to the commissioners, W. continuing liable to contribute to the parish rates. By another local act, 7 Geo. IV. c. 10, "for maintaining a turnpike road from W. to L., &c.," trustees were appointed to carry the act into effect, with power for such purpose to levy and assess rates upon the owners of the land; and by section 47, the powers and authorities conferred by the former local act, were not to be affected, except that the commissioners were to be relieved from maintaining, &c., so much of the road as was within W. The Public Health Act, 11 & 12 Vict. c. 63, was afterwards applied to W., and a local board appointed, to execute the office and have all the powers, &c., of surveyors of highways, except where such powers, &c., might be inconsistent with the act, and the inhabitants of any district were not to be liable to highway rate or other payment, not being toll, in respect of making or repairing roads or highways within any parish, township, or place, situate beyond the limits of such district. Portions of the turnpike road being out of repair, and the revenues accruing to the trustees under the local act being insufficient to keep it in repair and preserve the embankments, &c., an order was made, under 4 & 5 Vict. c. 59, upon the surveyor of the highways of B. for payment of a portion of the highway rates to the trustees, to be laid out in the repair of the portion of the turnpike road within the parish of B.; and this order being appealed against, it was *held*, first, that the road in question was a turnpike road, within the 4 & 6 Vict. c. 59. Secondly, that, by the 7 Geo. IV. c. 10, the management of the road was transferred from the commissioners to the turnpike trustees, the latter having the ordinary right to seek relief from the parish in case of the deficiency of funds, and the parish being liable to an indictment for non-repair of the road. Thirdly, that, under the Public Health Act, the part of the parish without the district of the local board, in case of the deficiency of turnpike funds, was liable to contribute to the repair of any part, within the parish and not within the district, whilst the district alone was liable to contribute to the repair of any part of the road within it; the former powers of the surveyor of the parish to make a highway rate no longer existing, and the two parts of the parish being entirely distinct, for the purpose of contributing to the repair, both of the turnpike road, and of the general highways. *Held*, also, that the local board of health were made the surveyors of the highways within the district, and empowered to make a highway rate for the purpose of contributing towards the deficiency of the turnpike funds; and that the order appealed against was, therefore, invalid. *Regina v. The Worthing and Lancing Turnpikes*, xxvi. 183.

4. *Trustees of Turnpike—Repairs.* The 4 & 5 Vict. c. 59, enabling justices to order the parish surveyor to pay a sum out of the highway rate for the maintenance of a turnpike road, if they find that the funds are insufficient for its repair, does not alter the duty of the turnpike trustees, or give them a right to apply their funds

otherwise than as directed by their local act. *Regina v. The Trustees of South Shields Turnpike Roads*, xxviii. 182.

5. The trustees of a turnpike road have no power, either under that act or the 13 & 14 Vict. c. 79, s. 4, to apply their funds in payment of arrears of interest upon moneys secured upon the tolls in priority to the necessary repairs of the road. *Ib.*

6. Justices of the peace have no authority to make an order on the trustees of a turnpike road for the repair of a road, under section 94 of Statute 5 & 6 Will. IV. c. 50, unless, upon examination of the state of the funds of the trust, they find that, after charging the trustees with sums received and giving them credit for lawful payments, a balance remains in their hands equal to the sum ordered to be paid. *Regina v. Hutchinson*, xxviii. 282.

7. A Turnpike Act, 3 Will. IV. c. 80, s. 12, appropriated the turnpike funds, in the first place to the payment of the expenses of obtaining the act, with lawful interest, and directed that the remainder, after payment of necessary expenses incidental to the execution of the act, "from time to time be applied in keeping down the interest of the principal moneys advanced or borrowed on account of the road," and in keeping in repair the road, and in repaying the principal moneys. The trustees, while the roads were out of repair, applied the tolls in reducing the arrears of interest due to the mortgagees before the passing of the act; and justices, at a special session for the highways, made an order, under statute 5 & 6 Will. IV. c. 50, on the trustees, to pay a sum of money to the surveyor of the highways. On appeal, the Quarter Sessions confirmed the order, subject to a case, which showed that, disallowing the payments of arrears of interest, the trustees had in hand more than the sum which they were ordered to pay to the surveyor. *Held*, that the obligation of the trustees to "keep down" the interest of the moneys borrowed took precedence of that to repair the road; but that the trustees were not authorized to pay arrears of interest when the road was out of repair; and, therefore, the court confirmed the order of sessions. *Ib.*

8. *Agreement to let tolls.* *Held*, that an agreement, signed by the clerk to trustees, which recited that A. B. was the highest bidder for, and had become the rentor of, certain tolls, and stated that the clerk on behalf of the trustees did thereby agree to let, and A. B. did thereby agree to take, the tolls and the toll-house, was a sufficient compliance with the statute. *Held*, also, that the 8 & 9 Vict. c. 106, s. 3, which provides that a lease, required by law to be in writing, of any tenements or hereditaments shall be void unless made by deed, does not apply to agreements for letting tolls, under the 3 Geo. IV. c. 126. *Shepherd v. Hodsman*, xi. 384.

9. The words, "turnpike road," in the Railways Clauses Consolidation Act, s. 60, mean a road which is repaired by tolls payable by passengers for the use of the road. *Regina v. The East and West India Docks, &c. Railway Co.* xxii. 113.

IV. Liability to repair Ways; and herein of the Indictment, Information, Presentment, Order of Justices, Costs, &c.

1 *Highway washed away by the sea.* A highway which anciently ran at right angles to the sea-coast, and sloping gently down to the sea, was so washed away by the encroachment of the waves, that it ended abruptly on the edge of a cliff twenty feet above the beach. *Held*, that as the substance of the road was gone beyond the edge of the cliff, there was no road beyond that point which the parish could be called upon to repair, and that they were not bound to provide any means of communication between the top of the cliff and the beach. *Regina v. The Inhabitants of Hornsea*, xxv. 582.

2. *Repair of bridges in the Isle of Wight, whether by the tithings or county.* The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the Isle of Wight not repairable by

tenure were repaired either by the tithings in which they were situate, or by rates in the nature of county rates, levied on all the parishes in the island; under the following arrangement. The Isle of Wight having been assessed to the general county rate, and appeals against such assessment having been made, in 1774 an arrangement was made, by an order of Quarter Sessions, and by consent, fixing certain proportions to be paid by the parishes in the Isle of Wight towards the general county rate, but leaving the expense of bridges and houses of correction to be raised by a local rate; "the said island being adjudged and declared not to be liable to pay to the county bridge rate, or to the house of correction; the Isle of Wight agreeing to erect and maintain houses of correction and bridges within the island at its own expense." Accordingly, from 1774, the practice was for the quarter sessions of the county, on the application of the justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the bridges and bridewell in the island, and this local rate, and not the general county rate, was always expended in such repairs. In 1813, a local act of parliament passed, by which commissioners were appointed for managing the roads and highways in the island, and which enacted that all bridges, &c., which had, previous to the passing of the act, been repaired by any tithings, &c., should for the future be repaired in the same manner and by such ways and means as other bridges, usually called county bridges, within the island, had been accustomed to be repaired. *Held*, that all bridges which, at the time when the local act passed, were repairable by the tithings, were thenceforward repairable by the county generally; and that the conventional mode of assessing the island alone to a rate for the repairs of its bridges and bridewell, under the arrangement of 1774, could not affect the legal liability of the county, or be any answer to an indictment against it for non-repair of such bridges. *Regina v. The County of Southampton*, xiv. 116.

3. *Rebuilding of bridge.* A bridge in the Isle of Wight was, after the passing of the above local act wholly rebuilt by order of the justices for the island division, out of the island rate before mentioned. The construction of the new bridge was materially different from, and it stood higher up the stream than, the former bridge. None of the forms required by the 43 Geo. III. c. 49, were observed in building the new bridge. *Held*, that the county remained liable to repair the new bridge. *Ib.*

4. *Foot-bridge.* A foot-bridge, formed by three planks, about nine or ten feet long, and a hand rail, which carries a public footpath over a small stream, is not such a bridge as the county is bound to repair. *Ib.*

5. As to the liability of a township to repair a highway which has never been repaired, see *Regina v. Tryddyn*, x. 402.

6. *Liability Ratione tenuræ—Usage.* The defendant, B, was indicted for the non-repair of a highway, which it was alleged he was liable to repair *ratione tenuræ*. Evidence was given of the conviction of one A, a former owner and occupier of the lands in respect to which the liability was said to arise, for the non-repair of the same highway, showing that A had pleaded guilty to a presentment against him alleging his liability to repair the said highway. Repairs by occupiers of the said lands subsequent to this conviction were also proved; and evidence was given that the defendant, B, purchased these lands after public notice of the liability to repair the highway, and that he is now the owner and occupier of the same. *Held*, by all the judges, that there was evidence to go to the jury of immemorial usage and liability *ratione tenuræ*, and, by Platt, B., that the immemorial usage was not conclusively established. *Regina v. Blakemore*, ix. 541.

7. *Indictment against a parish for non-repair—Allegation of immemoriality—Time.* An indictment against a parish for non-repair of a highway, alleged "that from the time whereof the memory of man runneth not to the contrary, there was, and yet is, a common and ancient highway," &c.; and the only other allegation that it contained as to time was, that a part of the said highway, situate, &c., "on the 1st day of Janu-

ary, in the 12th year aforesaid, and continually afterwards, until the taking of this inquisition, was and yet is" out of repair, so that the liege subjects of the Queen could not during the time aforesaid, nor yet can go, return, pass, &c. *Held*, that the allegation of immemoriality might be rejected as surplusage, and that, without it, sufficient appeared on the face of the indictment, as to time, to support the liability charged. *Regina v. Turveston*, i. 317.

8. "*Hard material*"—*Road little used*—*Rate of fine*. A parish was indicted for non-repair of a highway, and found guilty, and neglected to repair with hard materials; it was *held*, no answer to an application for imposing a fine, that the road never had been repaired with hard materials, if at all; that the adjoining parish, into which it ran, denied it was a highway; nor that it was so little used as not to be worth the expense. The fine is fixed by the amount required to put it in a substantial state. *Regina v. Claxby*, xxx. 358.

9. *Prior judgment for non-repair—Evidence*. Upon the trial of an indictment against the inhabitants of the township of H., for the non-repair of a highway, a prior judgment of quarter sessions upon a presentment, by a justice under the 13 Geo. III. c. 78, for non-repair of the same highway by H., was put in. The presentment alleged that the highway was in H., and that H. was liable to repair it. It also appeared by the judgment, that two of the inhabitants of H. had appeared and pleaded guilty, and that a fine was imposed. *Held*, conclusive evidence that the highway was in H., and that H. was liable to repair it. *Regina v. Haughton*, xviii. 287.

10. *Presentment submitted to by defendants*. The presentment did not state how the township was liable to repair. *Held*, that although it might be bad for this reason on demurrer or error, yet, that having been submitted to by the defendants, they were conclusively bound by it. *Ib.*

11. *Estoppel*. The fact of the fine imposed by the sessions not being shown to have been paid, did not prevent the judgment from acting as an estoppel, no fraud being imputed. *Ib.*

12. *Recital in private act*. A recital in a private act, (since repealed,) that the road in question was in D., is at most only evidence of that fact, and is not admissible against the estoppel. *Ib.*

13. *Former conviction against parish conclusive evidence of liability—Award of commissioners*. Upon trial of an indictment against parish A. for non-repair of a highway, it appeared that A. had always repaired the road in question, which passed over waste ground in the parish of B., and connected together two separate portions of A. In 1785, A. submitted to an indictment for non-repair of the same road, and paid a fine. In 1788, commissioners for inclosing the commons, &c., within B., set out the road in question as situate in B. and to be repaired by B. No dispute as to the boundary of the two parishes was brought before the commissioners, nor did they assume to settle any question of boundary. After the award, as before, the inhabitants of A. continued to repair. *Held*, that the former conviction was conclusive evidence against A. that the road was situate in that parish; and that the commissioners, having no jurisdiction to set out a road not situate in B., their award did not shift the liability from A. to B. *Regina v. Nether Hallam*, xxix. 200.

14. *Order of justices—Interested justice*—5 & 6 Will. IV. c. 50, ss. 94, 95—*Costs*. The 95th section of the 5 & 6 Will. IV. c. 50, imposes a ministerial, and not a judicial, duty upon justices to direct an indictment to be preferred for non-repair of a highway, where the liability to repair is simply denied by the party summoned before them. An order made by such justices is good, although it subsequently appear that one of them is interested in the subject-matter of the order. *Regina v. The Justices of Surrey*, xi. 436.

15. *Order directing railway company to repair highway*. An order of justices under stat. 8 & 9 Vict. c. 20, s. 58, directing a railway company to repair damage done by them to a road in the course of making the railway, need not specify the particulars

of the damage, nor what repairs were to be done; it is sufficient if it states the length of the damaged part of the road, and directs the company to make good all damage done. *The London and Northwestern Railway Co. v. Wetherall*, ii. 265.

16. The order and conviction for disobedience of it, may include several highways in the same parish. *Ib.*

17. *Costs of an indictment for non-repair.* The costs of an indictment against a parish for non-repair of a highway are not recoverable by distress against the surveyor, but are to be paid out of the funds which the surveyors may have in their hands, or which they may levy for the purpose. *In re The Surveyors of Highways of Tryddyn*, xxiv. 152.

18. *Information against township—Overseers' liability for costs.* At the hearing of an information against a township for non-repair of a highway, the surveyor, on behalf of the township, denied the obligation to repair, whereupon the justices ordered an indictment to be preferred at the quarter sessions, under 5 & 6 Will. IV. c. 50, s. 95. The indictment was preferred against the township, and a verdict of guilty recorded, and the justices made an order for the payment of the prosecutor's costs out of the highway-rate. The overseers neglected to pay the costs. *Held*, that section 103 did not authorize the justices to issue their warrant of distress against the goods of the overseers for such neglect to pay the costs. *Regina v. The Justices of Flintshire*, xxviii. 167.

V. Liability for Injuries occasioned by Non-repair.

1. *Trustees for repair of road—Death by their neglect—Manslaughter.* Trustees appointed, under a local act, for the purpose of repairing the roads in the district, with power to contract for executing such repairs, are not chargeable with manslaughter, if a person, using one of such roads, is accidentally killed in consequence of the road being out of repair through neglect of the trustees to contract for repairing. *Regina v. Pocock*, xxiv. 190.

2. *Non-repair of bridge—Action against county surveyor.* No action will lie against the county surveyor by an individual to recover damages for a personal or pecuniary injury resulting from the non-repair of a county bridge. *Makinnon v. Penson*, xxv. 457.

3. Nor, in such a case, are the inhabitants of the county liable to be sued through their surveyor. *Makinnon v. Penson*, xviii. 509.

VI. Surveyors.

1. *Removal of encroachment without warrant.* Where, in trespass for pulling down a cottage, it appeared that plaintiff had been convicted, under sect. 69 of stat. 5 & 6 Will. IV. c. 50, of building the cottage so as to encroach on the highway; and defendant justified, as surveyor of the highways, it was *held*, that sect. 69 required the surveyor, after a conviction, to remove the encroachment without a warrant; and therefore the conviction, though erroneous, was a defence. *Keane v. Reynolds*, xxii. 288.

2. *Prescriptive right to take stones for repairs—Trespass.* A surveyor of highways cannot justify a trespass under a prescriptive right, or a custom, to take stones from the waste, whether adjoining the sea-shore between high and low-water mark, or otherwise, for the purpose of repairing the highways of the parish. *Padwick v. Knight*, xvi. 573.

3. *Expenses for defending appeals—Action—Public policy—Incoming and outgoing surveyor.* The defendant, as surveyor of highways, had incurred large legal expenses in defending certain appeals against orders for stopping up highways, without the previous sanction of the parish. At a meeting of the vestry, where his accounts were

gone into, the items for these expenses were objected to, and opposition was threatened to be made to his accounts before the justices. The defendant ultimately offered to pay 50*l.* in discharge of the attorney's bill for costs, if no opposition were offered to the passing of his accounts before the magistrates. The vestry accepted the offer, and the plaintiff and other vestrymen signed a minute to the above effect. They also entered and signed a minute at the foot of the defendant's account, that the 50*l.* was to be paid to his successor in office, who happened to be the plaintiff. The accounts were passed without opposition, but the defendant did not pay the 50*l.* The plaintiff consequently sued him for it in the county court. *Held*, that there was no evidence of any contract with the plaintiff alone to entitle him to maintain an action alone for the 50*l.*; that if the 50*l.* was to be treated as part of the balance of the public money in the hands of the outgoing surveyor, the method of recovering it was not by action but by summary application under the statute 5 & 6 Will. IV. c. 50, s. 103; *semble*, that the arrangement with the vestry was illegal as contrary to public policy. *Kilham v. Collier*, ix. 321.

VII. Miscellaneous Cases.

1. *Appeal from order of justices.* The Highway Act, 5 & 6 Will. IV. c. 50, s. 88, gives an appeal from the order of two justices, as to diverting or stopping up a highway, provided for by s. 84. By s. 89 the quarter sessions are to empanel a jury, who are to determine three points therein specified. *Held*, that an appeal is given against the certificate of the justices, and the sessions have jurisdiction on such appeal to decide upon any substantial defect appearing on the face of the certificate, and are not limited to trying by a jury the three questions specified in section 89. *Held*, also, that a certificate under the statute is defective if it does not state upon its face that all the particulars required by section 84 have been complied with. *Regina v. The Justices of Worcestershire*, xxv. 150.

2. *Duty of commissioners of sewers to fence highway.* The defendants, commissioners of sewers, were the owners of, and had the powers of control and repair over, an ancient, open, and unfenced sewer which ran beside a public highway. *Held*, that it was not the duty of the commissioners to fence the sewer, and that they were, therefore, not liable to a person passing along the highway for injuries sustained by him in consequence of the want of a fence. *Cornwell v. The Metropolitan Commissioners of Sewers*, xxx. 548.

3. *Metropolitan Building Act.* The provisions of the Metropolitan Building Act vested in the official referees the sole jurisdiction of determining questions connected with building operations, but did not extend it to the decision of other matters in which the public is interested, and, consequently, the right of a justice to give redress under the Metropolitan Paving Act in case of encroachment on a public way vested in the paving commissioners, was not taken away by the Building Act. *Regina v. Ingham*, x. 378.

4. *Obstruction of private way by railway company—Action.* The 6th and 55th sections of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, take away the remedy by action for an obstruction of a private way by a railway company, unless special damage has been suffered. *Watkins v. The Great Northern Railway Co.* vi. 179.

5. *Ancient highway made a turnpike by statute—Tram roads—Nuisance—Indictment.* By act of parliament, an ancient highway, running over land the property of S., was made turnpike. On each side of the road, after the passing of the act, collieries were worked by S.; and he had from time to time made railways and tram roads across the highway, for conveyance of the coals to and from the collieries, and to an adjoining navigable river. In 1 & 2 Geo. IV. a new turnpike act passed, for repairing the same highway. After the passing of this act, S. continued one of the former tram roads,

and made new rail and tram roads across the highway, for the same purpose as before. By a clause in this act, a penalty, recoverable on summary conviction, was imposed on any person who should make any rail or tram road upon or across the said turnpike road, "without the consent of the said trustees, or legal authority," or should continue such rail or tram road, after such consent should be withdrawn. On indictment against S. for a nuisance in making and continuing one of his said railroads, after the passing of the last-mentioned act, it was *held*, that such making and continuing were an indictable nuisance, and that no inference to the contrary could be drawn from the facts of the case, or the words of the last act. *Regina v. Charlesworth*, xxii. 235.

6. To do the work complained of, the turnpike road was dug into, but filled up again, and restored to its former state, except that the rail or tram road remained, forming a groove of wood, adapted to the wheels of carriages, and which groove was sunk into the road, and did not anywhere rise above its level. *Held*, after a general verdict of guilty, that the court could not (on a special case empowering them to draw inferences as a jury) pronounce the injury created by this work too slight and uncertain to be a subject of indictment. *Ib.*

7. The 7 Geo. IV. c. 117, gives no power to commissioners to alter the level of streets. *Brown v. Clegg*, vi. 334.

WEIGHTS AND MEASURES.

1. *Illegal seizure of weighing machine by inspector.* Under the 28th section of the 5 & 6 Will. IV. c. 63, an inspector of weights and measures is not authorized to seize and take away as forfeited, a weighing machine found to be incorrect and unjust, and although an inspector, who has illegally seized a weighing machine, under a *bonâ fide* belief that he was acting for the time under the authority of the act, is entitled to the protection afforded by the 39th section, yet under the 40th section such protection does not extend to entitle the inspector to a verdict in an action against him for the illegal seizure. *Thomas v. Stephenson*, xviii. 345.

2. The Weights and Measures Act, 5 & 6 Will. IV. c. 63, does not apply to contracts made in England but to be performed in a foreign country. *Rosseter v. Cahman*, xviii. 565.

WILLS.

I. EXECUTION AND PROBATE OF WILLS AND CODICILS; VALIDITY; CONDITIONS.

II. MISDESCRIPTION; UNCERTAINTY.

III. INTERLINEATIONS, ERASURES, AND CROSS LINES.

IV. REMOTENESS.

V. OF POWERS AND APPOINTMENTS, &c.

VI. CONSTRUCTION.

VII. INTERPRETATION OF PARTICULAR WORDS AND PHRASES.

VIII. DEBTS AND LEGACIES, ON WHAT ESTATE A CHARGE.

IX. CHARITABLE GIFTS.

X. REVOCATION AND CANCELLATION.

XI. THELLUSSON ACT.

XII. WILLS ACTS.

XIII. MISCELLANEOUS CASES.

I. *Execution and Probate of Wills and Codicils; Validity; Conditions.*

1. *Unsatisfactory probate—Production of original will.* The probate of a will not being sufficient to satisfy the court that the testator's will was so set out as to enable

them to construe it correctly, the court required the production of the original, and did not confine its attention to the probate. *Manning v. Purcell*, xxxi. 452.

2. *Will by lunatic*. In 1815, the deceased was placed in confinement as a lunatic, and there remained till 1817, when he was released. In 1820, he made a rational will, which was written for him by his mother. In 1822, he was again placed in confinement, and so remained till his death, in 1849. In 1838, he was found, on a commission, to have been of unsound mind, without lucid interval, since 1815. On the evidence, the will pronounced for. *Bannatyne v. Bannatyne*, xiv. 581.

3. *Probate of unexecuted draft—Lunatic*. A. became of unsound mind, and while in that state destroyed his will. He recovered, and gave directions for the preparation of another will, to the same effect as the will destroyed. Before this was prepared, he destroyed himself. Probate granted of the unexecuted draft of the original will. *In the Goods of David Downer*, xxvi. 600.

4. *Scotch probate*. A Scotch probate is not recognized by the English court of chancery. *M'Donald v. Bryce*, xvii. 305.

5. *Production of all the attesting witnesses*. The party propounding a will is bound to produce all, however numerous, the attesting witnesses, if he asks for publication before the expiration of the term probatory. *Higgins v. Higgins*, xxiv. 606.

6. *Second testamentary paper written on same sheet with will*. A will and second testamentary paper were written on the same sheet of paper; the will was duly executed, but the other paper was merely signed by the testatrix. Probate of the will alone decreed. *In the Goods of Taylor*, ix. 582.

7. *Revocation by codicil—Revival*. A. D. left a will and four codicils. The first codicil substituted legacies of stock for money legacies; the second revoked the appointment of an executor and trustee, and named another person as executor and trustee in his place; the third gave legacies to the executors and trustees appointed by the will and second codicil; the fourth directed the sale, by the executors and trustees named in the will, of an estate devised by the will, and the investment of the proceeds, upon certain trusts, and ratified and confirmed the will in every respect, except as revoked and altered by the first codicil. *Held*, that the will and the first and fourth codicils only were entitled to probate. *In the Goods of Dendy*, vi. 584.

8. *Will of wife of a convict*. On affidavit satisfying the crown that the property passing under the will has been acquired since the conviction of the husband, probate granted of the will of a woman, wife of a convict who has received a ticket of leave. *In the Goods of Martin*, v. 586.

9. *Reference in one will to another*. Reference was made in a will to a will, probate of which had been granted by the court in Dublin, and which was in the registry of that court, the legatee for life under the former will being described as the tenant of certain estates devised in the latter. In the circumstances, the court allowed the probate of the former to pass, containing only extracts from the latter, the accuracy of such extracts being verified by affidavit of the solicitor. *In the Goods of The Dowager Countess of Limerick*, v. 583.

10. *Unexecuted draft of will—Second will—Codicils—Revocation*. A testator left an unexecuted draft of a will, and also a will of later date, appended to which were two codicils. The first will had been destroyed *animo revocandi*. The first codicil of the later will referred distinctly to the former will, showing an intention to revive it. *Held*, that the codicils alone were entitled to probate. *Semble*, that the draft of the first will, if propounded, would not be entitled to probate. *Hale v. Tokelove*, v. 574.

11. *Wills made by an Englishman in England and France—Domicil*. A, an Englishman by birth, made an English will, in 1843, being then in England, and he made a French will, in 1848, when he was in France. He possessed large real and personal estate in England, a house and other inconsiderable property in France. An allegation propounding the will of 1848, and pleading A to have been domiciled in France,

was admitted, when an act on petition was brought in on behalf of the person interested under the will of 1843, submitting that, in the circumstances, the will of 1848, if valid, did not revoke the will of 1843. *Held*, that the domicile was the only question before the court, and that the bringing in the petition was contrary to the practice, and must be rejected. *Laneville v. Anderson*, vi. 596.

12. *Evidence of one witness denying presence of testator.* Positive evidence of one of the subscribing witnesses negating the fact of signing, or acknowledgment of the signature by the deceased in his presence, in the absence of circumstances raising any presumption of his being mistaken, will compel the court to pronounce against the due execution of a testamentary paper. *Noding v. Alliston*, ii. 594.

13. *Codicil executed after testator had become of unsound mind.* A duly executed a will; and afterwards, having become of unsound mind, made a codicil, by which he gave the whole of his property to his housekeeper, naming no executor. This universal legatee, after having been cited to propound the codicil, appeared and refused so to do, but consented to the probate of the will alone, and probate of the will was decreed. *Knight v. Richards*, xxii. 635.

14. A codicil revoking all testamentary instruments, is entitled to probate. *Brenchley v. Lynn*, ix. 563.

15. *Signing on separate page—Wills Act.* A will, written on six pages of foolscap paper, was signed at the bottom of each page by the testatrix; the attesting clause was on the seventh page, where her name was again written. None of the witnesses saw her sign her name in any place except on the seventh page. The will was refused probate, but after the passage of the Wills Act, &c., probate was granted, administration not having been taken out. *In the Goods of Brown*, xxiv. 605.

16. *Alterations—Signature of testator and witnesses in margin.* Where the signature of the testator and the subscription of the witnesses are made in the margin of the will, near the alterations, the court will decree probate of the will with the alterations, without requiring any affidavit as to the time when the alterations were made. *In re Wingrove*, i. 625. See also *In re Hinds*, xxiv. 608.

17. *Subscription without words of attestation.* The subscription of the witnesses without any words of attestation is a sufficient compliance with the 1 Vict. c. 26, s. 9. *Bryan v. White*, v. 579.

18. *Witnesses unable to swear to what testator wrote—Paper identified.* The subscribing witnesses to a will, examined two years after the transaction, deposed to seeing the deceased write on a paper, and to their signing such paper, but they would not swear to what he wrote being his name, nor the name of the deceased being on the will when they so subscribed. They identified the paper subscribed by them, on which was the signature of the deceased. The attestation clause was full, and the deceased knew the requisites of execution. *Held*, that the will was entitled to probate. *Thompson v. Hall*, xiv. 596.

19. *Testimonium clause—Witness signing at side of will.* A testimonium clause, or any thing equivalent to it, is not a necessary part of a will; but where it is omitted the proof must be clear that the witnesses signed as such, in testator's presence and at his request. One called by a testator to witness his will signed his name at the side, and not below the body of the writing. *Held*, to be a "subscribing," within the Statute of Frauds. *Roberts v. Phillips*, xxx. 147.

20. *Re-attestation—Acknowledgment.* A. desired the subscribing witnesses to his will to put their names to it again, pointing out to them certain alterations. They did so, but without A's again signing. *Held*, a good reexecution by acknowledgment. *In the Goods of Dewell*, xxvi. 603.

21. *Attesting witness—Two unable to write.* Where a will was witnessed by two persons who could not write, and two other persons also subjoined their names as witnesses, it was *held*, that the latter two must be taken to have signed, not as attesting the signatures of the marksmen, but as witnesses to the will, and that they consequently could not take a legacy under it. *Wigan v. Rowland*, xxi. 132.

22. *Signature*—"Foot or end" of will, in 1 Vict. c. 26, s. 9. The words "foot or end" in 1 Vict. c. 26, s. 9, mean what the ordinary understanding of mankind would believe to be the foot or end; what might be fairly deemed the conclusion of the will. Every signature to a will is sufficient in law, where an ordinary person intending *bonâ fide* to carry out the directions of the statute, would in conformity with the dictates of common sense, place that signature. *In the Goods of Smith*, ix. 578.

23. Where in a will the signature is below the attestation clause, but not on the same side with the conclusion of the dispositive part of the will, or testimonium clause, the will is not duly signed, unless the attestation clause follow the conclusion of the dispositive part, or testimonium clause immediately, and without leaving a space for the signature of the testator. *Lemann v. Lemann*, vi. 598.

24. *Execution of by initials*. If the attestation clause in a will recites that the testator has made his mark, it is good, though the testator writes his initials instead of making a mark. *In the Goods of Savory*, vi. 583.

25. *Blank between end of will and attestation clause*. Though there occurs a considerable blank space between the termination of the body of a will and the attestation clause and signature of the testator and witnesses, yet the will may be admitted to probate. *In re Anderson*, i. 634.

26. *Codicil signed on second page*—Word "witness" on first page. A codicil, the signature to which is on the top of the second page, the codicil on the first page, leaving a blank space more than sufficient for such signature, but with only the word "witness" thereon is sufficiently signed "at the foot or end thereof," and is entitled to probate. *Jermyn v. Hervey*, i. 633.

27. *Paper in form of bill of exchange*. E. N., on his death bed, gave directions for the writing a paper in the form of a bill of exchange upon his agents, and this paper was signed in the presence of two witnesses, who attested and subscribed the same. The allegation propounding such paper as a codicil was admitted. *Jones v. Nicholay*, ii. 591.

28. *Informal codicil by seamen engaged with enemy*. An informal codicil made by a seaman engaged with the enemy, and on board ship, but in a river beyond the flux and reflux of the tide, is valid, under the 1 Vict. c. 26, s. 11. *In the Goods of Austen*, xviii. 598.

29. *Insanity, how tested*—Testator a Mohammedan. A native of England, who had lived long in the East, and was familiar with eastern habits and superstitions, and professed his belief in the Mohammedan religion, died in England leaving a will, which, after various legacies, gave the residue to the poor of Constantinople, and also towards erecting a cenotaph in that city, inscribed with his name, and bearing a light perpetually burning therein. The prerogative court having, chiefly on the ground of this bequest, and partly on parol evidence of the wild and extravagant language of the testator, pronounced him to be of unsound mind when the will was made, it was *held*, reversing that decision, that as the insanity attributed to the deceased was not monomania, but a general mental derangement, as the proper mode of testing the allegation was to review the life, habits, and opinions of the testator, on such a review there was nothing absurd or irrational in the bequest, or any thing in his conduct, at the date of the will, indicating derangement; and therefore the will was admitted to probate. *Austen v. Graham*, xxix. 38.

30. *Seaman's will*. Letters of a testamentary character, bearing date the day a mariner shipped on board a vessel that did not leave port for fifteen days after, and not proved to have been written aboard the ship, were not admitted to probate under Wills Act, sect. 11. *In the goods of Henry Corby*, xxix. 604.

31. *Validity*. A bequest is not void by reason of a mistaken supposition on the part of the testator of being under legal liability. *Ham's Will*, viii. 99.

32. *Undue Influence*. Circumstances under which it was held that the influence exercised by the wife in procuring a will was not undue. *Stulz v. Schaeffle*, xviii. 576.

33. *Control*. Control, as distinguished from undue influence, is connected with duress or fear. *Ib.*

34. *Importunity*. Importunity, to have legal effect, must be in such a degree as to take away free agency from the testator. *Ib.*

35. *Costs*. Where unnecessary evidence to a great amount is produced, though it was necessary to prove the will in solemn form, no costs will be allowed. *Ib.*

36. *Will prepared by a medical man for his patient for his own benefit*. Where a will is prepared and written by a medical man in attendance on a testatrix, at that time dangerously ill, and without professional advice, by which he is made the principal object of the testatrix's bounty, to the exclusion of her near relations, a court of justice, regarding the subsisting relation of a medical man and patient, will view his conduct with the utmost jealousy. *Greville v. Tylee*, xxiv. 53.

37. *Two wills*. Evidence may be admitted to rebut the presumptions arising against the latter of two wills executed on two successive days. *Bryan v. White*, v. 579.

38. *Condition—Lawful and unlawful means*. A condition in a will is not void simply because it may lead a party to attempt, by unlawful means, to obtain that which it was meant by the condition that he should obtain by lawful means. Otherwise, if corrupt or unlawful means are those which must necessarily or naturally be supposed to be the ones to which the party intends to resort. *Egerton v. Brownlow*, vii. 170.

39. *Restriction against female legatees becoming a nun—Forfeiture of legacy*. A testator declared that in case his daughter should take the veil, become a nun, continue to reside in a convent, or in any other way associate herself permanently with any Roman Catholic establishment of that nature, she should forfeit the bequest given her by his will; and he thereby, in that case, revoked the said bequest; and to prevent any portion of his property from being appropriated to other purposes than the benefit of his family, excluded his said daughter from all reversionary advantages from his will. The daughter having associated herself with a convent, the trustees paid the money into court under the Trustee Act. Upon petition by the daughter, it was held, that the condition imposed was a lawful condition, although the will contained no bequest over, and that the legatee had forfeited all claim to the legacy. *In re Dickson*, i. 149.

40. *Condition in restraint of marriage*. A general condition in restraint of marriage is good with respect to the testator's widow, but not good with respect to any other woman. *Lloyd v. Lloyd*, x. 139.

II. *Misdescription ; Uncertainty.*

1. *Identity of person*. Where, in case of misdescription, there is no doubt as to the identity of the person, the intention of the testator may be presumed and the legacy passes. *Ford v. Bailey*, xxiii. 257.

2. Where a testator described one of his legatees as "Vincent, son of my uncle Peter," and it was shown that said Peter had two sons only, neither of whom was named "Vincent," and with whom the testator was not intimate, but that another uncle had a son George Vincent, intimate with the testator, and by whom he was called "Vincent" only, the court held that said George Vincent was entitled to the legacy. *Bernasconi v. Atkinson*, xxiii. 207; affirming s. c. xvii. 103.

3. *Specific bequest*. A testatrix, the owner of four Spanish certificates of inscription, of the nominal value of 1,000*l.* each, redeemable for 550*l.*, bequeathed to trustees the sum of 2,000*l.* Spanish bonds or coupons, belonging to her, in trust for A. B. The testatrix had no Spanish bonds or coupons. She, during her life, was accustomed to describe her certificates as "of 500*l.* each," and the four as "securities for 2,000*l.*" Held, first, that the legatee was entitled to two only of the certificates of 1,000*l.* each,

the same being sufficiently described as bonds or coupons; and, secondly, that evidence of the expressions used by the testatrix was not admissible to explain the bequest. *Horwood v. Griffith*, xxiii. 411.

4. *Extrinsic evidence.* A bequest of 500*l.* to the Westminster Asylum for pregnant women. *Held*, upon extrinsic evidence, and context of the will, without any inquiry, a gift to "The General Lying-in Hospital." *The General Lying-in Hospital v. Knight*, xi. 191.

5. *Misdescription of sex.* Three sons and a daughter, the only children of A B who were living at the date of the will, and at the death of the testator, held entitled to legacies bequeathed to the four sons of A B. *Lane v. Green*, v. 225.

6. A bequest to one, described as the testator's niece, and daughter of his late sister, will go to his nephew, who is the only child which his only and deceased sister ever had. *In re Rickitt's Trust*, xxi. 66.

7. *Extraneous evidence.* Uncertainty in a will caused by the omission of a christian name, may be removed by evidence. *Phillips v. Barker*, xxiii. 599.

8. The meaning of the testator, in case of doubtful description, must be gathered from the words of the will, and not from extraneous evidence; the case where the words are equally incorrect as applied to two different persons may be an exception to this rule. *Douglas v. Fellows*, xxiii. 238.

9. The will of a testator contained the clauses following: "Let my debts be paid. Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family, except 200*l.* a year to be laid by as a marriage portion for my daughter A. A. C. My son E. C. C. is heir to the whole real estate." *Held*, that the above directions were void for uncertainty, and that the testator was to be taken to have died intestate, both as to his real and personal estate. *Jackson v. Craig*, iii. 173.

10. The court will not adopt an intestacy for uncertainty, except in the very last resort. *Bernasconi v. Atkinson*, xvii. 103; *Boys v. Bradley*, xvii. 132.

11. *Uncertainty as affecting gift.* The court will not hold a testamentary disposition to be void for uncertainty, if there is a reasonable degree of certainty as to the testator's intention. Therefore, where a testatrix bequeathed a legacy to the wife of a person by the name of one of their daughters, an infant of tender years, it was *held*, on claim by the husband and wife, that they, and not the daughter, were entitled to the legacy, and that the gift was not void for uncertainty. *Adams v. Jones*, ix. 269.

12. *Devise of estate in B—Two estates in B, one in trust.* A devised his estate in B to C. It appeared that he had two estates in B, one of which both A and his father had treated as if held in trust for fifty years or more for the benefit of a Catholic priest. *Held*, that C took a beneficiary estate, and that A must be taken to have devised to him therefore that estate which he held for his own benefit, and not that which he held in trust. *Blundell v. Gladstone*, xii. 52.

III. Interlineations, Erasures, and Cross lines.

1. *Presumed to have been made after execution.* Where in a will there were erasures and interlineations in the handwriting of the testator, it was *held*, that in the absence of evidence, they must be taken to have been made after the execution, and to be void, as relating to the real estate. *Simmons v. Rudall*, ii. 97.

2. *Change of name by direction of testatrix.* The deceased duly executed her will, using the name "Higgins" in the body of the will and in the signature. Subsequently the writer of the will, by her directions, erased the name "Higgins," and substituted that of "Redding," and the deceased re-signed the will, using the name "Redding," but there was no reexecution. *Held*, that, in the absence of intention to revoke, the will was entitled to probate as originally executed. *In re Redding*, i. 624.

3. *Onus probandi.* Where an alteration or interlineation appears upon the face of

a will, the presumption is that it was made after the execution of the will, and it lies upon the party setting up the will to give some evidence to rebut that presumption. *Doe d. Shallcross v. Palmer*, vi. 155.

4. *Different pen and ink.* By the Statute of Wills, 1 Vict. c. 26, s. 1, obliterations, interlineations, or other alterations in a will, after execution, are void, if not affirmed in the margin, or otherwise, by the signature of the testator, and the attestation of witnesses, but the mere circumstance that the amount, or the name of the legatee is inserted in different ink or in a different hand, does not constitute an alteration, &c., within the statute. But if there has been an erasure on the face of the will, and that erasure has been superinduced by other writing, the *onus probandi* lies upon the party alleging the alteration to have been done prior to execution. *Greville v. Tylee*, xxiv. 53.

5. In the absence of proof, that certain words in a will, written with a different pen and in a different ink, and in a different handwriting, partly upon an erasure, were inserted prior to execution, so much of such will, consisting of the inserted words, which constituted a reversionary disposition, pronounced against. *Ib.*

6. *Probate in blank.* Where a testator bequeathed a moiety of certain personal property to his son, and the other moiety to other persons, naming the son as residuary legatee, and drew his pen across the words containing the description of the property thus bequeathed, and the will was proved with a blank as to the description, the court held that it could consider nothing but the probate, and, as the property was undetermined, it must all go to the residuary legatee. *Taylor v. Richardson*, xxiii. 178.

7. *Name of testator and witnesses in margin opposite interlineation.* In 1847, A regularly executed his will; two years afterwards he made an interlineation in the will, in the margin of which, and opposite the interlineation, he and the subscribing witnesses to the will placed their initials. Held, that the interlineation was to form part of the probate. *In re Hinds*, xxiv. 608. See also *In re Wingrove*, i. 625.

8. *Cross lines over certain bequests.* Where cross lines are drawn over certain bequests in a will, the will must be taken to have been executed after the cross lines were drawn, and the only question is, what is the meaning of testator; and, in general, such crossed bequests must be considered no part of the will. *Gann v. Gregory*, xxvii. 459.

9. *Cancellation—Ink lines drawn across will—Presumption in equity.* When the ecclesiastical court grants probate of a will of personalty, dated since the passing of the 1 Vict. c. 26, with lines drawn across it in ink, the court of chancery will presume that the cancellation was made after execution, and will treat it as of no effect. *Gann v. Gregory*, xix. 83.

IV. Remoteness.

1. *Gifts to great-grandchildren.* A testator gave his real estate to trustees on trust to apply the rents to the use of his daughter and her children and their issue until the death of the longest liver of the said children. On that event, he gave an estate to his oldest living great-grandson, the residue to be sold, and the proceeds given to his grandchildren, the children of his daughter. Held, that all the above gifts for the great-grandchildren of the testator were void for remoteness, and that by his grandchildren and children of his daughter, in the gift of the proceeds of the residue of his estate, he meant great-grandchildren. *Gooch v. Gooch*, viii. 138.

2. *Gift to son who may be called by a particular name.* In case of a gift to A in trust for any son which he may have called B, when he shall have attained the age of twenty-two, and if no son so called shall attain such age, then the gift to A for his own use, the gift to B being void for remoteness, A is not entitled thereto for his use. *Joy v. Aspinwall*, xxiii. 453.

3. A bequest of certain sums to be invested in the testator's name forever, the interest to be received by the testator's three sons, A, B, and C, successively for life,

and after the death of the survivor of them, to the first and other sons of A successively for life; then in the same manner to the sons of B, and then the sons of C. *Held*, that after the life estates to the testator's three sons, the rest of the gifts were void for remoteness. *Raphael v. Boehm*, xv. 531.

4. Bequest to trustees upon trust to pay the interest to A, B, and C for their lives, and on the death of each of them one half of the fund or share to the children of each so dying, at the age of twenty-one, and the other half to such children for life only, and afterwards to their children at twenty-one. *Held*, that the gift to the children of the children of A, B, and C was void for remoteness, and that A, B, and C did not take an absolute interest. *Whitehead v. Rennett*, xxi. 469.

5. Gift to trustees for E. W. for life, and after his decease to assign, &c., to all his children who should be living at his decease, and who should be or live to attain twenty-five, and to apply the income in the mean time for their maintenance. E. W. died in 1837, leaving eleven children; the testator died in 1845. Four only of the children of E. W. survived; the youngest attained twenty-five in 1848. *Held*, that the gift was not void for remoteness. *Southern v. Wollaston*, xix. 452.

6. *Gift over in event of testator's death without leaving issue.* By indenture of marriage settlement, lands were settled to J. J. R. for life; remainder to trustees for securing a jointure and certain portions; remainder, in default of issue male of J. J. R. in that marriage, to J. J. R. in fee. By will, dated 1816, J. J. R. devised all the said hereditaments, "in the event of his death without leaving issue by his said wife," to his wife for life; remainder to P. R. for life; remainder to trustees, to sell, and pay to E., (the petitioner,) 4,000*l.*, at twenty-one, or marriage, "and to be a vested interest then, though payment might not be possible till after the deaths of his wife and P. R.; and to pay and divide the residue among such of the other children of P. R. as should be living at his decease, or then dead, leaving issue, the issue of any such dead child to take the parent's share. *Held*, that the gift over, in the event of the testator's death without leaving issue, was not void for remoteness. *Rye's Settlement, in re*, xvii. 43.

7. *Failure of issue.* Where the ulterior limitations in a testator's will depend on his death without leaving issue, and among those ulterior limitations there are provisions which cannot refer to a general failure of issue, then the failure will be taken to be a failure of issue living at the death of the testator, and not a general failure of issue. *Ib.*

8. *Child of nephew entitled.* A bequest "to each child that may be born to either of the children of either of my brothers" to be paid to each at twenty-one, is not a gift to a class, but to each individual who may answer that description. Under such a bequest a child of a nephew, the child being born six months after the testator's death, was held entitled. *Storrs v. Benbow*, xxi. 400.

9. *Trusts for maintenance and sale.* A testator devised lands upon trust to pay the rents and profits to a tenant for life, and, after her decease and until her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children, and, on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead. *Held*, that the trust for maintenance was separable from the rest, and was not bad for remoteness, whether the trust for sale was so or not. *Gooding v. Read*, xxxi. 109.

10. *Contingency—No lawful issue.* Devise to E. the daughter of my said sister A. for life, and from and after her decease to her eldest son then living (if any); "and in case of no lawful issue of any son," to the eldest son of my nephew J. W., then living, or unto the next eldest son of my nephew, R., by lawful issue. "And I do intend and purpose that the said messuages shall not be sold or divided, but always kept entire, and descend in perpetuity forever to the eldest heir at law of J. and A." E. died a spinster. The plaintiff was the eldest son of J. W., and alive at the making of the will; and, J. W. being the eldest son of J. and A., and J. W. being dead, the

plaintiff was also the eldest heir at law of J. and A. *Held*, that by the will, on the death of E., a spinster, the estate passed to the plaintiff; and that the devise was not void for remoteness. *Saxton v. Clapham*, xxviii. 143.

11. *Grandchildren and their issue.* Where a testator directed that on the death of each of his grandchildren, not necessarily in being at his death, the issue of such grandchild should take their parent's share and also declared other trusts to take effect after the termination of the lives of the said grandchildren, it was *held* that these trusts were all void for remoteness. *Gooch v. Gooch*, xxi. 534.

12. *Formedon—Estate tail—Condition precedent.* A, by his will devised certain property to his executors, to sell and pay debts; if this proved insufficient therefor, he devised to them all his other lands to sell and pay debts, and divide the residue among his children; but if the first devised property proved sufficient, &c., he gave and devised to his son B his dwelling-house for his natural life, and after his death to the issue of his body lawfully begotten, if more than one, equally among them. A died in 1797. B took possession of the house, and in 1798 enfeoffed R. in fee thereof, and died. Writ of formedon was sued out within twenty years thereafter. *Held*, that the action was not barred by the statute 3 & 4 Will. 4, c. 27, as the time of limitation ran only from the death of B, and not from 1798, when B ceased to receive the profits, as B's right to enter and receive them had not been barred by a neglect to enter, but because he could not enter against his own feoffment; that the limitation in the will to B for life, and the issue of his body, gave B an estate tail; that that limitation was not too remote to be valid, though it depended upon the contingency whether the first devised property was sufficient, and ascertained by a sale to be sufficient to pay the testator's debts, as it was to be presumed that such sale would be made, and sufficiency or insufficiency ascertained within a year after the testator's death. But, as the devise to B was dependent on the condition precedent of the sufficiency of the first devised property to pay the debts, the evidence did not support an allegation in the count of an absolute devise to B and the heirs of his body. *Rimington v. Cannon*, xx. 246.

13. *Estate tail.* A testator gave freehold and leasehold estates to trustees upon trust for A, for life, and directed them, after the death of A, to pay the rents, or so much thereof as should be necessary, for the maintenance of A's son Robert, and all other sons of A, until he or they should attain twenty-five; and, on his or their attaining twenty-five, upon trust for him and them for their lives, as tenants in common, and, after their decease, in trust for the eldest son of Robert and the eldest of all the sons of A, and the heirs of his and their bodies; and for want and in default of such issue, over; it was *held*, that the devise and bequest of the freehold and leasehold estates took effect in favor of Robert and such other sons, and was not void for remoteness; and that there was an estate tail given to the eldest son of Robert and the eldest of the sons of A. *James v. Wynford*, xvii. 444.

14. *Cy-près—Gift over valid as an independent clause—Effect of recovery suffered.* Bequest of an estate in trust for P. M. for life, and then for his first son for life; then for the first son of such first son in tail male; in default of such issue, in trust for all and every of the sons of P. M. in like manner. In default of issue of the body of P. M., then in trust for T. M. for life; then to his eldest son T. G. M., for life, &c. Provided that if P. M. or T. M., or their issue, should become entitled to certain estates, called Jodrell Estates, then the devised estates should go to the next person entitled under the will, &c. *Held*, that the limitations to the issue of P. M. subsequent to the life-estate of his eldest son were void for remoteness; and that the doctrine of *cy-près* could not be applied, as it would let in classes of persons not intended to be provided for, and postpone classes intended to be provided for; and consequently that P. M. took only an estate for life. *Held*, also, that the gift over to T. M. and his issue in default of issue of the body of P. M., &c., was valid as an independent clause, such gift over according with the previous valid limitations. *Held*, also, that a recovery suffered by T. G. M., of the Jodrell Estates, to the use of himself in fee, did not prevent the shift-

ing clause as to the devised estate taking effect; and that, consequently, the latter estate passed over to his son, the plaintiff. *Monypenny v. Dering*, xv. 551.

15. "*Or*" taken to mean "*and*." In case of gift to A for life, and at the end of thirty years, the property to be sold and given to her, her children, "*or their heirs*," the gift at the end of thirty years is not liable to objection on the ground of remoteness, and the word "*or*" before "*their heirs*" must be taken to mean "*and*." *Lachlan v. Reynolds*, xv. 234.

16. *Bequest to children giving present vested interest—Executory bequest void for remoteness.* A bequest in trust for the benefit of A for life and then for the benefit of A's child, or children, and to be in them a vested interest on their attaining the age of thirty years; and, in case of the death of any without attaining such age, then his or her share to go to the survivors. *Held*, that the word "*vested*" meant indefeasible, so that the share of each child who attained thirty was no longer to be defeasible by the executory bequest. *Held*, also, that the original bequest to the children gave them a present vested interest; and that the executory bequest, on the death of any under thirty without issue, was void for remoteness. *Taylor v. Frobisher*, x. 116.

V. Of Powers and Appointments, &c.

1. A testator directed his trustees to hold 20,000*l.* bank annuities, and pay the dividends to his son for life, with restrictions on alienation; provided, that if his son should marry with the consent of his trustees, a settlement might be made of the fund, subject to the life-estate, for the benefit of the wife and issue, and subject to the trusts of such settlement; or "*in case none shall be declared*," he directed that the fund should go to such persons as his son should by will appoint; provided that in case his son died unmarried, or, having been married, without leaving issue, and without having exercised the power of appointment, the trustees were to hold one moiety of the fund upon the trusts mentioned. The son died without having been married, having by his will appointed 10,000*l.*, part of the fund, to his two brothers. *Held*, reversing the decision of the court below, that the son, in the events which had happened, had a valid power of appointment over the fund. *Sheffield v. Coventry*, xvii. 470.

2. *Appointment to children—Children of deceased child excluded.* Where a testator gives his wife the power of appointing certain property, limited only by the proviso that B's share shall not be smaller than that of any other of the children, and, in default of appointment, then all the children living at the wife's death, including B, if living, shall share alike; and, moreover, if any child shall die before the wife, leaving children, then such child, or children, shall have the share of the parent; and the wife appoints the estate to all the children living at her death, including B, the appointment is good; and if B has died in the wife's lifetime, leaving children, such children are excluded. *Neatherway v. Fry*, xxiii. 252.

3. *Appointment in favor of children—Void condition annexed.* A testator, having power to appoint by will a sum of 3,000*l.*, made his will, giving his general estate to his children for life, with remainder to their issue; and after referring to the above power, he appointed the fund amongst his children, and requested them not to spend their shares thereof, but to leave the same for the benefit of their children. *Held*, that these words did not constitute a trust for the grandchildren, so as to put the children to their election, but that they amounted to a condition annexed to the appointment in favor of children, and that such condition was void, as inconsistent with the power. *Blacket v. Lamb*, x. 5.

4. *Words of limitation necessary to create a fee in a deed of trust.* Power in a deed to a married woman, to appoint "*in and by her last will or instrument testamentary or in nature of a will during her intended coverture*." The estates by the same deed were, in default of appointment, limited to the children of the wife as tenants in common, without words of limitation. *Held*, that an appointment by will

after the decease of the husband was void, the words "during coverture" applying to the whole clause, and that the children took only life estates. *Holliday v. Overton*, x. 175.

5. *Appointment to children—Death of one child.* A testatrix, having a general power of appointment, upon her death, over a sum of 2,000*l.*, after referring to the power, directed and appointed that the said sum should, after her death, be paid to her four daughters and her two sons, A and B; and the testatrix appointed her son B her executor, and constituted him her residuary legatee. Before the death of the testatrix, her son A died, whereby his sixth share lapsed. *Held*, that such sixth share passed by the residuary clause in the will to B, under the provisions of the Wills Act. *In re Spooner's Trust*, ix. 101.

6. *Liability of estate for debts.* A testator was seized of real estate in fee simple, and was possessed of personal estate, and had also a general power of appointment over other real estate; he executed his will, by which he devised his fee simple estate and bequeathed his personalty, and also executed his power of appointment over the other estate; the personal estate was insufficient for the payment of the testator's debts. *Held*, that the devised real estate was primarily liable to the payment of the debts, and if insufficient, then that the appointed real estate was liable, whether the debts were by specialty or by simple contract. *Fleming v. Buchanan*, xix. 561.

7. *Power to exclude children.* A made his will, and gave personalty to B, a married woman for life, and after her death as she should appoint, and in default of appointment, to her husband; and if she should survive him and make no appointment, then to her children. B had three children, and by her will she appointed, after her husband's death, 2,000*l.*, between two of her children, and 1,500*l.*, to the other, and she appointed the residue to her three children by name, in such manner as her husband should appoint by will. He by his will appointed 500*l.* to one of the children; ()*l.* to another, and the residue to the third. *Held*, that the husband had no power to exclude either of the children; that his appointment was therefore bad; and that the appointment of the wife took effect in favor of the three children. *White v. Wilson*, xix. 138.

8. *Power of trustees to advance.* A testatrix gave 1,000*l.* to trustees to pay the interest to the petitioner for life, and afterwards the capital to be divided between his children. There was also a power to the trustees, if they should think fit, to advance all or any portion of the 1,000*l.* for the "preferment, advancement, or establishment in the world" of the petitioner. A portion of the 1,000*l.* had been advanced under this power. The petitioner had had twelve children, five of whom were alive; and, being in embarrassed circumstances, now asked, with the consent of the children and of the trustees, that the remaining portion of the money might be paid over to him under the power in the will. *Held*, that this was not such a case as was contemplated by the power. *Luard v. Pease*, xxi. 513.

9. *Limitations of rent charge in favor of daughter's husband, and sons—Power of appointment—Avowry.* Replevin for an alleged wrongful distress. The defendant avowed, justifying the distress in respect of his title to half a year's rent charge. The avowry set out a will by which the testator, amongst other limitations, devised his estates in G. to W. B. for life, with a power of appointment, and in default of appointment in strict settlement, remainder to T. R. B. and Diana his wife, one of the testator's natural daughters, in the like strict settlement; remainder in the same manner to W. L. and Sophia his wife, another of the testator's natural daughters; remainder "to the use and behoof of Louisa Wentworth (the other of his natural daughters) or such person as she should first intermarry with, if any, before she attains the age of twenty-one years, by and with the consent and approbation of trustees or the survivor of them and his heirs, and which person should also previously make a competent settlement upon her, to the like approbation of the said trustees, for and during their joint natural lives or the life of the survivor of them, without impeachment of waste, and from and after the determination of that estate, then to the use of the trustees and

the survivor of them and his heirs, for and during the life of his said daughter Louisa, or such person as she should so first marry (if any) and the life of the longer liver of them, upon trust, to support contingent estates, and after the decease of the longer liver of them, his said daughter Louisa, and of such person as she should so first marry (if any) then to the use and behoof of all and every or any the son and sons of the body of his said daughter Louisa by such first or any after-taken husband, with the like power of appointment, and for all such and the like estates and interests and with the like remainders and limitations as aforesaid in relation as aforesaid, with remainder over in default of such issue." The testator then devised unto "J. Cockshutt and his heirs one other annuity or clear yearly rent charge of 8,000*l.*, upon trust nevertheless to and for the only proper use and behoof of my said daughter Louisa Wentworth and her assigns until she, his said daughter, should marry (under and with the restriction above mentioned) or for and during the term of her natural life, and when and so soon as she his said daughter should marry as aforesaid, then upon such trusts, and in like manner and with the like powers and for such and the like estates and interests, and with the like remainders and limitations, and subject to the same contingencies and annihilations as is and are thereinbefore particularly mentioned, expressed, limited, directed and declared of and concerning and in relation to the aforesaid rent charge thereinbefore given unto or for the benefit of his said daughter Sophia." The avowry further stated that said Louisa first married one W. S. who died leaving a son; and that the said Louisa afterwards married one J. Clifford. Plea, setting out the first indenture, and alleging in bar that at the time of the marriage of Louisa with the said W. S. she was under twenty-one, and that she so married without the consent or approbation of the trustees or either of them, nor was any settlement made by the said W. S. on her previous to such marriage. *Held*, upon demurrer, that the above words, "when and so soon as she his said daughter should marry as aforesaid," were to be taken as referring merely to the fact of marriage before mentioned, and that although the limitations of the rent charge in favor of Louisa's first husband could not have taken effect, yet those in favor of her sons by him or her after-taken husband would; that a power of appointment became vested in Mrs. Clifford, and therefore that the first avowry was valid, and the plea in bar no answer to it. *Beaumont v. Squire*, ix. 380.

VI. Construction.

1. *Absolute bequest—Precatory words.* A testator gave his shares in certain freehold and leasehold property, to his wife, for her sole use and benefit, adding, "And I beg and request that at her death she will give and bequeathe the same, in such shares as she shall think proper, unto such members of her own family as she shall think most deserving of the same." The testator also gave to his wife his personal property, for her sole and separate use and benefit, requesting that she would give what should be remaining, unto such members of her own and his family as she should think most deserving and entitled to the same. By a codicil, he gave his residuary estate to his wife. *Held*, that there was an absolute gift of all the testator's property to his wife, without being subject to any trust. *Green v. Marsden*, xxi. 538.

2. A testator, by his will, bequeathed all his property of whatsoever description to his wife, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her, that she would dispose of the same to and for the joint benefit of herself and his children. *Held*, that the widow of the testator was entitled to have the entire residuary property transferred and paid to her for her own use and benefit. *Webb v. Woolls*, xiii. 63.

3. If a testator, by his will, gives his wife all his personal property absolutely, and then writes an informal codicil containing precatory words, which, if construed as a part of the will, might be so far inconsistent with the main body of the will as to give the wife a life-interest only, the words of the codicil must be taken to be merely an

expression of the testator's wishes, without meaning to make them obligatory *Williams v. Williams*, v. 47.

4. *Vesting—Survivors or survivor—Share and share alike.* A testator gave a leasehold house, which was let for twenty-eight years, to trustees to pay the rents and profits for the benefit of his five children, whom he named, or the survivors or survivor of them, in equal shares and proportions, share and share alike. *Held*, that the words "survivors or survivor" referred to the death of any of them in his lifetime; that the words "share and share alike" referred to those children who should survive him, and created a tenancy in common, and that the interests were vested in the children on the death of the testator. *Ashford v. Haines*, xi. 152.

5. *Bequest to children of B and C, if C survive B.* Bequest of residue equally between A and B (the wife of C); and if C survive B, to him for life, and afterwards to their four children. *Held*, that the children took only in the event of C surviving B. *Cattley v. Vincent*, xv. 140.

6. *"Surviving brothers and sisters."* Testatrix gave all her property to her mother for life, and at her decease directed the residue of her estate to be divided equally between the surviving brothers and sisters of the testatrix. *Held*, on demurrer, that such only of the legatees as survived the testatrix were entitled to her residuary estate. *Spurrell v. Spurrell*, xxi. 522.

7. *Rights of children in legacy contingent on surviving their mother.* Legacies to the children of A, the interest to be paid for their maintenance, and a bequest in trust for A for life, and from and after her decease to all and every of her children living at her decease; it was *held*, that the rights of the children of A in the legacy (in trust for her) were contingent upon their surviving their mother. *Farrer v. Barker*, xv. 229.

8. *Gift over—Survivor.* The testator gave the income of a fund to trustees, in trust, to pay the same to A B for life, and after her decease to pay the principal money to her daughters, C and D, in equal shares; with a gift over to the issue of either of them dying in the lifetime of A B; and should either C or D die in the lifetime of A B, without leaving issue, then the whole fund was to go over to the survivor of the two daughters; but in case both of them should die in the lifetime of A B without leaving issue, then in trust for W. W. absolutely. The testator died in 1844, leaving A B and her daughter D surviving. C, the other daughter, died in his lifetime, unmarried. *Held*, that, upon the death of A B, the surviving daughter was entitled to the whole fund. *Domville's Trust, in re*, xvii. 598.

9. *Legacies of stock—Survivorship—Added legacies.* By a will, property was given to trustees, to apply the rents, interests, and proceeds for the maintenance of the testator's son Edward, for his life, and not to be paid to any person under an assignment by, or execution against, the son; and after the decease of the son, for the two daughters of the testator, absolutely. By a codicil, it was declared that, in case of assignment by Edward, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of Edward. By another codicil, the testator gave 600*l.* stock to Edward, in addition to what he had left by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son William, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughters. *Held*, that the true construction of the second codicil was, that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life-interest. That, although in one codicil the words, "in the event of the death of Edward," meant upon the death of Edward, it did not follow that the words in another codicil, "in the event of both their deaths," meant upon both their deaths; for one expression was applied to a life-interest and the other to a capital sum; that the period of survivor-

ship must be referred to the period of distribution, namely, the death of the testator. That, therefore, Edward, having survived the testator, took the legacy of stock absolutely. *Mores' Trust, in re*, xvii. 577.

10. The rule, that added legacies are subject to the same conditions as the legacies to which they are added, is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift. And whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given—*quære*. *Id.*

11. *Joint tenants—Last survivor authorized to dispose by will of estates devised.* Devise of estates to the testator's three daughters "to be jointly and equally enjoyed, or divided in the case of the marriage of any of them; and they, or the survivor in case of death, are by this, my will, fully authorized to dispose of the same by will, or assignment, as they shall think proper." The testator gave also personal property to be equally divided among them, and expressed a wish that they should live together. None of the daughters married. *Held*, that the last survivor alone had the power of disposing by will. *Cookson v. Bingham*, xxiii. 27.

12. *Lapsed legacies.* A testator gave a sum of money to be divided between the relations of his late wife, in such shares as if she had died a spinster, and intestate. The wife had sixteen next of kin at her death, five of whom died in the lifetime of the testator. *Held*, that those living at the death of the testator each took a share, and that five shares went to the residuary legatees. *Ham's Will*, viii. 99.

13. *Devise of trust and mortgage estates—Disclaimer.* P. devised lands to W. and S. and the heirs of the survivor, upon trusts for payment of debts and to apply the surplus. S., the survivor, died many years afterwards, having never proved P's will, nor in any manner acted in the trusts. S., by his will, devised all his mortgage and trust estates to L. and B. L. and B., by their answer, stated that they believed their testator had never acted, nor claimed any right, under the devise from P.; that they did not make, and never had made, any claim; and they expressly disclaimed. *Held*, that, as S. had never disclaimed, and as L. and B. had accepted the trusts of S's will, the legal estate of P.'s lands was vested in them. *King v. Phillips*, xv. 7.

14. *Conditional gift over in deed—Release by will.* Declaration of trust, by deed, of a sum of stock standing in the names of trustees, after the decease of the settler to sell, and out of the proceeds to pay 3,000*l.* to A for his absolute use, and the residue to B and A equally; and in case A survived the settler and afterwards died intestate without leaving a child or children then living, or born in due time after his decease, before he should return to England, then the whole fund to B., his executors, &c., in case he, or any child or children of his body should be then living; if not, then all to C. The settler died. B, in consideration of an advance, released all his interest in a moiety of the fund subject to the payment of the 3,000*l.* to the trustees. C bequeathed all her personal property to B, and died. B bequeathed all his personal property to A, and died without leaving any child. *Held*, that A took an absolute interest in the fund under the deed, for that the conditional gift over, if good, was released by the effect of the wills of B and C. *In re Palmer's Trust*, xv. 310.

15. *Condition precedent or subsequent—Mortgage.* W. D., having an absolute appointment by deed or will over an estate, devised it to her husband, R. D., with power to sell and dispose of the same, or to raise any sum of money thereon by mortgage, as he should think proper, "provided that such part of all and every sum and sums of money, so as aforesaid raised by the said R. D., either by sale or mortgage, as shall be unexpended at my (his) decease, shall be charged upon the houses belonging to R. D., situate, &c., to be disposed of immediately after the decease of the said R. D., that sum to be paid to my four nieces." Remainder over. R. D. mortgaged the estate, and died, never having charged his houses with any part of the mortgage-money. *Held*, that the condition was not a condition precedent, and that the mortgage by R. D. was a valid mortgage. *Watkins v. Williams*, x. 23.

16. *Devise by mortgagee in fee of lands of gavelkind tenure.* A mortgagee in fee of lands of gavelkind tenure gave and devised all the residue of his estate, which should remain after paying his just debts, funeral and testamentary expenses, to his wife for her own use and benefit. *Held*, that in consequence of the devise by the will, no estate in the mortgage premises remained vested in the infant co-heirs in gavelkind of the mortgagee. *Field's Mortgage, in re*, vii. 260.

17. *Widow put to election—Vested interests in nephews and nieces.* Where a testator, by will, gives all his personal estate and an annuity to his wife, and certain real estate to trustees, with the power to let the same until all his nephews and nieces shall be of the age of twenty-one years, and directs the same to be afterwards sold and the proceeds thereof to be equally divided among all his nephews and nieces except two; the widow will be put to her election between her dower and the benefits given to her by the will; and all the nephews and nieces who attain twenty-one, except those specifically excluded, will take vested interests. *Parker v. Sowerby*, xxi. 39.

18. All that is necessary to raise a case in which a widow must elect between her dower and the provisions of the will is, that there should appear upon the face of the will an intention which would be frustrated by the claim of dower. *Parker v. Sowerby*, xxvii. 154.

19. *Election by legatee to take produce of real estate as realty.* Though slight circumstances are sufficient to raise the presumption of an election by a legatee of the produce of real estate directed to be sold, to take the property in its actual unconverted state, the mere fact of a legatee entering into and continuing in possession of the estate until his death, which happened within three years afterwards, having done no other act which would lead to the presumption of his having elected to take the property as realty, is not of itself sufficient evidence of such election; and therefore such property did not pass under a general devise of all his real estate contained in a will made shortly after he entered into possession. *Dixon v. Gayfer*, xxiii. 149.

20. *Power of sale and mortgage.* Distinction between a devise of estates to trustees upon trusts for certain persons, subject to debts, &c., and a devise to trustees charged with debts, &c., with a direction for, or trusts which require, an out and out conversion; in the former case, a mortgage may be a proper mode of raising the particular charge, in the latter a sale only is authorized. *Stroughill v. Anstey*, xii. 356.

21. *Income of funds bequeathed—Gift over on decease or marriage.* A testator bequeathed the income arising from certain funds to A, a widow, for life or until her marriage; and after her death or marriage, which should first happen, he gave the principal amongst her children by two former husbands. A married again between the date of the will and the death of the testator, and he was aware of her marriage. *Held*, overruling a decision of one of the vice-chancellors, that A was not entitled to the income of the funds, but that the gift over upon her decease or marriage came at once into operation. *Bullock v. Bennett*, xxxi. 463.

22. *What property passes under power—Consols, ground-rents, and shares.* A, having a power of appointment over a sum of consols, some leasehold ground-rents, and some shares in an insurance company, made a will, by which she bequeathed all her real estate, money, and securities for money, to B, and all the rest, residue, and remainder of her personal estate to C. *Held*, that all the property subject to the power passed by the will, and that B was entitled to the consols, and C to the shares and ground-rents. *Turner v. Turner*, xiii. 204.

23. *Conditional devise—Ejectment.* A testator, after charging certain fee simple property in L. with an annuity, devised the same, subject to the payment of the annuity, to his son J. D., his heirs, and assigns forever, provided J. D. should, when requested by D. D., another son of the testator, convey to the said D. D., his heirs and assigns forever, the messuage called C.; but if J. D. should refuse so to do, then

the testator devised the lands made liable to the annuity to D. D., his heirs and assigns forever. J. D. was seised in fee of the C. estate at the death of the testator, and continued so seised till his own death, having demised the same to a tenant from year to year, and never having been requested by D. D. to convey the estate to him. By his last will, J. D. devised the C. estate to his wife in fee simple, and D. D. subsequently tendered to the widow of J. D. a conveyance of the said estate to him, for her to execute. On her refusal, D. D. brought an action of ejectment for the recovery of the property in L., but it was *held* that it could not be maintained. *Doe d. Davies v. Davies*, vi. 301.

24. *Legacy in trust—Cestui que trust restrained from anticipating or assigning income.* A legacy, given to trustees in trust to pay the income thereof to the nephew of the testator, at certain periods, but to be held by them in trust for other purposes if the nephew should attempt to anticipate or otherwise assign or incur the same, will not be forfeited or affected by an assignment of those portions of the income which are already due and in arrear. *In re Stulz*, xxi. 80.

25. *Perishable property given to be enjoyed in succession.* The rule laid down in *Howe v. The Earl of Dartmouth*, 7 Ves. 137, (a), is, that where property of a perishable nature is given to be enjoyed in succession, the object of the testator can only be effected by converting the property into permanent annuities, and giving each person, in succession, the dividends of the fund. This rule prevails, unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, and which it is incumbent on those contesting the application of the rule to point out. Modern cases allow small indications of intention to prevent the application of the rule; but the mere absence of any direction to convert is insufficient. *Morgan v. Morgan*, vii. 216.

26. *Bequest of legacy on trust to apply interest to maintenance of grandson—Grandson entitled to interest not applied to maintenance.* A bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one; and, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson, for his life; and a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over. *Held*, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, showed that the interest was intended for him, and that he was therefore entitled to the interest which accrued during his minority, and was not applied in his maintenance. *In re Rouse's Estate*, xv. 183.

27. *Cumulative legacies.* Bequest of property to the testator's children, in equal shares, the share of each daughter to be invested, and the interest paid to her as it became due. By a codicil, the testator directed his executors to transfer a sum of consols as a legacy to R., "my daughter, named in my will, in trust as otherwise therein stipulated, any thing therein to the contrary notwithstanding." *Held*, that the sum of consols was an additional gift, to be taken absolutely, subject nevertheless to have it secured. *Ledger v. Hooker*, xxiii. 515.

28. A bequest of a trust for the maintenance of C. L., till 22, then to her for life; if she died without issue, gift over; if leaving issue, in trust for child, or children equally. A clause in a codicil of the will was as follows: "I have altered my views respecting C. L., respecting the 1,000*l.*, as left in my will, and which I now think may prove a snare for her. I now leave 500*l.*" for her education and board. *Held*, that the latter gift was not as a substitute for the former one, but cumulative thereto. *Sawrey v. Rumney*, xv. 307.

29. S. D., by his will, gave to his natural or reputed daughter, M. S., 2,000*l.* for her separate use. By a codicil he said, "I add 3,000*l.* to which M. S. is entitled under my will." By the last codicil, made a few days before his death, and which in the

attestation clause was published as his will, he said, "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000*l.* for my daughter, M. D.," &c., calling her by his own name, and not, as he had previously styled her, M. S. *Held*, affirming the decision of the court below, that the last legacy of 20,000*l.* was substitutional and not cumulative. *Russell v. Dickson*, xvi. 83.

30. *Maintenance of children—Mother entitled to rents and proceeds without account.* A testator gave his estate on trust to assign the same between his eight children, when they should attain the age of twenty-one, and in the mean time to pay to his wife or otherwise apply the rents and proceeds of the respective shares for their respective maintenance and education; and there was a direction that, in case of death under twenty-one, the share, with the accumulations, if any, should go to the children who did attain that age. *Held*, that the mother, having maintained the children, was entitled to the rents and proceeds without account. *Brown v. Paul*, i. 130.

31. *General devise—Restrictive words.* A testator devised to J. S. "all those my three messuages, with the gardens, close of land, and all other my real estate whatsoever, situate at Little Heath, in the parish of F., now in the occupation of myself, A. and B." At the date of the will, and at the death of the testator, he was possessed of three messuages, with gardens and a close of land, at Little Heath, which were in the occupation of himself, A. and B. He had also the reversion in a house and garden, situate at Little Heath, which was in the occupation of C., who was entitled to it for life. Besides these, he had no other property in the parish of F. *Held*, that the house and garden, in the occupation of C., passed under the general devise to J. S. As a general proposition, effect must be given to every word of the will; and words of description, following a general devise, will not be construed as restrictive, where the doing so would render the general devise inoperative, and where they may be rejected as a false demonstration. *Doe d. Campton v. Carpenter*, i. 307.

32. *Subsequently acquired real estate—Codicil.* A testator, possessed only of personalty, by the residuary clause of his will, bequeathed the same to his wife for life, and after her decease to his children in certain proportions. Having subsequently acquired real estate, he made a codicil, by which he left certain shares to his wife, "on the same terms as I have every thing else, (every thing I possess I leave her.*)" *Held*, that the words showed a present intention, and passed the real estate. *Warner v. Warner*, ii. 68.

33. *No child of testator living at time of making will—Devise to nephew—Child afterwards born.* A testator, by his will, devised an estate to his wife for life, with remainder in fee to his nephew, with a proviso, that in case the testator's wife should at his decease be pregnant with a child, the devise to the nephew was to cease, and such child was to take the remainder in fee. At the time of making his will the testator had no child, and he was expecting to die; but a child was afterwards born in his lifetime, and the testator made a codicil to his will, devising after-acquired property to such child. The wife was not *enccinte* at the death of the testator. *Held*, that the child born in the testator's lifetime had no estate under the will, and that, as there was no posthumous child, the devise to the nephew took effect. *Doe d. Blakiston v. Haslewood*, ii. 308.

34. *Income of residuary estate—Surplus—Lunatic.* A, by will, gave the income of his residuary estate, after the death of B, to trustees for the benefit of C, and died. B, by her will, gave the income of her residuary estate to trustees, upon trust, to apply a sufficient part of the income for the maintenance of C during his life, and declared that, in case there should be a surplus of income, such surplus should be considered as principal, and invested accordingly, and gave such principal on the trusts therein mentioned, and died. C was found a lunatic, and the annual sums allowed for his maintenance were greater than the annual income of C's estate. *Held*, that B must be taken to have made her will without reference to C's other income, and that C was

entitled to have the whole income of B's estate applied to his maintenance, in exoneration of the income of A's estate. *Methold v. Turner*, iii. 168.

35. *Marriage settlement—Power to alter securities—Bankruptcy of trustees.* Stock was transferred to trustees, on trusts of a marriage settlement. There was a power to alter and vary securities with the consent of the husband and wife. All the trustees transferred 2,000*l.*, part of the fund, to the husband, and the same was sold out, and the produce used by him and his copartners, two of whom were trustees. The husband and his copartners became bankrupt, the third trustee also became bankrupt. The other and only solvent trustee, who was the father of the wife, by his will, gave 6,000*l.*, new *Sl.* 10*s.* per cents., to the trustees of the settlement. His will contained the following direction: "For giving my daughter her legacy of 6,000*l.*, new *Sl.* 10*s.* per cents, I order and direct, that whatever foreign bonds A. B. and Co. should have of mine be sold, and the produce thereof, with my balance of accounts with the said house, shall be added for purchasing the said legacy." The testator also directed his bankers to pay all his dividends, and his balance of accounts with them, to his wife during her life, after having paid his legacy and debts. A suit was instituted against the executor of this will for a replacement of the 2,000*l.* out of the estate, and another suit was instituted by the same party against the executor for payment of the 6,000*l.* legacy. *Held*, that the gift of the 6,000*l.* was a satisfaction of the 2,000*l.* and interest. *Bensusan v. Nehemias*, iv. 140.

36. *General words allowed full effect—Whether real estate passes.* No general rule applicable to every case can be laid down. The question, whether real estate passes or not under the general words of a will, is to be determined only from the intention of the testator as expressed in the will. All that can be done is to collect the intention from the context of the whole will; and it is the duty of the court to examine, with this object in view, every clause of the will, and apply thereto the general rules of construction adopted by the courts. It is a well-established rule of construction, that general words must be allowed their full effect, unless it is perfectly clear that such effect is controlled by the context. *Stokes v. Salomons*, iv. 133.

37. *Vested interest.* A testator bequeathed his residuary personal estate to trustees, upon trust for A for life, and after the death of A in trust for all and every the children of A, share and share alike, to the son or sons when they should have attained the age of twenty-one, and for the daughter or daughters, at that age or marriage; with a gift over, if A should die without having a child, or, having any, such children should die, being sons before twenty-one, and daughters before twenty-one or marriage. A died, leaving an only child B, who died under twenty-one. *Held*, that the trust property had vested in B, so that the income between the death of A and the death of B belonged to B's estate. *Ridgway v. Ridgway*, iv. 108.

38. *Annual produce of residue to children—Death of child—Representatives entitled.* A testator gave the annual produce of his residue to his three children, and directed, that, after the decease of any one or two of them, the shares belonging to the parent should go to the children of the parent; and after the decease of the survivor of his children he gave the residue to his grandchildren. One of the children died, leaving issue, who died in the lifetime of one of the other children. *Held*, that the representatives of the issue were entitled to the share of the annual produce which belonged to the parent. *Homer v. Gould*, iv. 62.

39. *Bonus on shares in insurance company passing as income.* By a bequest of all the testator's property to trustees for the benefit of the wife for life, and, after her death, to the children, the bonus on shares in an insurance company, accruing after the death of the testator, passes to the wife as income. *Johnson v. Johnson*, v. 164.

40. *Bequest to children to be afterwards born—Who entitled.* A testator, by a codicil to his will, gave legacies of 500*l.* each to four children, by name, of his niece, Alice Early, the eldest daughter of his brother Henry, and he directed his executors to pay,

out of his personal estate, the sum of 500*l.* apiece to each child that might be born to either of the children of either of his brothers, to be paid to each of them on his or her attaining the age of twenty-one years. The testator's niece, Alice Early, besides the four children named in the codicil, had three other children living at the date thereof. *Held*, that those children were not entitled to a legacy of 500*l.* each, as the words of the codicil contemplated only children who might be born subsequently to the date of it. *Early v. Middleton*, vi. 86.

41. *Bequest of interest.* A testator bequeathed to his wife the interest of the capital sum of 1,000*l.*, for her sole use and benefit, independent of any husband she might marry, and her receipt alone to be a sufficient discharge to his executors. *Held*, that the gift of the interest of 1,000*l.* was tantamount to an absolute bequest of the capital. *Humphrey v. Humphrey*, vi. 113.

42. *Same meaning to be given to words in different parts of will.* When a word has clearly been used in a certain sense in the early part of a will, the same meaning must be given to it in other parts, unless the intention of the testator clearly appears to be different. *Doe d. Page v. Page*, vi. 346.

43. *Interest given to one who is trustee under the will.* A testator, by will made in England, left all his property in England and Canada to trustees, to be converted and divided between certain of his relations named. By a codicil, made in Canada, the testator left all his property in Canada to trustees, to be converted and remitted to one of the trustees named in his will, to whom he gave it, to hold to his heirs, &c., forever, and revoked every thing to a contrary effect in his will. *Held*, that this devisee took the proceeds of the sale of the property in Canada beneficially. *Schofield v. Cahuc*, viii. 55.

44. *Shifting clause.* A testatrix by her will devised certain real estates to the use of M. J. for life, with divers remainders over; among others, to P. M. for life, with like remainders to his sons and daughters in tail; with remainder to J. M., brother of P. M., for life, with like remainders to his sons and daughters in tail, &c.; provided that if P. M. and J. M., or either of them, their or either of their issue, &c., should become entitled to certain other real estates belonging to R. M., "so as to be in the possession or in the actual receipt of the rents and profits thereof," then the said estates devised by her will should shift from the person so becoming entitled, in manner therein mentioned. At the date of the will, R. M. was entitled to real property in fee and in tail. These estates were subsequently disentailed and devised and so came to the son of J. M., who was then entitled to the other devised estates, by limitation as a purchaser, and not by inheritance or under the original limitations existing at the date of the testatrix's will. *Held*, that this did not prevent the shifting clause from taking effect, and that the words in the will "the messuages, lands, &c., now of or belonging to R. M.," meant all the real estate held by him in fee as well as in tail. *Monypenny v. Dering*, viii. 42.

45. *Real estate devised in trust for sale—Personalty.* A testator devised his real estate to trustees, upon trust after the decease of his wife, to receive the rents and apply them for the benefit of his son during his life; after the decease of his said son, upon trust to sell, and invest the net proceeds and apply the income thereof to the maintenance of his said son's children, &c. If they died under age and without issue, on further trusts. After the death of the testator and his wife, the son died a bachelor. *Held*, that the trust for sale was absolute, and the property must be considered as personality, and the son of the testator, in the events that had happened, took it as personality, if he took it at all, as heir of the testator. *White v. Smith*, viii. 77.

46. *Residue to executrix not taken beneficially.* A testatrix, among other legacies, gave S. P., her sole executrix, 3,000*l.* and a like sum in addition, "for the trouble she would have in acting as executrix;" then made other bequests, and gave the rest of her personal estate to S. P., her executors, administrators, and assigns, "well knowing that she will make a good use, and dispose of it in a manner in accordance with my

views and wishes." *Held*, affirming the decision below, that the executrix did not take the residue beneficially. *Briggs v. Penny*, viii. 231.

47. *Words creating trust.* Words accompanying a bequest expressing confidence, belief, desire, or hope, as to the application of the bequest, will create a trust, when they exclude all discretion in the donee, the subject is certain, and the objects definite. *Id.*

48. *Gift over not taking effect—Personal representatives entitled.* A testator's will contained a bequest to trustees, upon trust for his daughter for her life, then to be paid to her children, on their attaining twenty-one, or marrying. In case any of the said daughter's children "should happen to die before being entitled in possession to his share," the share was to go to the survivor or survivors. The daughter had two children who attained twenty one; one of them survived the testator, but predeceased her mother. *Held*, that the gift over did not take effect, but the personal representatives of the deceased child were entitled to her share. *Re Yates*, viii. 224.

49. *Bequest to daughter for life, then to husband—Second husband not entitled.* A testatrix gave certain money to her daughter M. for life, then to be divided between the husbands of her daughters and her son, or such of them as might be living at the decease of her said daughter. One of the daughters married a second husband, after the death of the testatrix, and he was living at the death of the tenant for life. *Held*, that the testatrix meant to designate the particular husbands living at the time she made her will, and that the second husband was not entitled to a share of the trust fund. *Ex parte Bryan's Trust*, viii. 253.

50. *Lapsed gift as to moiety of residuary estate—Right of survivorship.* A testatrix gave her residuary estate, after the death of three persons, upon trust to pay and assign it equally between G. B. and E. B., their executors, administrators, and assigns; but if neither of them should be living at the death of the survivor of the tenants for life, she gave the same to F. H. G. B. died in the lifetime of the testatrix, but E. B. survived the tenants for life. *Held*, that the gift lapsed as to a moiety of the residuary estate; that no joint estate was created between G. B. and E. B.; that no right by survivorship arose by implication; that the event had not happened upon which the gift over was to take effect; and that one moiety of the residuary estate was undisposed of and belonged to the next of kin of the testatrix, and that the costs must be paid out of her estate. *Baxter v. Losh*, viii. 274.

51. *Trust for benefit of children.* A testator made his will in these terms: "I give and bequeath all my property, of whatsoever description, to my wife, for the maintenance of herself and our children," naming them, and making her sole executrix. *Held*, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to account. *In re Harris*, viii. 537.

52. *Bequest of leasehold property—Liability for dilapidations—Practice.* A testatrix, by her will, bequeathed certain leasehold property, being houses, to A, absolutely for all the residue of the term, "subject to the payment of the rent, and the performance of the covenants reserved and contained in the lease;" and she bequeathed her residuary real and personal estate, subject to the payment of her debts, funeral, testamentary, and other expenses, to B, absolutely. *Held*, both upon principle and construction, reversing the decision of *Wigram, V. C.*, that, *inter se*, A, and not the residuary legatee, was liable for dilapidations existing at the death of the testatrix; and that A should indemnify the executors of the testatrix against liability before being let into possession. *Held*, also, under the circumstances of this case, that the specific legatee was sufficiently represented upon the appeal by the executors of the testatrix; but time was given him to present a petition to have the case reheard, if he should be so advised. *Hickling v. Boyer*, ix. 209.

53. *Representatives of deceased child entitled.* A testator bequeathed the interest of 3,000*l.* at 5*l.* per cent. to his daughter for life, and, after her death, he gave the said sum of 3,000*l.* to trustees in trust for all the children of his daughter, share and

share alike, to be paid to sons at their ages of twenty-one and daughters at their ages of twenty-one or days of marriage, with interest in the mean time on their shares for their maintenance and education, and benefit of survivorship, in the event of any of the said children dying without issue. The testator's daughter had five children living at his death, one of whom attained twenty-one and died in her lifetime without issue. *Held*, that the representatives of the deceased child were entitled to his share. *Tribe v. Newland*, ix. 200.

54. *General residuary bequest.* A specific enumeration of articles, after a bequest to A of "all and every thing I die possessed of," followed by a declaration that "I leave every thing I die possessed of to A, for her entire and sole use and benefit," was held to be a general residuary bequest. *In re Kendall*, ix. 196.

55. *Bequest of policy upon uses—Memorandum expressing testator's wishes—Trust.* A testator, by his will, bequeathed a policy of assurance on his own life to A and B, upon the uses of a letter signed by them and himself. At the date of the will there was no such letter. Subsequently, the testator addressed a note to his executors and signed a memorandum, by which he stated his wishes as to the disposition of the moneys to be received in respect of the policy. The testator kept the policy in his possession until his death. *Held*, that no trust was created by the memorandum, and that the policy formed a part of the residue. *Johnson v. Ball*, ix. 159.

56. *Conversion—Annuity—Condition.* A testator gave freeholds and leaseholds to trustees, upon trust to pay the income to C. for life, or at their discretion to invest it, with remainder to his children, and in default of children, on trust to sell, and divide the produce in manner afterwards directed. He made similar gifts for the benefit of his other children and their issue, and directed the trustees to divide the produce in sixths, and apply one sixth to the purchase of an annuity for C. C. died without children, and the trustees sold. *Held*, that the one sixth of the product of the sale was undisposed of, and went to the next of kin of the testator. *Walters v. Corpe*, v. 225.

57. *Memorandum allowed as will of personalty—Settlements of real estate—Election.* A memorandum by a person possessed of real and personal estate was at first supposed to be wholly inoperative, but was, long after his death, allowed as a will of personalty. In the mean time settlements of the real estate had been made with a view to carry out the intention of the memorandum as to the real estate. It was held, that the person entitled to the personal estate under the memorandum, and being also benefited by said settlements, was not to be put to an election between them, as the will referred only to the personal property. *Egremont v. Lee*, x. 188.

58. *Residue to one for life, remainder to missionary societies—Railway shares.* Bequest of the residue of the testator's property "of every description it might be" to one for life and then to missionary societies. Part of the property consisted in railway shares. *Held*, that the remainder-men were entitled to have the shares sold and the proceeds invested in consols, without any prejudice to the question whether the shares were, or were not, real estate within the Mortmain Act. *Thornton v. Ellis*, x. 85.

59. *Gift to executors.* A, by his will, directed his executors to pay over all the residue of his property to B; but in case of B's death, then to pay over the same to "the executors or executrixes which B by her will might appoint." B died before A, having by her will given the residue of her property to C, and appointed D her executrix. *Held*, on a bill filed by D against C, that D took the residue of A's estate as part of the personal estate of B, and that he was to hold it upon the trusts and for the purposes of B's will. *Long v. Watkinson*, x. 70.

60. *Bequest to children of freehold and leasehold property—Issue of deceased child to take parent's share.* A testator willed and bequeathed freehold and leasehold property in manner following: "I will and bequeathe to my eldest son, one seventh share of my property, to his heirs, executors, and administrators. So to each of his other

six children. "And in case any of my sons or daughters die without issue, that their share returns to my sons and daughters equally among them; and in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share, share and share alike." All the seven children of the testator survived him, and one of them afterwards died, leaving an eldest son and several other children. *Held*, that this latter clause did not operate either by way of executory devise, or to cut down the estate of the parents to an estate for life, but that it referred to a dying of the sons and daughters of the testator in his lifetime, and that consequently the eldest son of the deceased child took the whole of his parent's share in the freeholds as his heir at law and in the leaseholds as his administrator. *Gee v. The Mayor, &c. of Manchester*, x. 450.

61. *Passing residuary estate.* As to the residue "of his estate and effects, whatsoever and wheresoever, canal shares, plate, linen, china, and furniture," the testator devised and bequeathed the same to his wife. *Held*, that the residuary personal estate passed, and that the general words were not limited to things *ejusdem generis* with canal shares, &c. *Fisher v. Hepburn*, xi. 336.

62. *Interest in personal estate.* A testator gave his freehold estate "and property, whether real or personal," to A for life; and after her decease, he gave "all his said freehold estate and property" to B and wife for life; and after their decease, he gave "all his said freehold property" to their children, "for an estate of inheritance in fee-simple," and in default he gave "his freehold estate and property" to C, "his heirs, and assigns, in fee simple." He charged his personal estate with some legacies, and he gave the residue of which he should die possessed, &c. to A. *Held*, that B and his children took no interest in the personal estate, which belonged to A. *Hollingsworth v. Shakeshaft*, xi. 308.

63. *Bequest of residue—Taking by implication.* Bequest of residue to John L., but if he should die in the lifetime of the testatrix, without leaving children, then to Charles L. *Held*, that the children of John L. took nothing by implication. *Addison v. Busk*, xi. 304.

64. *Bequest to widow for life, then to five persons—Tenants in common—Survivorship.* In case of a bequest to the widow of the testator for life and then "to F., G., H., I., & K., and in case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike," the estate passes to F., G., &c., in five equal shares, as tenants in common; and the words "in case of the death," mean in case of death before the period of distribution, and applies to death in the lifetime of the testator, but before the death of the widow; and in case of death each one's share vests absolutely in such of his children as are living at the death of their parent, or at the death of the testator, whichever last happens. *Ive v. King*, xi. 216.

65. *Leasehold may pass under description of freehold.* A leasehold estate will pass under the description of freehold, when the reference to its name, or local situation, and the fact of the testator having no freehold estate answering thereto, leave no doubt of the identity. *Nelson v. Hopkins*, xi. 66.

66. *Alternative gift—Ambiguity.* A direction in a will that trustees should "divide" a reversionary fund equally between a testator's children living at the decease of the tenant for life, "or such others as would have been entitled to it at the death of their parents—*held*, not to include a grandchild whose father died after the testator, but before the tenant for life. *Miller v. Chapman*, xxxi. 386.

67. *Bequest of dividends—Balance at bankers.* In case of a bequest to trustees to pay the dividends arising from the personal estate of the testatrix "invested at her decease in or upon any stocks, funds, or securities whatsoever, yielding interest," to certain persons, a balance in the hands of the bankers of the testatrix, which balance yields interest, is undisposed of by the terms of the will. *Archibald v. Hartley*, xi. 54.

68. *Residuary legatees—Private leger—Statute of Limitations.* A testator gave his residuary estate equally among his six children, and directed that sums of money appearing by his private leger to be due from them, should in the division be brought into account. *Held*, that allowance must be made for all sums appearing due, though they were barred by the Statute of Limitations. *Rose v. Gould*, xi. 10.

69. *Unqualified gift—Prior restrictions.* In general, a new unqualified gift will not be made subject to the restrictions imposed on a prior gift in the will. *Boodle v. Partington*, xii. 301.

70. *Pecuniary legacy raiseable out of residuary real estate.* A testator, by his will, dated in 1839, gave certain pecuniary legacies, and some interests in his real estate, and then gave all the rest and residue of his estate and effects, real and personal, to his son, absolutely, and appointed him sole executor. *Held*, that a pecuniary legacy was raiseable out of the residuary real estate. *Francis v. Clemow*, xxiii. 125.

71. *Gift to A for life, remainder to A's sisters or their children living at A's decease.* In case of a gift to A for life, with remainder in default of appointment to the sisters of A or their children living at A's decease, the children of a sister who dies in the testator's lifetime, before the date of the will, take no interest, and the children of the sisters surviving A take *per stirpes*. *Congreve v. Palmer*, xxiii. 165.

72. *Landed estate given to one set of persons, subjected to pecuniary charge for benefit of other interests.* Where landed estate is given by will to one set of persons, or for the purposes of one set of limitations, but is subjected by the will to a pecuniary charge for the benefit of other interests, and those other interests given by the will do not exhaust the entire property in the money, the benefit of the charge, as far as it is not given away, sinks for the benefit of those to whom the real estate is devised, subject to the charge. *In re Cooper's Trusts*, xxiii. 183.

73. *Language in will assumed to be testator's.* The court is bound to assume the language in a will to be the testator's own language; hence, evidence by the attorney who wrote the will is not admissible to show that certain words were put in at his suggestion. *Bernasconi v. Atkinson*, xxiii. 207.

74. *Devise of estate tail—Funds in trust to be appropriated for benefit of such estate—Bar of estate tail.* Where a testator devises his estate in tail, and devises to trustees funds to be appropriated for the benefit of such estate for a term of years, and then to be paid over to the possessor of the estate, if of a certain class, and the estate tail is barred and charged to one in fee, and the purposes of the trust consequently fail, then the owner of the estate, if of the described class, becomes entitled to an immediate transfer of the fund. *In matter of Colson's Trusts*, xxiii. 222.

75. *Bequest of railway shares—Consolidated stock.* Bequest of all the testator's Great Western Railway shares, and all other the railway shares of which he might be possessed at the time of his decease,—*held*, to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the company, made under the authority of an act of parliament, converted into consolidated stock; but not to pass consolidated stock in the same company purchased by the testator after the date of his will. *Oakes v. Oakes*, xv. 193.

76. *Misnomer.* A gift by will, to my nephew, John Henry, and should he not marry, to be equally divided between Samuel, "John," and Mary, all of Calcott Hall; all of them must receive 50*l*. John Henry did not marry, and died in 1835. The testatrix had a nephew "Thomas," who now claimed to participate in the fund, together with Samuel and Mary, his brother and sister, on the ground that the testatrix had written the name "John" instead of Thomas. *Held*, by the master of the rolls, that Thomas was not entitled. That the word "John" sufficiently described John Henry; that his being a legatee of the whole did not prevent his having a part of the fund in another event; and his representatives were declared entitled to one third of the fund; but the claim of Thomas was dismissed, without costs. Upon

appeal the judgment was affirmed, *dissentiente* Knight Bruce, L. J. *Mostyn v. Mostyn*, xix. 501. Judgment affirmed, xxxi. 16.

77. *Reference from one part of will to another.* Reference may be made from one part of a will to another, in order to ascertain the meaning of each part, even when the rules of law, as to construction, are the best established and the most cogent. *East v. Twyford*, xxxi. 62.

78. *Estate tail intended to be estate for life.* Therefore, where a testator divided his property into several parcels, disposing of the first parcel by words which indicated pretty clearly his intention to give L. an estate tail therein, and in a subsequent part of the will still more clearly appointed another parcel to M. for life, and added "as in the case of L.," it was *held* that it must have been the intention of the testator to give L. only an estate for life. *Ib.*

79. *After-acquired real estate.* A testator, then owning no real estate, gave and bequeathed "all the residue of his goods and chattels, stock in trade, estate, and effects, of what nature and kind soever," to B, his executors, &c., in trust, to sell and pay the proceeds to his wife and children. *Held*, to pass subsequently acquired real estate. *O'Toole v. Browne*, xxv. 210.

80. *Legacy to woman whom testator had deceived by pretended marriage—Former codicil.* A testator gave a legacy to a woman whom he had deceived by pretended ceremonies of marriage, to be used for her own and children's benefit, and he appointed her their guardian. *Held*, with reference to a former codicil, to comprise her child and the child of another woman, both of whom were specifically named in the former codicil. *Hart v. Tribe*, xix. 564.

81. *Legacy, when vested.* A testator devised real estate to A, in fee, charged with an annuity to B for life, and directed that after the death of B, the estate should be charged with the payment of 100*l.* apiece to X, Y, and Z, and that the same should be paid to them respectively within six calendar months after the death of B, or such of them as should be then living. X died in the lifetime of B. *Held*, that the legacy to X had not vested, and was not payable to his representatives. *Goodman v. Drury*, xiii. 135.

82. *Apportionment on deficiency.* A bequest of 9,900*l.* to A, and 10,000*l.* to B. The first sum had been previously given by deed in equal moieties to the same persons. *Held*, that inasmuch as the testatrix supposed that she still had the power of appointing both sums, the legatees must share the 10,000*l.* in the proportion of 99 to 100. *Laurie v. Clutton*, xv. 85.

83. *Enlarging estate.* Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate. *East v. Twyford*, xxxi. 62.

84. *Devise to trustees to pay rents to testator's daughter for life, after her death to use of her children—Survivorship—Tenants in common.* A testator devised lands to trustees to pay the rents to his daughter Anna for life; after her death the trustees were to hold said estate "and all accruing share and interest to which Anna might become entitled by survivorship under the trusts of this will or otherwise," to the use of Anna's children, &c., or if none, then to the use of his son W. and daughter Maria, the survivor of them and the issue of such of them as had died, their heirs, &c., as tenants in common. He then made another devise in the same terms to Maria, with the same limitations, *mutatis mutandis*, in favor of W. and Anna. Maria died before testator. Anna died, leaving a husband and two children, the plaintiffs. *Held*, that they were not entitled as tenants in common in fee to a moiety of the lands devised to Maria for life. *Greenwood v. Sutcliffe*, xxv. 266.

85. *Devise to three unmarried daughters, as tenants in common in fee—Codicil providing for case of marriage of daughters.* D., by his will, devised all his real and personal estate to his three unmarried daughters, as tenants in common in fee; and, by a codicil, desired, "that if one of the three daughters should get married, the two

then remaining single should, at the end of twelve months after his decease, pay to the married sister 500*l.* in lieu of all further claim on his property; and the two surviving daughters, then single, should be sole possessors of all his property." *Held*, that the codicil had no operation unless one of the daughters married in D.'s lifetime, or within the twelve months. *Lloyd v. Davies*, xxv. 434.

86. *Widow's right to reside in testator's house—Inconsistency.* Where a testator, by his will, directed that his wife might be allowed to reside in his house during her widowhood, and in a subsequent part of the same will directed that when his youngest child should have attained the age of twenty-one, then the house, &c., should be sold, and an annuity be paid to the wife, it was *held*, that the widow's right to reside in the house ceased at the sale. *Chapman v. Gilbert*, xxxi. 193.

87. *Acceleration of vesting.* If, in a will, estates are devised to trustees upon trust to pay the rents and profits to the testator's son for life, and then to stand seised of the same in trust for the first and other sons of said son in tail general, and by a codicil the gift of the rents and profits to the son is revoked, and an annuity substituted therefor, the effect of the codicil, if such appears consistent with the intention of the testator, is to accelerate the vesting of the remainder in tail in the first grandson. *Lainson v. Lainson*, xxxi. 200; affirming s. c. xxiii. 72.

88. *Special occupant.* A testatrix, by codicil, devised real estate to her daughter, to hold to the said daughter, her heirs, executors, administrators, and assigns, for and during the natural lives of her said daughter and two other persons. *Held*, that upon the death of the daughter during the existence of the other two lives, her heir took as special occupant, notwithstanding the addition in the same devise of the words "executors, administrators, and assigns," to the word "heirs." *Carpenter v. Duns-mure*, xxviii. 116.

89. *Time of vesting.* In case of a gift in trust for A for life and then to divide six months after A's death, the residue and accumulation among the children of A and B who should be living, and have lived to attain twenty-one, it was *held*, that the word "living" referred to the time of the testator's death, and not to the time of distribution, so that each child, on attaining twenty-one, took a vested interest absolutely. *Kidd v. North*, xxvii. 479.

90. *Power to cut timber.* A testator gave an estate in trust for a term of years, without impeachment of waste, with power to mortgage or sell, and subject thereto to a life with remainder to A for life, remainder to A's issue in strict settlement; the trustees were to be allowed to cut so much timber as they should see fit after a certain time for the benefit of A. A died a few years after that time, the trustees not having exercised the power to cut timber. After A's death the term was sold for the purposes of the trust. *Held*, that the purchaser was entitled to the timber on the estate at the time of the sale. *Watlington v. Waldron*, xxvii. 281.

91. *Direction to carry on trade.* A direction by a testator to his executors, to continue to carry on his trade, does not authorize them to embark in his trade any of the testator's general assets beyond those already embarked in it at his death. *M'Neillie v. Acton*, xxiii. 7.

92. *Settlement to use of husband and wife for life, and after decease of survivor, to children—Default of issue—Ultimate limitation.* By a marriage settlement, in consideration of the intended marriage and of the wife's fortune, certain premises were settled to the use of the husband and wife for life, and after the decease of the survivor, in case there should be only one child then living, and no other child should be dead leaving issue, then to the use of such one child in fee; but in case there should be more than one such child living at the decease of the survivor of the husband and wife, or any child or children should be then dead leaving issue, then to the use of all and every one or more of such children of the marriage, and such children's children respectively, for such estates, &c., as the husband and wife or the survivor should appoint, and, in default of appointment, to the use of all and every the chil-

dren of the marriage as tenants in common in tail, with cross-remainders; and for default of all such issue to the use of the wife's brothers and sisters in fee. There were issue of the marriage two children, who both died without issue before the survivor of the husband and wife. No appointment was ever made under the power. *Held*, by Lord Campbell, C. J., Coleridge, J., and Wightman, J., that the devise contemplated three contingencies, the first two of which had failed; and that the third, namely, the default of all issue of the marriage at the decease of the survivor of the husband and wife, had taken effect, and that consequently the ultimate limitation to the wife's brothers and sisters took effect. *Held*, by Crompton, J., that the ultimate limitation to the wife's brothers and sisters was contingent on the event of there being more than one child of the marriage living at the death of the survivor, or of a child or children of the marriage being then dead, leaving issue; and that that event having failed, ultimate limitation never took effect; and that the words, "in default of all such issue," did not mean, "in the event of there being no child living at the death of the survivor." *Doe d. Lees v. Ford*, xxii. 302.

93. *Illegitimate children.* In case of a gift in trust for A for life, then for the wife of A, and after her death for the children of A then living. A never having married, but having illegitimate children, of which fact the testator was cognizant, it was held that such children were excluded. *Warner v. Warner*, ii. 68.

94. Bequest that when B's first born son should attain the age of twenty-one, then half of the estate to such son and the other half to B. An illegitimate son of B, living at the date of the will, and maintained by the testator, is not entitled under such bequest. *Durrant v. Friend*, xi. 2.

95. Bequest of stock upon trust to pay the dividends to one for life, and then to divide the capital equally "between all the children of G. and the children of M., the wife of W. B., who should be alive at the respective deaths of the said G. and M." M. was married at the date of the will; she died after the testatrix, without lawful issue, but leaving several illegitimate children, all born before the date of the will, and whom the testatrix believed to be legitimate. The court admitted evidence of all facts in the testatrix's knowledge at the time she made her will; but upon the result of this evidence, there being a possibility that M. might have had legitimate children after the date of the will, and there being nothing on the face of the will to confine the description to the illegitimate children who were in existence at the date of it, it was held, that the illegitimate children took nothing. *Overhill's Trusts, in re*, xvii. 323.

96. The court will not presume that a married woman aged forty-nine, is past child-bearing. *Ib.*

97. There is no inflexible general rule, that illegitimate children cannot participate in a gift to children. An illegitimate child may take, if such is clearly the intention of the testator, even if the children are all described as the children of a "present wife." *Owen v. Bryant*, xiii. 217.

98. Where a testator gave a legacy to all of the children of a late nephew, who had died leaving one legitimate and two illegitimate children, it was held that they were all entitled under the will. *Leigh v. Byron*, xxi. 510.

99. *Leaseholds and freeholds to be converted into stock—Bequest of such stock to nephew on attaining twenty-one—Petition under Trustee Relief Act.* A testator, by his will, directed the lease of his residence to be converted into money, and invested in stock for his wife to receive the interest for life, and that she should receive all interest on all sums of money that he might have on any note of hand, bill or bond, except as therein mentioned. The testator then directed a freehold estate to be sold, and the produce invested in stock, and that his wife should receive the interest of the same as well as of all stock standing in his name at his death. At the decease of his wife, the testator directed all interest and dividends to be invested half-yearly, and to be added to such stock which he bequeathed to his nephew, which stock and all accumulations by the addition of such interest, the testator declared should become the

property of his nephew on attaining twenty-one. The will did not contain any residuary bequest: *Held*, on petition under the Trustee Relief Act, that the nephew was entitled to the stock in which the produce of the leaseholds had been invested, as well as the stock in which the produce of the testator's freehold estate had been invested. *In re Trusts of Courtois's Will*, xxi. 500.

100. *Bequest of annuity—Restraint upon encumbering the same.* A testator gave all his residuary estate to trustees, upon trust to pay the proceeds to his wife for life, and after her decease upon trust to sell the property and to stand possessed thereof, as to one seventh part, in trust to lay out and invest the same in a government annuity for the life of his son, and upon further trust to pay such annuity when and as the same should become payable, not by anticipation, to his said son, for his life, for his own use: but the testator declared that in case his son should, either before or after his (the testator's) death, become bankrupt or insolvent, or should do any act to encumber the annuity, then the property was to go over to other persons. The testator's son survived the testator and died in the lifetime of the tenant for life, without having become bankrupt or insolvent, and without having done any act to encumber the annuity. *Held*, that his personal representatives were entitled to the property. *Day v. Day*, xix. 556.

101. *Time of vesting.* A. W., the testatrix, by will, dated in 1798, gave personalty to trustees to invest, and pay the dividends to H. F. B. for life; and after his decease in case he should leave a child or children, in trust for all and every the child and children of H. F. B. equally, payable at twenty-one; and the part or share of each such child or children was to be considered a vested interest or vested interests in him, her, or them respectively; and in case H. F. B. should leave no such child or children, then in trust for E. L. for life, with remainders over. H. F. B. had one child, E. B., who attained twenty-one, and died in his father's lifetime, leaving a widow and child him surviving. On a suit by the widow of E. B., claiming as his administratrix, insisting that there was an absolute gift to E. B.—it was *held*, that the persons claiming under the gift over were entitled. *Bythesea v. Bythesea*, xxi. 18.

102. *Issue taking per stirpes.* When a bequest is made in trust to one for life, and upon his decease to all his children equally, who should be then living except one, and to the issue of any of the children, who should then be dead and to the issue of the one so excepted, such issue taking their respective parents' share, the issue of that one so excepted will take *per stirpes* and not *per capita*. *Minchell v. Lee*, xxi. 21.

103. *Executory devise when to be allowed.* An executory devise is in itself an infringement of the rules of the common law, and is only to be allowed on consideration of its not exceeding certain established limits. *Challis v. Evers*, x. 429.

104. *Executory devise—Waiver of condition—Notice—Trustees.* W. P., by his will, directed his trustees, as soon as conveniently might be after his death, to divide his residuary estate into lots, and set a value upon such lots, and give a copy of such particulars of division and valuation to his (the testator's) son; and if within six months after delivery of such copy, the son should give notice in writing, under his hand, of his desire to relinquish all or any part of such real estate, his interest in the part of the estate relinquished was to cease, and become vested in the trustees, upon certain trusts, the effect of which would be, out of the relinquished estates, and by a charge on the others, to put all the testator's children on an equality. Provided, that if the son should neglect to give "such notice," or "by some notice or other writing," to consent to hold all the property on the terms thereinbefore mentioned, and within the time thereinbefore mentioned, then, and so soon as such neglect or refusal should have happened, the interest of the son in all the property was to shift to the trustees as before, the testator's wish being to give to each of his children, or their representatives, one fifth share of his property; and, subject to these provisions, the testator devised the said estates to his trustees for 500 years, remainder to his son in fee. No allotment or valuation was ever made by the trustees, nor any notice given by the son, but he

entered into possession of the estates, and accounted for the rents to the trustees of the father's estates until his death, which happened five years and a half after that of his father. *Held*, that the son had waived his right to have the estate first valued, and had elected to take the whole, subject to the charge for the benefit of the other children. *Godwin v. Coulson*, xxi. 23.

105. *Residuary gift to a class—Revocation by codicil as to some of legatees.* Where a testator by will designates certain persons by name and certain persons as a class, to be his residuary legatees, and by codicil revokes the bequest to some of them, the remainder of them will take the whole of the residuary gift. *Clark v. Phillips*, xxi. 122.

106. *Real estate—Residue.* A bequest of all the rest and residue of the testator's estate and effects, to trustees upon trust to collect, get in, and receive the same, and to invest the same and every part thereof in consols, will pass the real as well as the personal estate of the testator. *D'Almaine v. Moseley*, xxi. 134.

107. A testator gave his residuary real and personal estate to trustees, upon trust, after the death of C, as to one fourth, as C should appoint, and upon trust to divide the rest and residue between other persons. Soon after his death, a suit was instituted for the administration of his personal estate, which continued for twenty-five years after his death, when C died without making an appointment. *Held*, that the one fourth went to the heir. *Simmons v. Rudall*, ii. 97.

108. The heir was made a party for the first time at the death of C. *Held*, that he was barred by the lapse of time from disputing the validity of the devise to the trustees. *Ib.*

109. *Description of houses—"Strand"—Punctuation.* A testator, entitled to certain houses situate in Bull Inn Court, Strand, in the Strand itself, and in Maiden-lane, which he held under one title, devised to M. and D. for their joint lives, and to the survivor in fee, "his freehold estates situate in Bullen or Bull Inn Court, Strand, and Maiden-lane." M. having died, it was *held*, that the word "Strand" was to be read disjunctively, and that the houses situate in the Strand, as well as those in Bullen-court and Maiden-lane, passed to D., the survivor, in fee. *Gauntlett v. Carter*, xxi. 160.

110. The court will observe the punctuation, the articles, and the use of words in other parts of the will in construing obscure sentences in it. *Ib.*

111. *Relation to nearest antecedent.* A testator bequeathed life-interests in four distinct funds to four nieces respectively, and directed that, upon the decease of any or either of them, the principal of the fund, the interest of which was to be received by her or them, should be held in trust for "the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of my other nieces hereinbefore named in equal shares." One of the nieces having died, leaving two children, it was *held*, that her fund was divisible among these children and among the children of the three other nieces; it being proper to give some force to the word "of," and that word being referable to the word "children," as the last antecedent. *Peacock v. Stockford*, xxi. 208.

112. *Power of trustees to bequeath trusts.* Bequests to A and B, their executors and administrators, upon trust. B, the surviving trustee, by his will bequeathed his trust estates to C and D, their heirs, executors, administrators, and assigns, on the trusts; and he appointed C, D, and E, executors of his will. *Held*, that C and D took only the legal estate, and that neither C and D, by themselves, nor C, D, and E, were capable of executing the trusts. *In re Burt's Estate*, xxi. 239.

113. *Time of vesting.* Where a testator gave his personal estate to his wife for life, and a moiety of the remainder to six of his children, and provided that, if any one died before receiving his or her share without leaving lawful issue, it should go over, it was *held*, that the proviso contemplated the time, when the children should be entitled to receive their shares, and not the time of actual payment. *In re Dodgson's Trust*, xxi. 259.

114. *Residuary legatee preferred to representatives.* In case of a bequest to A for

life, and, if she dies without issue, then to B and C, to be paid to them when they are twenty-one, and B and C attain twenty-one, but die in the lifetime of A, the residuary legatee, and not the representatives of B and C, is entitled. *Widdicombe v. Muller*, xxi. 261.

115. *Gift to issue or over on failure of issue, as applied to real and personal estate—Annuity—Joint tenants.* Words importing a gift to issue or a gift over on failure of issue, when applied in a will to personal estate, receive a different construction from that which they would receive if applied to real estate. In case of a gift of an annuity to A for life and then to her issue, the testator requesting B and C to act as trustees for A to secure the annuity to her separate use, A is entitled to a life interest only, and after her death her children take as joint tenants. *Re Winch's Trusts*, xxi. 367.

116. *Conversion.* A testator gave all his real and personal estate whatsoever to his wife and son, whom he appointed executrix and executor, upon trust, to permit his wife during her life to receive the clear rents, issues, and profits, interest, dividends, and annual proceeds thereof, subject to all outgoings; and upon the death of his wife, then, as to all his said devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, and of which his wife was to have the clear yearly income for her life, upon trust for his son absolutely. *Held*, that certain leaseholds belonging to the testator were to be held by his widow in specie, no intention of conversion being expressed. *Harris v. Poyner*, xiii. 268.

117. Where a testator directs his real estate to be sold, and the proceeds to go as his personal estate, the conversion will be absolute for all the purposes of the will, but the direction will not operate so as to change the character of any share of the proceeds undisposed of by the will. *Taylor v. Taylor*, xxi. 363.

118. *Apportionment of charges on real and personal estate.* When the real and personal estate of a testator are constituted into one mass, and subjected to certain charges, the charges are to be apportioned between the real and personal estate, and borne by them *pro rata*, according to their relative values. *Robinson v. The Governors of London Hospital*, xxi. 371.

119. A declaration in a will that the proceeds of the sale of the testator's real and personal estate shall be considered to all intents and purposes as part and parcel of his personal estate, will not prevent his heir from receiving the moneys arising from the sale of the real estate, in exclusion of the testator's next of kin. *Id.*

120. *Bequest of shares—Policy of assurance.* A shareholder in an unincorporated insurance company, by whose rules every holder of shares was required to effect an insurance with the company, by his will gave to A and B "all and every of his shares and interest in the company, and all the advantages to be derived therefrom." The words "shares and interest," were also, in other parts of the will, used with reference to companies of different kinds. *Held*, that the policy of assurance effected by the testator with the company, did not pass under the bequest. *Harington v. Moffat*, xvii. 22.

121. *Gift to two in equal moieties—Death of one.* Gift of personalty, to be equally divided between J. and A. for the period of their natural lives, after which to be equally divided between their children. *Held*, that on the death of A., J. was entitled to a life interest in one moiety, the remainder to be divided between the children of J. and A. *per capita*. *Abrey v. Newman*, xvii. 125.

122. *Substitutional words.* S. S., who died in 1821, bequeathed the interest of all her property, the same being wholly personalty, to F. S. for life; but in case she should die unmarried, then over to A. and B., or to their heirs, as they may deem proper." B. died in 1835, leaving a widow and seven children, and having by his will bequeathed the residue of property to two of his sons. F. S. died in 1852, without ever having been married. *Held*, that the words "or to their heirs" were substitutional, and that consequently, as the property was personalty, the next of kin of B. took his share in equal proportions, the words "as they may deem proper" having no operation. *Jacobs v. Jacobs*, xvii. 267.

123. *Legal estate in mortgaged property.* A testator being mortgagee in fee of an estate, bequeathed to trustees, "all his money in the funds and on securities," upon certain trusts declared by his will. *Held*, that the legal estate in the mortgaged property did not pass under these words. *Ex parte Caulley*, xvii. 390.

124. *Rights of crown to lapsed legacy.* A testator, by his will, dated in 1822, appointed A (his widow) and B his executors, and gave B a legacy for his trouble, and bequeathed his personal estate to A and B, on the usual trusts for conversion, and directed that the income of the proceeds should be paid to A for life, and that after her death, his trustees, or the survivor of them, or the executors or administrators of such survivor, should stand possessed of one half of the capital for A, her executors, administrators, and assigns. A died in the lifetime of the testator. The testator was illegitimate. *Held*, that the lapsed part of the testator's estate belonged to the crown, and not to B, the executor. *Powell v. Marrett*, xvii. 406.

125. *Legacy to executor.* A testator gave to E. 200*l.*, and appointed him to be his executor; and declared that, if his (the testator's) son should not recover from his then mental malady, then he gave E. 200*l.* E. did not prove the will. *Held*, that E. was entitled to both legacies. *Wilde v. Davies*, xvii. 466.

126. *Devise of residue to executor in trust—Beneficial interest.* A testator devised "all my estate, both real and personal, to E. E., his executors, administrators, and assigns, to and for the several uses, intents, and purposes following; that is to say:—"and then, after specifying various objects of the bounty, appointed "the said E. E., executor of this my last will and testament." The trusts of the will did not exhaust the estate. *Held*, that E. E. did not become entitled, for his own benefit, to the personal estate undisposed of, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions. *Ellcock v. Mapp*, xvi. 27.

127. The rule in such a case is, that where there appears a "plain implication or strong presumption" that the testator, by naming an executor, meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus. *Id.*

128. *Trust by implication.* Gift in trust for A. B., but if he should die in the lifetime of the testator "without leaving any child, or, &c.," then the residue in trust for another absolutely. This does not create any trust by implication for the children of A. B. *Lee v. Busk*, xv. 380.

129. *Residue belonging to testator's next of kin.* Bequest of residue unto R. S., the son of P. S., for his sole use and benefit, at twenty-one; failing him, to the next male child of P. S., who should attain that age; and failing male children of P. S., to the seven daughters of A. B., the survivors and survivor of them, in equal proportions, their respective shares to be at their free will and disposal. R. S. died before twenty-one, and P. S., having survived all the daughters of A. B., died in September, 1852, without having had any other male child. *Held*, that the residue belonged to the next of kin of the testator. *McDonald v. Bryce*, xvii. 305.

130. *Wills and settlements.* Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains. *Farrer v. Barker*, xv. 229.

131. *English will—Real estate in Scotland.* The will of a testator, domiciled in England, and having real and personal estate there, and real estate in Scotland, giving all his real and personal estate in trust for the benefit of all his children, does not pass the estate in Scotland, nor is the eldest son and heir, according to the law of Scotland, bound to elect between the benefits given by the will and the real estate in Scotland. *Maxwell v. Maxwell*, xiii. 440.

132. *How legatees take.* If in a will there occurs a limitation in favor of sons, accompanied by the provision that they shall take in order of primogeniture, and

there is no such provision as to grandsons, the sons take by particular description and the grandsons as a class. *East v. Teyford*, xv. 205.

133. *Vesting of legacy in child.* A bequest in trust to pay the income of a sum of money to A for life, and then to transfer the capital to the child, or children, of A, when they should attain the age of twenty-one; A had a child who attained the age of twenty-one, but died in her lifetime. *Held*, that the legacy had absolutely vested in A's child. *In re Thomson's Trusts*, xv. 498.

134. *Perpetuity.* A testator, by his will, bequeathed his personal estate to trustees, upon trust to pay the income to his two sisters, A and B, for their lives, and to the survivor for her life; and then to pay the capital to their children; and, in default of such children, to pay the income to C, his brother, for his life, and then to pay the capital to his children; and in default of such children, to the testator's next of kin. The testator, by a codicil, declared that he left his effects, failing his brothers and sisters and their heirs, to E. The testator had two sisters only, A and B, and two brothers only, C and D, who all died without children. *Held*, that the bequest in favor of E took effect. *In re Pattison's Trusts*, xv. 516.

135. *Gift over upon alternative event.* Though a gift over on an event, expressed as a single event, but comprising in sense two branches, will not be construed as made on two events; yet it is otherwise where the testator has expressed two alternative events, one of which may be comprehended in the other. *Monypenny v. Dering*, xv. 551.

136. A testator, who in his will refers to a settlement, must, in the absence of something to show the contrary, be taken to know the general effect of that settlement. *Lake v. Currie*, xiii. 485.

137. *Restraint on anticipation or assignment—Forfeiture by assignment.* Testator gave 2,000*l.* to trustees upon trust to pay the annual income to C. S. during his life, weekly, monthly, or quarterly, as his trustees should think fit. Testator then declared that C. S. should have no power or authority to anticipate or assign, but that if he did anticipate or assign, or attempt to do so, the gift to him should be void. C. S., being in want, as was alleged, of necessaries, at the end of eighteen months from the testator's decease assigned to K., for a valuable consideration, all the dividends which then had already accrued and were payable, but not future dividends. This assignment recited the will, and the conditions against assignment in it, and was expressed to be "so far as C. S. lawfully could or might, without working a forfeiture of his life-interest. *Held*, first, on a joint petition presented by K. and C. S., for payment to K. of the said annual income, that nothing passed to K. Secondly, on another petition presented by C. S., that he had committed a forfeiture of all his interest under the will. *In re Stulz*, xix. 264.

138. *Postponement of bequests till after widow's death.* Bequests to the sons and daughters of D. of 200*l.* each, also the children of a son of D. 200*l.* to be equally divided among them, to be paid twelve months after the decease of the testator's widow. *Held*, to be postponed as to all the bequests till after the widow's death. *Child v. Elsworth*, xix. 218.

139. *Valuation of residuary estate to be made after testator's death—Charges in respect thereof.* A testator gave all his residuary real and personal estate to trustees, upon trust for his wife for life; and after her death he directed that a just and true valuation should be made of "all his freehold and leasehold estates, stocks, funds, and securities, and other residuary personal estate," and directed the same to be divided, or considered as divided, into seven equal parts, and then disposed thereof; and the testator directed that A. B., one of his executors, who was a surveyor by profession, "should be entitled to charge, and should be allowed all reasonable charges as a surveyor, in valuing his said freehold and leasehold estates, and in letting the same, and in collecting the rents, or otherwise in the management of his said estates, whenever requested or instructed so to act by his co-trustees." *Held*, that this latter clause ap-

plied solely to the valuation and management of the freehold and leasehold estates, and that A. B. was not entitled, under this clause, to make any charges in respect of valuations made by him of the residuary personalty after the death of the testator's widow. *Knott v. Cottee*, xiii. 304.

140. *Expenses of making good dilapidations—Tenant for life and remainder man.* In case of a bequest in trust to the testator's wife for life, and after to his son in trust absolutely and, after the death of the testator, the widow is obliged, pursuant to a covenant made by the testator, to make good dilapidations to certain leaseholds, these expenses are properly chargeable upon the corpus of the estate and not upon the income of the widow. *Harris v. Poyner*, xiii. 268.

141. *Enjoyment of leaseholds in specie—Shares and bonds.* If, by a will, the income of all the testator's leasehold and other estates, and of all other his estate and effects, are given to his wife for life, and the property proves to consist of only leasehold estates and certain shares in companies and Dutch bonds, the widow is entitled to the enjoyment of the leaseholds in specie, but not of the shares and Dutch bonds. *Blann v. Bell*, xiii. 188.

142. *Legacy upon condition.* A trustee, having doubts as to the legality of laying out in repairs certain sums derived from the sale of timber from the estate, his co-trustee advised that it be done and promised to indemnify him and save him from all harm in the matter. In his will, the surety ordered that 1,000*l.*, the sum he supposed to have been expended in repairs, be paid to the persons entitled to the moneys arising from the sale of the timber, if they would accept the same in lieu of all claim thereto. It was found that only 500*l.* had been thus expended in repairs. *Held*, that the persons interested in the money arising from the sale of the timber, were entitled to the whole sum of 1,000*l.*, if they would take it on the terms stated by the will. *Stewart v. Frankland*, xiii. 298.

143. *Residuary bequest—Widow dying or marrying again.* A testator gave to his wife all his stock in trade, &c., for her life, if she should so long continue his widow; but at her death, or second marriage, he gave the said stock in trade, &c., to be equally divided among the children he then had or might have. But in case his wife should not marry again, then the testator bequeathed to her all and every his personal estate and effects whatsoever for her life, and the same to be equally divided amongst such of his children as should be living at her decease, share and share alike. *Held*, that the first clause in the will was not intended to be a specific bequest, and the last a residuary bequest; but that both clauses were intended to deal with the whole property, and were applicable to different events: the first applying to the testator's widow marrying again, the latter to her dying without marrying again; and the latter event being the one which happened, the children living at her death became entitled, to the exclusion of the representatives of those who had died. *Wiggins v. Wiggins*, xiii. 150.

144. *Residue to wife during widowhood—Residue consisting in part of debt payable by instalments with interest—Who entitled to interest.* A testator by his will, bequeathed all the residue of his real and personal estate to his executors, upon trust to pay his wife the income and profits thereof, so long as she should continue his widow. A part of the personal estate of the testator, at his death, consisted of a debt of 12,000*l.* payable by annual instalments of 1,500*l.*, with interest at 5*l.* per cent from the death on the debt or such part as for the time being should remain unpaid. *Held*, that the tenant for life was entitled to 4*l.* per cent. on the debt or such part as should remain unpaid, and that the other 1*l.* per cent. ought to be invested for the benefit of the tenant for life and those entitled in remainder. *Meyer v. Simonson*, xiii. 133.

145. *Period of division.* A bequest in trust for a wife and five children, with the following provisions as to the shares of the three daughters: "But in case of the marriage of all or either of his daughters, the child or children of either of them that should outlive their mother or mothers should have his, her, or their mothers' share;

and in the case of the death of one or more of his aforesaid children that might die unmarried, his, her, or their shares and share should be equally divided among the survivors of his aforesaid children or their children." The testator's widow died in 1838, and one of the daughters died in 1849, without having been married. *Held*, that the period of division as to the daughters' shares was not the death of the tenant for life, but the deaths of the daughters; and that the gift over upon dying unmarried was not to be restricted to dying unmarried in the lifetime of the tenant for life. *In re Walker's Trust*, xiii. 39.

146. *Codicil—Executory bequest over.* A, by his will, bequeathed leaseholds to his daughter M. for her life, and after her decease to her lawful issue, and "in default of such issue," to his son G. and his issue. A codicil, made by the testator, recited that he had bequeathed the leaseholds to G. after the death of M., and "in default of her leaving lawful issue." *Held*, that the will might be interpreted by the codicil, and that the gift over in the will, "in default of issue," being therefore capable of importing a bequest over on failure of issue living at M.'s death, it ought to be taken in that sense; and that even if the limitation in the will gave an absolute interest to M., there was a good executory bequest over to G. and his issue. *Darley v. Martin*, xxiv. 275.

147. *Property to be settled on children after parent's death—Cross-limitations over.* Where property is directed to be settled on children after the death of the parent, equally, so that the issue of any child dying in the lifetime of the parent, may take his or her deceased parent's share; and in default of such children, over:—*Held*, that such children or issue must survive the parent; and that there must be cross-limitations over, in the event of any child dying in the lifetime of the parent leaving no issue who shall survive the parent, in favor of the other children, or issue of deceased children, surviving the parent. *Turner v. Sargent*, xxiii. 580.

148. *Bequest for benefit of children and their issue.* Bequest in a certain event "for the benefit of my children and their issue," with a reference to a previous bequest to E. "and in case there shall be no child of E. living at the time of her decease, &c., or, being any, they shall all die under twenty-one, then unto all and every my children then living, and the child, &c., of such of my "said" children as shall then be dead, *per stirpes* in equal shares." *Held*, that the children of a child who was deceased at the date of the will were not entitled. *In re Thompson's Trust*, xxiii. 570.

149. Bequest to A and B of an estate, each to have one half, for life, and then the said premises to go to their children; B died without children, leaving A his heiress at law. *Held*, that A took B's moiety as heiress at law. *In re Laverick's Estate*, xxiii. 455.

150. *Unmarried daughters.* Where a testator gave a legacy to the son and unmarried daughters of A equally, and a part of these daughters afterwards married, it was *held*, that the gift was not to a class, but to the son and daughters of A, who were unmarried at the date of the will. *Hall v. Robertson*, xxiii. 275.

151. *Bequest to husband and wife and third person.* In case of a gift of personal property to a man and his wife and a third person, the same rule applies as in the case of real property, and the husband and wife are entitled only to a moiety. *In re Wylde's Estate*, xv. 371.

152. *Bequest to two on attaining twenty-five or marrying—Cumulative legacies.* Bequest of 1,000*l.* each to A and B when they should attain the age of twenty-five years, or marry with the consent of the executors; and the same will directed that 1,000*l.* be invested for each when she should arrive at the age of twenty-five years, &c. *Held*, that the first legacies vested on the happening of either of the alternatives, and that the legacies last named were cumulative to the first. *Thompson v. Teulon*, xv. 458.

153. *Specific bequests—Bank annuities.* In case of a bequest of "1,000*l.* 3*l.* per cent. consolidated bank annuities, part of the stock standing in my name in the books of the Government and Company of the Bank of England," in trust for A for life, and other bequests in the same words, it proving that the testatrix had no stock stand-

ing in her own name, but was entitled to a sum of consols, insufficient to pay the legacies, and to a sum of *3l. 5s.* per cent. standing in her husband's name, it was *held*, that the legacies were specific bequests out of both these funds, and carried interest from the death of the testatrix. *Saunders v. Rumney*, xv. 4.

154. *Gift of policies and shares—Policies misdescribed.* The testator gave certain "policies" to one legatee and certain "shares" to another. The described policies could not be found, though others could, but the shares were properly described. The word "policies" passed the policies, though misdescribed, and the shares passed according to the plain construction of the will. *Waters v. Wood*, xv. 292.

155. *Wife entitled to legacy in her own right.* A bequest to B, with a declaration that if B died in the lifetime of the testator, the legacy should not lapse, but go to B's representatives. B died, leaving a wife and three children, making a will, giving all his personal estate to the wife. *Held*, that the wife was in her own right entitled to the first named legacy. *Hewitson v. Todhunter*, xv. 356.

156. *Children entitled to interest of respective shares for life—Death of child.* A testator directed his property to be invested in the funds, 1,000*l.* in each child's name, and 1,000*l.* in his wife's; the interest to be received by them for life, and afterwards to their descendants; except his wife's which was, at her death, to be divided amongst them. By a codicil, he alluded to the funds being increased, and directed the same division and appropriation to be made, except that, as any share should fall in, it was to be added to the others, in case the original holder should have no children. *Held*, that upon the will and codicil taken together, the children were only entitled to the interest of their respective shares for life, and that the share of any child dying without children would go over. *Bird v. Webster*, xvii. 451.

157. *Residuary legatees entitled to surplus produce of copyhold estates.* A testator, by his will, devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trusts, for sale and conversion into money, and directed them to pay certain legacies, but did not make any residuary bequest. The testator, by an unattested codicil, gave other legacies out of the mixed fund, and appointed A, B, and C his residuary legatees. *Held*, that A, B, and C were entitled to the surplus produce of the copyhold estates. *Wildes v. Davies*, xvii. 466.

158. *Vested indefeasible interests in children.* A testator gave all the residue of his real and personal estate to trustees, upon trust to convert and invest his personal estate, and to pay the interest, income, and rents to A for life, and declared that they should, as soon as conveniently might be after the decease of A, convey, pay, assign, transfer, and make over the residuary real estates and the trust moneys and premises unto and among all and every the child and children of A, as and when they should severally and respectively attain their ages of twenty-one years, as tenants in common, and their respective heirs, executors, and administrators; and, if there should be but one child, then to such child, his or her heirs, executors, and administrators. A died, leaving three children, two of whom died in their infancy. *Held*, that all three children took vested indefeasible interests in the real and personal estate. *King v. Isaacson*, xvii. 455.

159. *Power to trustees to convert personally into realty—Intention to make two funds blended property.* A testator made a will in the following form: "Whereas, I am seised in fee-simple of divers freehold manors, or reputed manors, messuages, lands, tenements, rents, and hereditaments, situate, &c., and of a leasehold estate in, &c., and also of a copyhold estate, situate, &c., and also of freehold estates in, &c., and of large sums in the funds of England. Now I do hereby give and devise, after my just debts and funeral expenses and legacies are paid, (which I order to be paid out of my personal estate,) all my estates in the funds of England, and all my said manors, &c., unto three persons in succession, and their sons successively in tail male, in strict settlement; "and for default of such issue, I give and devise the same to my own right heirs forever." He then gave his trustees a power, with the consent of the

person who might be in possession, to lay out his personal estate in the purchase of freeholds, &c., and to settle the same when purchased to such uses as were declared of his "manors, or reputed manors, messuages, lands, tenements, rents, hereditaments, and premises devised by this my will, as shall be then existing undetermined, or capable of taking effect, &c., to, &c., for no other estate, use, trust, or purpose whatsoever." *Held*, first, that the power to trustees to convert personalty into realty did not operate as an absolute conversion. But, secondly, that, on the face of the will, it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated; and that such intention did not cease with the failure of issue male under the limitations, so as to make the real estate afterwards go in one way, and the personal estate in another. *Beauvoir v. Beauvoir*, xviii. 1.

160. *Equality of division among children—"Error scribentis."* A testator who had made equal allowances during his life to four sons for their maintenance, and had settled property of the same annual amount on each of his three daughters on their respective marriages, made his will, dividing his real estate into seven portions, and described it in seven schedules. The annual rental of each portion, excepting "four" and "five" was of nearly equal amount. The testator was indebted on mortgages of his real estates, and directed the trustees of his will, out of his personal estate, to pay to the son to whom he afterwards devised "four," an annual sum, while a piece of land which was comprised in "four" was unlet. He then directed the rents of "four" and "five," and equal portions (fifths) of the rents of the other five properties to be set apart to raise the annual sum, and to be accumulated till the mortgages could be paid off. He then directed that when the vacant piece of land should be let, (which the testator himself estimated would make the rental of "four" about equal to each of the others except "five,") the annual sum for paying off the mortgages should be raised by the whole rents of the lands comprised in the "fourth" schedule, and the remainder by equal sixth parts of the hereditaments comprised in the other schedules. *Held*, overruling a decision of a vice-chancellor, that the whole will showed that the general intention of the testator was equality of division among the seven children, and that the word "fourth," in the place where it was used, must be treated as there without design, without meaning, and *merum per errorem scribentis*; and further, that "fourth" was written for "fifth," and the will must be so construed. *Hart v. Tulk*; *Tulk v. Hart*, xix. 438.

161. *Devise of estates derived by inheritance does not embrace estates acquired by deed of gift.* A testator, by his will, gave all his freehold and copyhold hereditaments in the county of D., "which had or might thereafter come into his possession by inheritance from his late father;" to trustees for a term of 500 years, upon trust, to provide for the payment, among other things, of an annuity of 3,000*l.* to his wife. Part of the testator's estates in the county of D. were conveyed to him by his father by deed of gift, and he entered into possession of them in his father's lifetime. Other parts of the testator's estates in the county of D. were devised to him by his father's will, he being his father's heir at law. The latter estate was insufficient to provide for the sums charged upon it. *Held*, that the estates acquired by the testator by the deed of gift, did not pass by the devise to the trustees. *Wilkinson v. Bewicke* xvii. 3.

162. *Gift to nieces—Children of deceased niece.* Gift by will to "my nieces, to be paid and divided equally between them, for their separate use; and in case of either of them dying in the life of A, then the share of the one so dying to go to her children equally." Afterwards, the testator made another gift, "for the benefit of my said nieces, in manner hereinbefore directed as to the said first gift." One of the nieces died in the lifetime of A, leaving children. *Held*, that these children took no interest in the second gift. *Lumley v. Robbins*, xix. 22.

163. *Legatee of mortgage—Unpaid arrears of interest—Repairs of mortgaged premises—Duress.* A testator's will contained the following clauses: "I give all my interest and claim on household property in N., belonging to the successors of the late [mortgagee] on which I have a mortgage of 1,500*l.*" &c., "to the plaintiff, his heirs, and assigns forever," &c. "My widow shall pay my funeral expenses and other just debts, without interfering with the legacies to my family." *Held*, that by the will, not only the principal sum of 1,500*l.*, but also all unpaid arrears of interest, passed to the plaintiff as legatee. That the plaintiff was not liable to repay to the executrix the sum she had paid for repairs of the mortgaged premises ordered by the testator. That the executrix was not justified in refusing to give up to the plaintiff the mortgage deed until he had paid to her the amount of the arrears of interest and of the bill for the repairs; and that, assuming that she had assented to the legacy, and that the sums were paid under duress, he was entitled to recover them back. *Gibbon v. Gibbon*, xx. 214.

164. *Tenants in common.* In case of a bequest upon trust to pay the profits for the support of the testator's daughter, A, and her children, and when the youngest of said children should have attained the age of twenty-one, then to pay the profits to such children equally, with the benefit of survivorship among A and her children, and, in case of the death of any child leaving issue, such issue to take the parent's share, it was *held* that, from these provisions and the tenor of the will in other respects, the children of A took as tenants in common. *Gooch v. Gooch*, xxi. 584.

165. *Devise to trustees for benefit of daughters to be paid to them at twenty-one—Provision in case of marriage.* If a testator gives property to trustees for the benefit of his daughters, to be paid and assured to them as they shall attain the age of twenty-one, and provided any daughter marries under twenty-one, with the consent of the trustees, then they may pay such daughter her share at the time of such marriage, or in their discretion settle the same, the trustees have no power to direct a settlement for the benefit of one of the daughters married under twenty-one without consent. *Taylor v. Austen*, xxi. 270.

166. *Power of sale in executors.* A testator, by his will, appointed A, B, and C to be his executors, in trust to dispose of his property. He directed that all his debts should be discharged and that the residue of his property should be disposed of by them at the time therein mentioned, save and except his estate at M., which he gave to A for life. *Held*, that A, B, and C had a power of sale of the estate at M. *Mather v. Norton*, viii. 255.

167. *Gift of annuity.* A testator gave an annuity "to A for her life, and the issue from her body lawfully begotten; on failure of which, to revert to my heirs; and I request B and C to act as my trustees for A, so that the said annuity may be secured for her separate use." *Held*, that A was entitled for life only to the annuity, with remainder to her issue. *Re Wynch's Trust*, xxvii. 375.

168. *"Next of kin."* A remainder to the next of kin of A, if A is not living on the happening of certain events, means the next of kin of A at the time of his death. *Gundry v. Pinniger*, xi. 63.

169. *Next of kin ex parte maternâ, when to be ascertained—Exclusion.* Money was left to trustees for the use of M. for life, with remainder to her children; but in case she should die without issue, or they should all die before their shares became vested, then after the decease of M. to "pay, assign, and transfer" the stock unto N., if he should be then living, but if he should be then dead, then unto the next of kin of N. in a legal course of distribution *ex parte maternâ*. N. died in the life of M., who was then his next of kin *ex parte paternâ* and also *ex parte maternâ*; but upon the death of M. the fund was claimed by the next of kin *ex parte maternâ*. *Held*, that the next of kin was to be ascertained at the death of N.; that the words *ex parte maternâ*, implied no exclusion of the next of kin *ex parte paternâ*, and that M. on the death of N. became absolutely entitled to the fund. *Gundry v. Pinniger*, vii. 148.

170. *Husbands of daughters not taking as next of kin.* Under a bequest, in the event

of daughters dying without leaving issue, in trust for the persons who would at the time of the decease of such daughters respectively, be entitled, as next of kin, or otherwise, to the personal estate of such daughters respectively, under the statutes made for the distribution of intestates' effects, it was *held*, that the husbands of the daughters did not take. *Milne v. Gilbert*, xix. 228.

171. *Remainder to "personal representatives or next of kin."* In case of a bequest by a testatrix of her personal estate to her sister for life, for her separate use, with remainder over among her nieces, with remainder, in case of the nieces dying without children "to the personal representatives or next of kin" of the testatrix's father, the next of kin of the father at the death of the testatrix are entitled. *Philps v. Evans*, vi. 37.

172. *Heir at law.* A testator devised and bequeathed all his real and personal estate to trustees upon trust (after certain life estates) for the heir at law of his family then living, whosoever the same might be. *Held*, that the next of kin of the testator, according to the Statutes of Distribution, had no interest under the above gift. *Tetlow v. Ashton*, i. 164.

173. *Bequest to class, one excepted.* In case of a bequest in favor of a class of persons, the testator expressing an intention to except one of the class, but not specifying which one, the bequest is valid for the whole class. *Illingworth v. Cooke*, v. 66.

174. *Devise to a class, in part legal and in part illegal.* In case of a devise to a class, a part of which is legal and a part of which is illegal, the court will not split the devise and give effect to that which is legal. Therefore, in case of a residuary gift to the unborn children of A when they shall have attained the age of twenty-three, if A dies without having had children, though the latter event is included in the former, yet the court cannot hold the limitation good as a limitation over in case of A's not having children. *Challis v. Evers*, x. 429.

175. *Period of ascertaining a class.* A bequest to A for life and at his death to his issue-living at the time of his death and the issue of those who should then be dead, (the last mentioned issue taking by representation from their deceased parent,) when they should have reached the age of twenty-one. A had a child, B, who died in his lifetime, leaving four children. Two of these died in their infancy in the lifetime of A. *Held*, that the class to take was all the children left by B, and that the gift had vested absolutely in all those children. *Barker v. Barker*, xiii. 172.

176. *Time at which to take death of legatee.* Where a testator makes a gift to persons of a class, and then declares that, if any of this class shall die without leaving issue, his or her share shall go to the survivors, and in case any one deceased shall have left issue, such issue shall be entitled to their parents' share, the time of the death referred to must be held to be in the lifetime of the testator, and, consequently, those of the class surviving the testator take absolutely shares in the estate. *Woodburne v. Woodburne*, xxiii. 323.

177. *Bequest to such of a class as should be in England at testatrix's death—Some in Ireland held entitled.* Where a testatrix bequeathed her estate to such of a certain class as should be in England at the time of her death, and to the children of persons of that class who should then be dead, such children living in England, two of the class, one of whom was staying in Ireland with her husband, who was on duty there, and the other visiting the first, at the death of the testatrix, were held entitled to shares. *Woods v. Townley*, xxiii. 310.

178. *Legacies to some specially named and to others as a class—Exclusion of some.* A testator, after giving legacies to various persons, some of whom are mentioned by name and others described as a class, bequeathed the residue of his property to his several legatees thereinbefore "specially named," exclusive of the objects taking under the trusts for the distribution of blankets. *Held*, that the testator, by excluding certain persons not mentioned by name from his residuary bequest, had sufficiently explained his intention; and that under the words "specially named," those legatees who were

not mentioned *nominatim*, but only described as a class, were entitled to share equally with the other legatees. *In re Holmes's Trust*, xvii. 392.

179. *Bequest to such relations as should claim within two months*—*Class when ascertained*. Bequest to A for life, and afterwards, in an event (which happened,) the testator directed advertisements to be made for his relations, to such only of whom as should claim within two months he left the property, to be divided according to the discretion of his executors. *Held*, that the next of kin of the testator, according to the statute, took equally, and that the class was to be ascertained at the death of A, and not at the death of the testator. *Tiffin v. Longman*, xix. 293.

180. *Priority*. A testator gave his estate to trustees, upon trust to invest, and out of the dividends to pay two life annuities to his daughter, and other annuities to other relatives; he also gave certain legacies. *Held*, upon the construction of the will, reversing the decision of the court below, that, the estate proving deficient, the annuities were not entitled to priority over the legacies, but must abate ratably; and that they were not to be paid out of the *corpus*. *Miller v. Huddleston*, viii. 26.

181. *Onus of proving priority*. In deciding upon questions of priority under a will, the mere circumstance of relationship to the testator is not entitled to much weight. The onus lies on the party seeking priority to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive. *Ib.*

182. *Annuities—Alternative gift—Right of option*. A testatrix, by her will, dated in 1832, gave to trustees the sum of 20*l.* per annum, bank long annuities, or "an amount or yearly sum equal thereto," upon trust to pay the same to A B for her life, and after her decease to transfer the principal stock or money, which should be set apart for the payment of the said yearly sum unto A B's children who should be living at A B's decease. At the date of her will, the testatrix had 50*l.* long annuities, and she continued to possess the same until her death. These long annuities being terminable in 1860, it was *held*, that the testatrix intended to give a permanent annuity of 20*l.*; and that the trustees were bound on behalf of the children of A B to take the course most beneficial for them, and to have a permanent fund invested, producing 20*l.* per annum. *Haggar v. Neatby*, xxiii. 386.

183. *Legacy-duty*. A testator gave a real and personal estate, subject to one "clear" yearly rent-charge, or annuity of 100*l.* a year to A. *Held*, that it was to be paid without any deduction for legacy-duty. *Bailey v. Boulton*, ix. 195.

184. *Words not to be added to or transposed—Annuities*. The words of a clause in a will are not to be added to, nor transposed, if they are susceptible of a reasonable construction as they stand. Therefore, where several nephews took gifts of 300*l.* each, some to be sunk in an annuity for life, and two gifts were, "to A 300*l.* annuity for his life; to B the same," it was *held*, that these words passed, not gross sums to be taken by way of annuity, but annuities of 300*l.* *Walker v. Tipping*, x. 294.

185. *Priority between legatees—Clear annuity—Legacy-duty—Surplus income*. A testator, after bequeathing to pecuniary legatees, bequeathed three "clear" annuities for the lives of the annuitants. He then bequeathed his residuary estate in trust to pay a clear annuity of 1,000*l.* to his widow, and upon trust, after payment of the four annuities, to pay the residue of the income during the life of the widow to A. The capital of the residue, after the widow's death, was to be held, as to 5,000*l.* upon such trusts as the widow should appoint, and subject to her appointment the 5,000*l.* was to be held in trust for B, for life, and after her death to fall into the general residue; and subject to such disposition as aforesaid, and as to the residue of the testator's estate and effects after the widow's death, and subject as to the 5,000*l.* and the interest thereof as aforesaid, upon trust to pay certain legacies amounting to 18,000*l.*, with an ultimate residuary gift to E. And there was a direction that, upon the death of the several annuitants, the funds on which the annuities were secured should follow the ultimate destination of the residue. *Held*, that the two first-mentioned pecuniary legacies and three annuities had priority over every other gift; that the annuities

were given free of legacy-duty; that the annuities were charged on the capital of the residue, but that A was entitled to retain the surplus income paid to her in one year, and to receive the surplus for another, although the income was in the subsequent years insufficient to answer the annuities; that on the death of an annuitant in the lifetime of the widow, the ultimate residuary legatee did not become at once entitled to the fund set apart to answer the annuity; that after the widow's death, the 5,000*l.* would have no priority over the other reversionary legacies; and that the reversionary legatees were not entitled to have any surplus income, during the widow's life, set apart to secure payment of their legacies. *Haynes v. Haynes*, xxvii. 410.

186. *Annuity by way of jointure.* A. devised to his son R. an annuity of 300*l.*, and by a codicil declared that if R. should marry, it should be lawful for him to settle an annuity of 300*l.* upon the woman he should marry by way of jointure, to be charged upon the estate like the 300*l.* devised by the will, and if R. should so settle an annuity, it should be a substitution for that given in the will, and that given by will should, on such substitution, cease. *Held*, that an annuity settled by R. on his wife, in the exercise of this power, took effect during the life of R. and his wife, and that the words "by way of jointure" did not postpone it till R.'s death. *Jamieson v. Trevelyan*, xxvi. 502.

187. *Annuities, perpetual or for life.* A testator, having some real property, and considerable sums invested in foreign funds, after having by his will given various pecuniary legacies, said, "I desire that my executors shall purchase annuities for each of my two sisters, E. B. and H. F., of 100*l.* a year each, the said annuities to be purchased in the British funds." He then gave other annuities, and proceeded: "I direct my landed property at O. to be sold by auction, and the produce to go to the carrying out of the aforesaid annuities and legacies; and should the produce of the said sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property. After the above annuities and all legacies have been paid and effected, I desire the remainder of my personal property shall be laid out in the purchase of an annual income in the 3*l.* per cent. consols, for the benefit of a cancer ward in the Middlesex Hospital." *Held*, (*dissentiente* Lord Cranworth, L. J.,) reversing the decision of the master of the rolls, that the annuities given to E. B. and H. F. were not for life only, but perpetual. *Kerr v. The Middlesex Hospital*, xvii. 66.

188. *British funds.* *Quære*, what is the meaning of "British funds," as occurring in this will. *Ib.*

189. *Absolute interest.* Per the Lord Chancellor. Where, in these cases, the will is fairly open to the construction that the absolute interest passes, the authority of parliament in favor of general devises of land ought to have some influence. *Ib.*

190. *Annuity to separate use of married woman.* A testator, by his will, gave to A, a married woman, an annuity for her life for her separate use, and by a codicil, gave to A, in addition to the legacy mentioned in his will, the sum of 300*l.* No legacy had been given to A by the will. *Held*, that A was entitled to the 300*l.* for her separate use. *Warwick v. Hawkins*, xiii. 174.

191. *Residue divided equally among five.* Direction in a will, that the residue, after the death of the tenant for life, should be equally divided among testator's five sisters and their respective families. *Held*, a gift of one fifth to each of the sisters and her children living at the death of the testator as joint tenants. *Parkinson, in re*, ii. 104.

192. *Next of kin taking as tenants in common.* Gift of property in trust for one for life, and then to such person or persons as should then be entitled thereto, as the testator's next of kin, under the statutes made for the distribution of the effects of intestates. *Held*, that the next of kin of the testator, at the death of the tenant for life, took as tenants in common, and not as joint tenants, the stat. 22 Car. II. c. 10, in this respect determining the mode of taking as well as the persons entitled. *Horn v. Coleman*, xix. 19.

193. *Estate for life.* A testator devised and bequeathed to his wife, during her life, the interest, or rent of his house, together with all his other goods and effects whatsoever, and after the death of his wife he gave the said house, together with all his other goods and effects whatsoever, to his four children, to be equally divided between them. *Held*, that the children took an estate for life only, in the house. *Harding v. Roberts*, xxix. 451.

194. *Interest, absolute or partial—Power of disposal—Discretion—Equitable control.* A gift for the "present expenses of a wife and the children." *Held*, that she was absolutely entitled, though one of the children was an adopted child, and was taken away from her. *Hart v. Tribe*, xxiii. 397.

195. A gift to a wife "to be used for her own and the children's benefit, as she shall think best," and recommending her not to diminish the principal. *Held*, that the fund must be invested, and that she was entitled to the income for her life, and that the children had an interest in the capital, and that the wife had a discretion to exercise in disposing of it; and liberty was given to apply. *Ibid.*

196. *Estate in fee simple.* A testator by his will (made before the passing of the 7 Will. IV. and 1 Vict. c. 26,) devised as follows: "I give and bequeathe to my son J. W. all that farm or estate I bought of Mr. B., of London, containing about twenty acres, situate at the Quinton, in the parish of H., in the county of S., and in the occupation of myself, my son G. W., and W. J." *Held*, that the son took an estate in fee simple in the property. *Burton v. White*, xiv. 499.

197. A testator gave his estate to his wife "in the fullest manner, subject to the following provisions." He then gave certain legacies. He then expressed his desire as to the manner in which his property should remain invested, and should be disposed of by his wife in her will. He then provided for the disposition of his property, if his wife should be prevented from making such will. He then declared that the last clause was not to do away with, or prevent his wife from exercising the entire right over his property, should she be enabled to carry it into effect in the way he had "left it to her, or in any other most agreeable to herself." *Held*, that the widow took the whole absolutely, subject to the payment of the legacies previously given, and that the desires expressed were "precatory." *Huskinson v. Bridge*, iii. 180.

198. *Estate for life.* A testator devised his real estates to J. B. for life, remainder to his first and other sons "in tail male; and in default of such issue, to the daughter or daughters of the said J. B., to hold to them, if more than one, and their heirs, as tenants in common, and not as joint tenants; and in default of issue of the said J. B., to and for my own right heirs forever." *Held*, that J. B. took an estate for life only under the will. *Baker v. Tucker*, ii. 1.

199. *Fee given by vested limitation—Remainder—Gift over—Contingent remainders.* Although where a fee is given by a vested limitation, a remainder upon it must be an executory devise, and if it be too remote, this and all subsequent remainders are void; if a fee be limited in contingency, and the estate is given over upon a contingency divesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder. *Doe d. Evers v. Challis*, ii. 215.

200. A testator gave real property to his daughter Elizabeth for life, and after her decease to such of her children, if a son or sons, who should live to attain the age of twenty-three years, and if a daughter or daughters who should live to the age of twenty-one years, their respective heirs and assigns, as tenants in common; with limitation over to his son John and his daughters Sarah and Anne, and their children, upon terms and conditions similar to those of the devise to Elizabeth and her children; and in case of the death of his said son or of either of his said two last-mentioned daughters without leaving a child who should fulfil the condition, he gave the part and parts such children or child would be entitled to, as aforesaid, unto the child or children of his said son and two last-mentioned daughters having issue which should fulfil the condition. All the children of the testator named in the will survived him.

Elizabeth died, never having had a child; Anne survived Elizabeth, and died, never having had a child; Sarah died, leaving seven children, all of whom attained the prescribed ages; John had two children, who attained the prescribed ages in his lifetime. *Held*, that in the events which happened, the limitation subsequent to the death of Elizabeth without issue took effect by way of contingent remainder, supported by her life estate and vesting immediately on its determination, and that upon the death of Anne without issue, each of the children of John took one twelfth of the property originally devised to Elizabeth. *Held*, also, that the gift over took effect upon the death of Anne without ever having had any issue, equally as upon her having children who did not live to attain the prescribed ages. *Ib.*

201. *Estate-tail—Power of sale in trustees.* J. W. by will directed that certain property should come into the possession of his son John, when he attained twenty-five years of age; in language creating an estate-tail; with remainder to his daughter Ann, subject to the same limitations. He then says: "Thirteenthly, now if it should please God to take away both Ann and John under age, or without leaving lawful issue, I give and bequeathe to my brother Joseph Westerman and his heirs forever all those cottages," &c.; and then, "I order all that is left to be immediately sold;" and the will then directed certain payments "out of the moneys arising from such sale." J. W. was illegitimate. Ann died an infant and unmarried. John survived the testator, was his heir at law, attained the age of twenty-five, and died, leaving two children, who died infants. By will he devised away all his real estates. *Held*, first, that the devisees of John had no estate in the hereditaments devised by J. W.; secondly, that Joseph Westerman had an estate in fee in remainder, under the 13th clause; and thirdly, that the trustees had the power of sale of the remainder in the other tenements not comprised in the 13th clause, after the death of John. *Mortimer v. Hartley*, iii. 532.

202. *Absolute interest in personality and estate tail in realty.* A testator left his fortune between his two daughters A and B, limiting the share of his daughter A, in case of her dying without children, to B and her children. B had children at the date of the will. A died without ever having had a child. *Held*, that A took an absolute interest in the personality bequeathed her, and an estate tail in the realty *Bacon v. Cosby*, iii. 186.

203. *Gift of interest to one till she attains twenty-three, then principal to her for life and to children afterwards.* Testator gave a legacy to A. Afterwards, by a codicil, he directed that she should only have the interest of a portion of the sum until she attained twenty-three, but that then the whole should be "settled upon her for her life, and after her death to her child or children, in equal proportions, so that no husband of hers may spend it." A attained twenty-three, and died without having had a child, and without the executors having made any settlement of the legacy. *Held*, that the legacy was a gift in which A took an absolute interest, subject to the interests of her children, if she has had any. *Bell v. Jackson*, vii. 92.

204. *Vested interest in child not defeated by dying without issue.* A testator at his decease left a widow and three children, all of whom attained twenty-one and survived the wife. By his will, he gave real and personal estate to trustees "to transfer to each of his children their share after the death of his wife, or as soon as they arrived to twenty-one years, but if one of the three children should die leaving no children, his or her share should be equally divided between the other two, and their heirs forever." One of the testator's children married, and died, leaving no children, but leaving his wife surviving. *Held*, that he took a vested interest in his share of the testator's property not liable to be defeated upon his afterwards dying without leaving a child surviving. *Edwards v. Edwards*, ix. 232.

205. *Estate in fee to son, with executory devise over in the event of son's dying without issue.* A testator gave the residue of his property, both real and personal, to his son A, his heirs, executors, administrators, and assigns, with a proviso that, in case A

should die without leaving lawful issue, such part of his residuary estate as might be in the nature of freehold should, at his death, be divided into two equal parts, one half part whereof he gave to his son B, and the other to his daughter C. *Held*, that A took an estate in fee in the freeholds, with an executory devise over, to take effect in the event of his dying without issue living at the time of his death. *Ex parte Davies*, ix. 88.

206. *Heirs ex parte maternâ*. Testator, by will, gave and directed his real estates to be sold, and the interest of the proceeds of the sales to be paid to his daughter for life, with remainder as she should appoint by will, and, in default of appointment by her, then, to his own heirs, *ex parte maternâ*. By a codicil, he directed the trustees (if his said daughter required it) to sink the whole or part of the same property in an annuity for her for life, to be paid to her sole and separate use, without power of anticipation. The testator left his daughter, his only child and heir at law, him surviving. *Held*, that she was absolutely entitled to the real estates. *Rawlinson v. Wass*, x. 113.

207. *Tenants in common—"Respective."* Bequest of personalty to trustees, in trust to pay the income to A and B for their lives, with provisions for the maintenance of their children, if any, and against alienation; and after the decease and failure of issue of A and B, the trustees were to continue the payments to any husband A and B might respectively have, during the life of such husband; and after the decease of the respective husbands of the said A and B, then the testatrix gave the whole of the said funds over to C. A died without leaving a husband or issue. *Held*, that B did not take the whole for her life, but that C took A's share immediately on her decease. *Ewington v. Fenn*, x. 235.

208. *Devise of interest of stock to one for life and after his death the principal to his children—Vested interest*. Upon a devise of interest of stock to one for life, and after his death the principal to his children, a child dying in his father's lifetime, takes a vested interest. But in case of a similar devise to three and their children, and upon the death of either of the three without issue, his share to be payable to the survivors and their issue, the interest of a child of one of the three dying in his parent's lifetime is divested. *Westwood v. Southey*, x. 241.

209. *Life estate with proviso annexed restraining alienation*. A proviso restraining alienation, annexed to a life estate, is void, as much as if annexed to an estate in fee. *Rockford v. Hackman*, x. 64.

210. A life estate, given in the prior part of a will, may be well determined by an apt limitation over, contained in the subsequent part of the will. *Ib*.

211. The court must look to the previous part of the will to ascertain what interest the testator intended to give, and to the ulterior part to see in what events that interest is given over. *Ib*.

212. *Estate for life with power of appointment—Joint tenants—Precatory words*. In case of a bequest of the testator's property to his widow, her heirs, &c., for her sole benefit, in full confidence that she would apply the same for the benefit of his children, the widow takes only an estate for life with power of appointment in favor of the children, and, in default of appointment, the children take as joint tenants. *Wace v. Mallard*, xi. 4.

213. *Devise in trust to pay rents to testator's daughter for her life, then to appropriate the same for education of children—Life estates in children*. Devise to trustees of a house and premises upon trust to pay the rents to the testator's daughter for her life, and then to appropriate the same for the education, &c., of her children during their minority; and when the daughter's youngest child shall have attained the age of twenty-one, then as follows: "I give and devise the said house and premises unto the said children, who shall then be living, in equal shares and proportions." *Held*, that the estate given to the trustees was limited to the life of the daughter and the minority of her children, and that the said children then took life estates as tenants in common. *Doe d. Kimber v. Cafe*, xi. 576.

214. *Joint tenants.* In case of a bequest of the testator's estate to A, B, and C, as tenants in common, and if any of the devisees die in his (the testator's) lifetime, then the estate and interest "shall go to the survivor or survivors of them, and his or their heirs," &c., and A dies in the lifetime of the testator, then B and C take as joint tenants the share intended for A. *Leigh v. Mosley*, xi. 334.

215. *Bequest to feme covert to her separate use—Codicil.* By will, the testatrix gave a share of her property to B, a feme covert, for her separate use during her life, with remainder to her children. By codicil, revoking this disposition, the testatrix declared that B should have her share, "to be at her own disposal, independent of her children, so that no part of it should be put under trust, as mentioned in the will, but to be entirely at her (B's) own disposal, to give to any of her children (the R's) who may be kind and dutiful to her." Held, that B took an estate for her separate use during her life. *Ker v. Ruxton*, xi. 220.

216. *Estate on condition—Absolute interest on becoming twenty-one.* If A leaves an estate to B on the condition that if B shall die before arriving at twenty-one, or after arriving at twenty-one and without issue or disposing of the estate by will or otherwise, it shall go to C, B takes an absolute interest on becoming twenty-one. *In re Yalden*, xii. 74.

217. *Vested share in residuary estate.* A gift of residuary estate to A, and such of the children of B as should be living at the death of C their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants; but if any such children should die under twenty-one, their shares to be in trust for the survivor or survivors, and other or others of them the said children of B and the said A, living at the decease of C, and his and their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants, so and in such manner that the children of B attaining twenty-one and surviving C and the said A, in case A survive C, should take equally *per capita*. Held, that A, surviving the testator, and dying in the lifetime of C, took, nevertheless, with the children of B who survived C, a vested share in the residuary estate. *Falkner v. Grace*, xii. 213.

218. *What is not a devise in fee.* The words "I bequeathe to my sons, A and B, and likewise constitute and ordain them my sole executors of this my will, all and singular my lands, messuages and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed," were held, not to be a devise in fee. *Bromitt v. Moor*, xii. 241.

219. *Gift to a "Husband and wife for their lives."* Where there is a gift by will to a husband and wife for their lives, with remainder to the testator's grandchildren, and the wife survives the husband, she takes an estate for life, and, after her death, the estate is to be equally divided among the grandchildren of the testator. *Moffatt v. Burnie*, xxiii. 67.

220. *Rule in Shelley's case.* A testator, by his will, devised all his real estate to A. B., his eldest son, for ninety-nine years, if he should so long live, and subject thereto to trustees and their heirs during A. B.'s life, in trust only to support contingent remainders, with remainder to the heirs of the body of A. B., and for want of such issue to his second son, in like terms. By a codicil, the testator, after confirming his will, devised his real estate to trustees upon certain trusts for the payment of debts and securing a jointure for his wife. Held, that the trustees were bound, after providing for the jointure and debts, to convey the estates to the same uses as those declared by the will; that the heirs of the body of A. B. took by purchase, and that no equitable freehold resulted to A. B., so as to attract the operation of the rule in Shelley's case, and create an estate tail in A. B. *Semble*, the rule in Shelley's case applies only where the remainder is created by the same instrument which creates the particular estate. *Coape v. Arnold*, xxxi. 133.

221. *Contingent remainder—Failure of limitation over.* A testatrix devised to T. for life, and at his death, to his second son on his attaining twenty-one; but in default

of there being a second son of T., to the second son of C. on attaining twenty-one. After her death, T. had sons, the second of whom, G., died before he attained twenty-one years. T. died intestate. *Held*, that G. did not take in fee with an executory devise over, but took a contingent remainder, and that the contingency of G.'s attaining twenty-one years not having happened at the death of T., the limitation over failed, and the heir at law was entitled. *Alexander v. Alexander*, xxx. 435.

222. *Legal and equitable estate—Pauper—Settlement.* On an appeal from an order removing a pauper from M to B, it appeared that M, by his will, devised a house and land in W. to his wife for life, and "after my wife is deceased the same shall be sold within six months, and be equally divided between my six children; and, providing any of them should be dead, their father's or mother's share to be equally divided between their children, whereof I choose for executors or executrixes, A. M., my wife, and W. H., my son-in-law, whereof they shall be paid their reasonable expenses." Some of the grandchildren of the testator, issue of one of his deceased daughters, were minors at the time of his death. The pauper, one of the daughters of M., and her husband, occupied the house and land at the time of his death, in August, 1844, and until they were sold under the will, in April, 1845. *Held*, that the legal estate coupled with an equitable interest descended, under the will, to the pauper jointly with the other heirs at law of the testator, and that she had therefore such an estate as gave her a settlement in W. *Regina v. Burgate*, xxvi. 220.

223. "*Dying without leaving issue*"—*Estate tail with cross remainders in tail.* A devised freehold and leasehold property to his son John, his heirs and executors, so far as the nature of the property would admit, and in case of his decease without leaving issue, gave the same to his son William and his heirs. He devised other property to his son William and his heirs, with a similar proviso in favor of John. And in the event of the decease of both John and William without leaving issue, he gave both properties to his daughter M. *Held*, that the combination of personalty and realty in the same gift was not sufficient to vary the settled construction of the words "dying without leaving issue" in the case of realty, and that John and William took estates tail in the freeholds respectively devised to them, with cross-remainders in tail in the same. *Bamford v. Chadwick*, xxvi. 302.

224. *Joint tenancy.* Where there is a bequest of personalty to A for life and then the principal to A's lawful child, or children, if any, the children of A take as joint tenants. *Kenworthy v. Ward*, xxiii. 22.

225. *Absolute or contingent bequest.* A testator bequeathed the interest of his property in the funds to his wife for life or widowhood, and the capital, at her death, in equal shares, unto and among the children of his brothers J. and E. and of his late brother S., as should be living at the death or second marriage of his wife. By a codicil, he declared it to be his wish, that H. M. M. (a niece) might have her share equally with his brothers E. and S.'s children. *Held*, that H. M. M. took her share absolutely and not contingently upon her surviving the tenants for life. *Biggs v. Gibbs*, xix. 348.

226. *Absolute bequest of residue of personal estate.* A. B. devised all the residue of her real estate to M. S., her heirs and assigns, and she directed her executors, after payment of her debts, to pay to, or permit and suffer M. S. to take the interest, dividends, and profits of her personal estate; and she bequeathed to certain parties, after the death of M. S., the sum of 1,000*l.*, and, subsequently, by a codicil, she bequeathed, after the death of M. S., 1,000*l.*, 3*l.* 10*s.*, per cents. *Held*, that M. S. took the residue of the testatrix's personal estate absolutely. *Jenings v. Bailly*, xix. 34.

227. "*Or*" held to mean "*and*"—*Condition—Vesting.* A testator having devised an estate in fee, to his son, to have possession of the same at the age of twenty-one years, and by codicil provided that if he "should die without issue or before he should attain the age of twenty-one years," then the property should go over to other persons

designated; it was held that the word "or" should be read "and," and that the son having attained the age of twenty-one, took an indefeasible estate. *Morris v. Morris*, xxi. 152.

228. *Gift to cousins—Vested interests.* A testator gave property, after the failure of prior limitations, "unto my first cousins by my mother's side, and the issue of such of them as may happen to be dead, *per stirpes*, and to their heirs, executors, administrators, and assigns forever, as tenants in common." Held, that the words "and the issue," &c., did not make the class ascertainable in *futuro*, but that the first cousins *ex parte maternâ*, living at the testator's death, took vested interests, liable to be divested *pro tanto*, so as to let in all other first cousins born before the period of distribution. *Baldwin v. Rogers*, xvii. 248.

229. *Estate in fee with executory devise over—Estate tail.* Devise made in 1826, in these terms: "I give and devise unto my wife, Elizabeth, the lands, &c., to hold the same unto her and her assigns, for, and during her natural life, and after her decease, I give and devise the same to my nephew, S. J., his heirs and assigns forever; provided always, and my will is, that in case it should happen that my said nephew shall depart this life before he shall have attained the age of twenty-one years, and if after he shall have attained such age of twenty-one years he shall die unmarried, or, having been married, without lawful issue, then I give the same unto my brothers, T. J. and J. J., &c., and their heirs forever, as tenants in common. Held, that the testator's nephew, S. J., did not take an estate tail, but an estate in fee simple in the lands, with an executory devise over to the testator's brothers in the event of S. J. dying under twenty-one, or after that age dying without leaving lawful issue at the time of his death. *Doe d. Johnson v. Johnson*, xvi. 550.

230. *Estate for life.* Bequest that after payment of debts, &c., all the estate and effects should go to the wife and at her death the residue to certain named persons. Held, that the wife was entitled to an estate for life only. *Constable v. Bull*, xv. 424.

231. *Life interest with gift over to issue.* Bequest of leaseholds in trust for F. for life, and after his decease, for the issue of the body of F., if any such there should then be. If F. died before twenty-one, or afterwards without issue, gift over. Held, to confer a life interest on F., with a gift over to his issue, meaning descendants who should be living at his death, as joint tenants. *Hill v. Nalder*, xv. 816.

232. *Equitable estate in fee.* A bequest of legacies, then the residue of effects real and personal, to A and B, an annuity to C, and then all certain lands with personal estate to trustees, their heirs, &c., in trust for the purposes above mentioned, Held, that A and B took an equitable estate in fee in said lands. *Lord Torrington v. Bowman*, xv. 447.

233. *Rents and profits of real estate.* A devise of rents and profits of real estate carries with it the property in the land, but an order to trustees to pay to A. the dividends of stock is not an order to pay her the *corpus* of the stock. *Blann v. Bell*, xv. 448.

234. *Gift not conditional but absolute.* A provision in a will that the testator's sons shall take absolutely when they shall have arrived at the age of twenty-one, if they are, in the opinion of the trustees, of competent understanding, &c., to manage the same, does not make the gift conditional, but the estate vests absolutely in the sons. *Wright v. Wright*, xiii. 165.

235. *Unqualified gift of income of fund—Intention of testator.* Though the general rule is that the unqualified gift of the income of a fund confers an absolute, and not merely a life interest in the principal, yet the intention of the testator is carefully to be considered. *Blann v. Bell*, xiii. 188.

236. *Absolute interest.* A testator bequeathed the interest of certain personal property to his wife for life; "at her death one half of the property I give to my son G. M., the remaining half to be equally divided between my two daughters, and at their

deaths such shares to be equally divided among their children respectively." *Held*, that the son took an absolute interest in the moiety. *Scrivener v. Smith*, xix. 173.

237. A testator, by his will, gave a legacy to his daughter for life, for her separate use, with remainder to her children. By a codicil, headed as "instructions to his solicitor," to add to his will, he gave another legacy "to his daughter and children, for their sole use and benefit, &c., &c.," and one third of the residue "to his daughter and children for their sole use and benefit." *Held*, that the daughter took a life interest in the gifts by the codicil. *Cator v. Cator*, xi. 306.

238. *Life estates—Remainder in tail.* Under a devise to A for life, and after his decease to the first son of the body of A for life, and after the decease of the last-mentioned first son of A, to the first son of the body of such last-mentioned son, with remainder to the second, third, and all other sons of the body of such last-mentioned son forever, the elder being always preferred to the younger; and in default of all such issue, the estate to go and descend to the testator's own right heirs forever, it was *held*, that A's first son took only an estate for life, with remainder in tail to his first and other sons, with an ultimate reversion to the right heirs of the testator. *Kershaw v. Kershaw*, xxvi. 127.

239. *Bequest to "Issue"—Limitations—"Share and Share alike."—Estate tail.* By his will, a testator devised a particular estate to his widow and granddaughter for their lives; and, if his widow should marry again, the same estate was given to her for her life; and, if the granddaughter should die leaving issue, then, after the death of the widow, the same estate and other lands were devised to them, share and share alike; but, if the granddaughter should die leaving no issue, then over. The widow married again. *Held*, that the granddaughter took an estate tail, and not merely an estate for life. *Kavanagh v. Morland*, xxiii. 582.

240. *Remainder to children—Fee simple.* A testator gave all his estate, real and personal, to his wife for life; and after her decease all the houses (before named,) &c., "and all property whatever that should be remaining at her decease" he gave unto and equally among his children. *Held*, that the children took a fee simple in the real estate. *Footner v. Cooper*, xxiii. 261.

241. *Estate for life—Stock or stirps—Primogeniture.* Bequest of property to L. and afterwards to his eldest lawfully begotten son, &c., remainder to others in succession; with a direction, that, in case of the decease of an eldest son, in any of the cases, then the property to go to the second son, and so on according with primogeniture; but in every case a grandson to inherit before a younger son, and before the next named in the entail, or any of his sons. *Held*, that the testator did not regard L. as the stock or stirps, but looked to the sons of L. as the parties from whom the property was to devolve in succession; and that L. took an estate for life only. *East v. Wyford*, xv. 205.

242. *Estate tail in realty and absolute property in personality.* A testatrix, by a will made before 1838, devised a house and lands to her granddaughter, M. A., and bequeathed to her 200*l.* due on a bond; and the will then proceeded: "but in the event of M. A. dying without having any lawful issue," the house and lands, and the said 200*l.*, to revert to other grandchildren, &c. *Held*, that M. A. took an estate tail, and not an estate for life in the realty, and the absolute property in the personality. *Cole v. Goble*, xx. 234.

243. *Impeachment of waste—Estate tail.* An estate was devised to A, for life, without impeachment of waste, with remainder to his issue in tail; with remainder to B, for life, without impeachment, &c.; with remainder to his issue in tail. A had no issue, and his assignees having committed equitable waste, it was *held*, that the right to the produce could not be determined until the death of A, as he might have issue who possibly would be entitled to an interest in such produce. *Lushington v. Boldero*, xvii. 507.

244. *Devise of real estate charged with annuities—Provision in case annuitant sur-*

vive devisee—Estate tail. Testator devised to S. K., certain real estate for life, charged with the annuities mentioned in his will, and then proceeded: "But in case the aforesaid annuitants, or any of them, shall survive the said S. K., I then give the aforesaid estate unto the eldest surviving son of S. K., charged with the aforesaid annuities; but in default of issue male, I give the above-demised premises unto his brother T. K., charged in like manner with the aforesaid annuities, and unto his eldest surviving son on the same conditions; but in default of issue male, my will is, that the aforesaid demised premises do descend unto my heirs at law, charged nevertheless with the above-mentioned annuities." S. K. survived all the annuitants mentioned in the will, and after his death, J. K., his eldest son and heir at law, enjoyed the estate during his life, and then died, leaving a widow and an only daughter. *Held*, first, that the dispositions of the devised estate after the death of S. K. were not meant to be contingent on his being survived by all or any one of the annuitants mentioned in the will. Secondly, that S. K. took an estate in tail male, and that this estate not having been barred either by himself or by his eldest son, J. K., his second son, S. K., was entitled to the estate as tenant in tail male, subject to the dower of J. K.'s widow. *Key v. Key*, xix. 617.

245. *Bequest to married woman—Personal representative entitled—Residue undisposed of.* B. H. bequeathed 2,000*l.* consolidated annuities unto M. W. and her children, and directed that the residue of his property should be invested, and the interest thereof paid half-yearly to M. W., for her use and her children, until E. P. H. should be married, and her first child, that lived to be one year old. The testator then directed that all the consolidated annuities remaining in his name should be equally divided between M. W. and E. P. H., for their use and their children, share and share alike; and in case E. P. H. should leave no issue, then the remaining consolidated annuities should devolve to M. W.'s children. M. W. had only one child, who died under age, in 1790, a few months before the testator. E. P. H. married, and had only one child, who died in 1805, aged seven years. E. P. H. died in 1809, and M. W. died in 1837. *Held*, that the personal representative of M. W. was entitled to the 2,000*l.* consolidated annuities, and that the residue of the testator's estate was undisposed of, and belonged to his next of kin. *Mason v. Clarke*, xix. 58.

VII. Interpretation of particular Words and Phrases.

1. The following devise, "I leave my wife, R. H., to receive all moneys upon mortgages," gives the wife the legal estate in the mortgaged premises. *Doe d. Guest v. Bennett*, v. 536.

2. "*Property*," "*Interest*," "*Dividends*." A testator, by his will, devised his "property," and referred to the income by the words "dividends" and "interest." *Held*, that his real estate was included in the word "property," notwithstanding the use of the other words. *Morrison v. Hoppe*, v. 199.

3. "*All my estate and effects*." A gift by a will, within the operation of stat. 7, Will. IV. & 1 Vict. c. 26, of "all my estate and effects, whatsoever, and wheresoever, and of what nature or kind soever," unless restrained by the context, will pass after acquired real estate of which the testator dies seised. *Stokes v. Salomons*, iv. 183.

4. A bequest of all personal estate and effects "whatsoever and wheresoever," and of every kind soever, which the testatrix should be possessed of, or entitled to, at the time of her death, in "possession, remainder, reversion, or expectancy," does not pass real estate. *Gillies v. Longlands*, v. 59.

5. "*Dying without leaving issue*." A testator, by his will, gave certain shares of his residuary personal estate to certain legatees. He then directed that "the whole of the legatees should have the benefit of survivorship between them, in the event of any one or more of them dying without leaving issue." *Held*, that "the dying without leaving issue" did not refer to death in the lifetime of the testator. *Smith v. Stewart*, iii. 175.

6. "Issue." Under a bequest for all and every the "issue" of A. living at the decease of her and her husband; but, if any of the issue of A. should die in the lifetime of the survivor of A. and her husband, leaving issue, the issue of such issue, so dying, should take the share his parent would have been entitled to. *Held*, that the word "issue" meant children, and not descendants. *Pope v. Pope*, ix. 193.

7. In a will, the word "issue" is not a technical expression implying, *prima facie*, words of limitation, but will yield to the intention of the testator to be collected from the words of the will. *Re Wynck's Trust*, xxvii. 375. *Bryan v. Mansion*, xv. 455.

8. "Leaving issue." A gave an estate to B for life, remainder to the use of C; and in case C should die before B, or afterwards, leaving issue, then such issue should, on attaining twenty-one, take C's part. A child of C attained twenty-one, surviving B, but dying in the lifetime of C. *Held*, that such child of C took a vested interest in the estate. *Boulton v. Beard*, xxvii. 421.

9. "Having" or "leaving issue." Bequest to the testator's daughter for life and then to her children as tenants in common; in case she has only one child, to that child in fee; but in case she should die not leaving issue, then to the testator's other children. The daughter had two children, both of whom died during her life, one leaving issue. *Held*, that the word "leaving" might be construed as "having" and that the daughter's two children took absolute and devisable estates in remainder under the will. *In re Tookey's Trust*, xi. 60.

10. Vested remainder in fee, subject to life estate—"For default of such issue," meaning of—"Issue of their bodies," meaning of. A testator by his will devised certain lands upon trust, whilst his grandson M. was under twenty-one years, to receive the rents, &c., and invest the same for the benefit of his grandson W.; and after M. should have attained the age of twenty-one years, to permit him and his assigns, for and during his natural life, to receive the said rents, for his and their own use and benefit; and after the decease of M., to and for such uses, &c., as he should by &c., direct, limit, or appoint unto or amongst the child or children of the body of M. lawfully issuing; and for default of any such direction, &c., to the use of all the children, both sons and daughters, of the body of M. lawfully issuing, equally to be divided amongst them, if more than one, as tenants in common, and their heirs forever; and for default of such issue, to the use of all the children, both sons and daughters, of the testator's brothers and sister, as tenants in common, and their heirs forever. The testator then devised the residue of his real estates in the same terms to his grandson W.; and then followed the proviso, "that in case either of my grandsons should happen to die without issue of their bodies lawfully begotten," the trustees to stand seised of the estates devised to the deceased, to and for the like uses and trusts, for the benefit of the survivor. M. survived the testator, and had a daughter, deceased, whose heir at law the defendant was. *Held*, that under the first limitation the daughter of M. took on her birth a vested remainder in fee, subject to the life-estate of M., the words "for default of such issue" being necessarily taken to mean "for default of children of M.," in whom the remainder in fee would vest. *Held also*, that the words "issue of their bodies," &c., in the proviso, meant such issue as was before expressed; and that the proviso had not, therefore, the effect of cutting down the devise in fee to the daughter of M. *Foster v. Hayes*, xx. 72; *affirmed on error*, xxx. 267.

11. "Children"—*Estate tail*. A life interest in two freehold houses was devised to E. D., and "should she marry and have issue, then to go to her children; if she have no issue, then to go to F. W." *Held*, that E. D. took an estate tail, the word "children" being used synonymously with the word "issue." *Voller v. Carter*, xxviii. 267.

12. "Leaving children." Bequest in trust for A for life, and if he should leave a child or children, in trust for such child, &c., equally at twenty-one, the share of such

child to be considered a vested interest in him or her; in case A should leave no child, then remainders over. A's only child died in his father's lifetime, leaving a widow and child. *Held*, that the expression, "leaving children," must be used in its ordinary sense, and that the persons claiming under the gift over were entitled. *Bythesea v. Bythesea*, xxvii. 402.

13. "*Surviving children*," meaning of. A testatrix by her will, bequeathed "to my sister C. N.'s surviving children 30l. each," and subsequently proceeded as follows: "I give and bequeathe unto my sister C. N., the interest of my funded property, for and during her natural life, and after her decease such property to be equally divided between her surviving children." One of C. N.'s children, who survived the testatrix, died in C. N.'s lifetime. *Held*, that "surviving children," in the second gift, meant children surviving C. N., although in the first gift it meant surviving the testatrix. *Neathway v. Reed*, xvii. 150.

14. "*Heirs*." Although there be a limitation in a will in which taken by itself, the word "heirs" must be construed to mean "heirs general," and to give a fee simple, if there be a subsequent limitation in the will which can have no operation if this effect is given to the word "heirs," it shall mean "heirs of the body," and cut down the prior gift to an estate tail. *Foster v. Hayes*, xx. 72; *affirmed on error*, xxx. 267.

15. "*Heirs of body*." Where personalty is given by will to a person, and in the event of that person's death to "the heirs of her body," all the children of the party are entitled to take equally. *Pattenden v. Hobson*, xvii. 16.

16. "*Heir male*." Where a testator gives property to his heir male, he must be taken to mean his heir male at common law. *Thorp v. Owen*, xxiii. 313.

17. "*Servants*." A devise "to each servant in my domestic establishment" does not include a head gardener, but a servant hired by the year and paid weekly would not be excluded. *Ogle v. Morgan*, x. 92.

18. Testator bequeathed "to all my servants living with me at my decease, and who shall have then lived in my service for three years, one year's wages. *Held*, first, that this bequest extended to servants who were in the employment of the testator, though not resident in the same house; but, secondly, that it did not include any servants who had never entered into any contract or yearly hiring, or in which yearly wages was agreed upon; and, therefore, a gardener, who was engaged at a fixed sum per week, although paid at irregular intervals, was not included. *Blackwell v. Pennant*, x. 270.

19. A servant, who has the charge of the gardens at the mansion, but who lives in a cottage in the garden, and has an annual sum from his employer in addition to his yearly wages, does not come within the description of a domestic servant of the testator living with him, or in his service, at the time of his death. *Vaughan v. Booth*, xiii. 351.

20. *Gift to issue—Whether substantive or substitutionary—Period for ascertaining class—"Then living"—"Dying in the lifetime of."* A testatrix devised and bequeathed her real and personal estate to trustees, upon trust to pay the income to M. W. for her life, and then to M. W.'s mother for her life, (in case she survived M. W., and M. W. left no issue surviving;) and after the decease of M. W., and also after the decease of her mother, in case the gift to the mother should take effect, upon further trust to sell the real estate. The testatrix then directed the sale-moneys to form part of her residuary personal estate; and in the event of M. W., dying leaving no issue, (which event happened,) she gave one moiety of her residuary personal estate, from and after the decease of the survivor of M. W. and M. W.'s mother, unto and among the child and children then living of A. A., and the issue then living of any child or children of the said A. A. dying in the lifetime of the said M. W., and to their respective executors, administrators, and assigns, share and share alike, the issue of any such deceased child or children of the said A. A. taking only the share or shares that their respective parent or parents would have taken if living at the death of M. W.

And the testatrix declared, that if all or any one or more of the children of the said A. A. should die without issue in the lifetime of M. W., then she gave the share or shares of him, her, or them so dying unto and among the child and children of M. H. who should be living at the death of M. W., and to their respective executors, administrators, and assigns, equally to be divided between them, share and share alike. The testatrix died in 1825. M. W. died a spinster in 1830. M. W.'s mother died in 1850. A. A. had seven children, of whom the said M. H. was one. Five of them had died without issue before the date of the will. M. H. was dead at the date of the will, but left children, all living, except one H. C., who survived M. W., and died in the lifetime of M. W.'s mother, leaving two children, who survived M. W.'s mother. *Held*, first, that the words "then living" referred to the period of distribution, and that H. C. took nothing, as she did not survive that period. Secondly, that H. C.'s children took nothing, as she did not die in the lifetime of M. W. Thirdly, that the words "dying in the lifetime of the said M. W." were not confined to death after the date of the will; and that although M. H. was dead when the will was made, her children, who survived the period of distribution, were objects of the gift, and took among them one half of the above-mentioned moiety of the trust-fund. Fourthly, that in the events which had happened, the other half of that moiety was undisposed of. *Coutts v. Hurst v. Carter*, xi. 243.

21. "*And*" to be read "*or*"—*Felled timber—Apportionment of rent.* A testator bequeathed all the rents and arrears of rent, with timber felled, and other annual profits due to him at the time of his decease, from his Berwick Hill estate, unto the person or persons who should be entitled to the freehold "*and*" inheritance of the same estate in possession at his decease. On the death of the testator, his brother became tenant for life of this estate. *Held*, that the words "freehold and inheritance" must be read "freehold or inheritance," and that the tenant for life was entitled to the rents, &c., specified in the above clause. *Stapleton v. Stapleton*, xi. 90.

22. "*Moneys.*" A balance in the hands of bankers on a common banking account, and sums in banks as deposits, for which deposit notes are held and interest is received, may pass by the word "*moneys*" in a will. But a sum deposited by the testator in the hands of stakeholders to await the result of a bet will not pass under the word "*moneys.*" *Manning v. Purcell*, xxxi. 452.

23. Stock does not pass under a gift of "*money*" in a will. *Lowe v. Thomas*, xxvii. 238. But see *Waite v. Combes*, xiii. 192.

24. "*Household Furniture.*" Articles of furniture in an inn or tavern which are used only to carry on the business do not pass under the words "*household furniture,*" but only those articles which were used for the personal convenience and comfort of the testator and his family. *Manning v. Purcell*, xxxi. 452.

25. "*Worldly Goods.*" Testator gave all his worldly goods whatsoever, and whosoever they might be found, to trustees, upon the trusts and conditions in his will, his wife to have possession of all while she lived, but if she married, to quit possession. He then gave to his eldest son, and his heirs and assigns forever, 20*l.* and a close of land; and to the rest of his children, the rest of his worldly goods. *Held*, that "worldly goods" passed all the lands not specifically devised. *Wright v. Shelton*, xxiii. 509.

26. "*Surviving sister.*" A testator gave to each of his daughters, 5,000*l.*, the interest to be paid to her for her life, and if she should have children, the principal to be divided among them if they should attain twenty-one; if not, it was to be divided among her surviving sisters. A daughter, A, died, leaving two children, both of whom died under twenty-one. *Held*, affirming the decision of the master of the rolls, that a sister of A, who survived A, but died in the lifetime of the survivor of A's children, was not a "surviving sister" within the meaning of the will. *Curver v. Burgess*, xxxi. 329.

27. "*Unmarried.*" The word "*unmarried,*" as used in a will, ordinarily means

"never having been married." *Hall v. Robertson*, xxi. 504. *In re Thistlethwayte's Trust*, xxxi. 547.

28. "*Last will*." The term "last will" is not synonymous with the term "sole will." *Freeman v. Freeman*, xxvii. 351.

29. "*Manor*." If there is nothing inconsistent with such construction the word "manor" in a will must have its legal effect. *Hicks v. Sallitt*, xxvii. 212.

30. "*Vested*." A testator gave all his real property to his sons, in equal shares, as tenants in common, to be vested in them, as to one moiety, when each son should attain the age of twenty-one, and as to the other when the youngest son for the time being should attain twenty-one; and in case any of them should die before his respective moieties became vested, he gave the unvested share, which should belong to such son, to his other sons. And he directed the guardians appointed by the will, to receive the rents of the shares during the minority of his sons, and apply the whole or any part to their respective educations. *Held*, that "vested" must be taken to mean "not liable to be divested," or "vested indefeasibly." *Poole v. Batt*, xvii. 13.

31. The testator directed the trustees not to pay over the shares of the sons, or permit them to enter upon the real estate, until they had given bonds not to marry or illegally cohabit with the daughters of a person named. The court declined on the application of a party having a remote interest, to direct such bonds to be given. *Ib.*

32. "*Next of kin*." Under a bequest in trust for the testator's daughter, and, "in case of her dying without issue, then to her next of kin or otherwise, in the same manner as the estate would pass under the Statute of Distributions," the husband of the daughter so dying is not entitled. *Milne v. Gilbert*, xxvii. 344.

* 33. Wife is not one of the next of kin of husband under stat. 22 Car. II. c. 10. *Horn v. Coleman*, xix. 19.

34. *Annuity "for life of two sisters."* Where a testator directed the purchase of an annuity "for the life of his two sisters," it was *held* that the annuity was to continue only for their joint lives. *Grant v. Winbolt*, xxiii. 312.

35. "*Nearest of kin in the male line*." Gift by will of personalty, to be accumulated for twenty-one years, and then to be paid to testator's "then nearest of kin in the male line, in preference to the female line." *Held*, to be for the benefit, not of the testator's cousin, the nearest male relation at the period mentioned claiming through a continuous line of males; nor of his nephews, his then nearest of kin being males; but of his then surviving sister, being the then nearest of blood in the paternal line to the testator. *Boys v. Bradley*, xix. 73; affirming s. c. xvii. 132.

36. "*Male line*," when a testator dies without children, *held* equivalent to "*ex parte paternâ*." Inheritor, heir, party, &c., are nouns of number, and do not exclude females, nor a plurality of takers. *Boys v. Bradley*, xvii. 132.

37. *General gift—Articles ejusdem generis.* A testator, by his will, gave the residue of his personal estate to A, B, and C, to be equally divided by them. By a codicil, he gave A the arrears of rent due to him for his real estate, and the amount of any salary due to him, and also bequeathed to A all his clothes and any other property, goods, and articles belonging to him at the time of his death. By another codicil, he revoked the bequest made to B by his will. *Held*, that the gift to A, by the first codicil, was a general one, and that the words "property, goods, and articles" were not to be confined to articles *ejusdem generis* with clothes, and that, consequently, A was entitled to two thirds and C to one third of the residue. *Everall v. Broune*, xvii. 369.

38. "*Wife*" and "*children*" mean *lawful wife and children*. Bequest of stock, after the death of the testator's widow, upon trust to pay the dividends to G. for life, and then to his wife for life, and after the decease of the survivor, to divide the capital among the children of G. G. had, from a time previous to the date of the will, up to the death of the testator, been living with a woman who was believed to be his wife, and by whom he had several children. G. was never married; he died after the death

of the testator, in the lifetime of the testator's widow. *Held*, that the description in the will applied to a lawful wife and children whom G. might have had after the date of the will, and to no others. *Davenport's Trusts, in re*, xvii. 293.

39. *Bequest to "family of G." not void for uncertainty.* A bequest to the family of G. was *held* not to be void for uncertainty; but construed to be a gift to the children of G., (an uncle of the testator, known to and on terms of intimacy with him,) as joint tenants, and not to include the parents or their grandchildren. *Gregory v. Smith*, xv. 202.

40. *Promissory note passes as property.* A promissory note due to a testator, domiciled in England, by a person resident at the Cape, passes by the words, "property I shall leave in the Colony." *Scorey v. Harrison*, xvii. 46.

41. For the meaning of words "son," "grandson," and "inherit," see *East v. Tryford*, xxxi. 62.

42. "*Imprimis.*" *Semble*, that if a testator says "imprimis," or "in the first place I give" such a legacy that amounts only to the order in which he expresses his gifts in the will,—nothing more; otherwise, if he says "to be paid in the first place." *Miller v. Huddleston*, viii. 26.

VIII. *Debts and Legacies, on what Estate a Charge.*

1. Specific legacies held to be exonerated from payment of debts by devised real estates. *Plenty v. West*, xv. 283.

2. *Real estate charged as a subsidiary fund with debts and legacies.* A testator directed his debts to be paid, and then gave all his real and personal estate to trustees upon trust to pay certain legacies, and then declared certain trusts of all the real, residue and remainder of his freehold, copyhold, and leasehold estates, and all other his estate and effects. *Held*, that the personal estate was the primary fund for the payment of the debts and legacies; and that the real estate was only charged with them as a subsidiary fund. *Blann v. Bell*, xiii. 188.

3. *Charging estate with debts and funeral expenses.* E. H. after charging all his estate with the payment of his debts, funeral, and testamentary expenses, &c., gave and devised the rents and profits of all his tenements, &c., except his Bala houses, to A. H., his wife. He also gave her his personal estate, and appointed her executrix. *Held*, that the Bala houses passed to the heir at law of E. H., subject in equity to a charge for funeral and testamentary expenses, but that A. H. had no power to sell or mortgage the estate. *Jones v. Hughes*, iii. 554.

4. *Annuity charged on freeholds and moneys in funds—Copyholds.* G. T. was entitled to a life interest in freehold and copyhold estates, and also in three sums of stock; the legal estate in the freeholds was vested in trustees, but the copyholds had never been surrendered to them, and many of the freehold and copyhold lands were let together; the three sums of stock were in the names of the trustees. G. T. was also absolutely entitled in remainder to a moiety of the freehold and copyhold estates, and the stock. G. T., upon his second marriage, by a covenant and his bond, secured an annuity to his wife for life, and by his will confirmed the settlement, and said, "I charge all and every my freehold hereditaments and estate and moneys standing in my name in the public funds with the payment of the annuity, to my wife; and subject to the said annuity, I devise and bequeathe the same freehold hereditaments and estate and moneys in the funds to my niece and godchild, S. Q., her heirs, executors, administrators, and assigns, with remainder to her two sisters, &c. All the rest and residue of my real and personal estate, subject as to my personal estate to the payment of my just debts, &c., and legacies, I devise and bequeathe unto my wife, her heirs, executors, administrators, and assigns." The testator had no moneys standing in his name, and upon a suit by the devisee, it was *held*, that the testator meant his interest in the stock standing in the name of the trustees, to which he was entitled

in remainder; that the personal estate, as the primary fund for payment of the annuity, was not exonerated by the charge made upon the freeholds and the moneys in the funds; also, in the absence of any intention apparent on the will, that the word "estate" did not include the copyholds, and that they did not pass. *Quennell v. Turner*, iv. 84.

5. *Deficiency of residue after specific legacies given.* Where a testator, intending to dispose of a fund the amount of which is yet unascertained, gives a specific sum to each of two persons and the residue to a third, and there proves to be only enough to pay the testator's debts and the specific legacies, if it does not appear from the words of the will to have been the intention of the testator that charges on the fund should be borne equally by all, the loss caused by the payment of creditors is to be borne wholly by the residuary legatee. *Petre v. Petre*, v. 146.

6. *Deficiency of estate bequeathed to pay legacies.* A gave legacies to several persons by name, and added, "but if the personal estate and effects I became entitled to under the will of E. H. should fall short in paying these legacies, my desire is that 500*l.* out of any other part of my personal estate shall be applied for that purpose." The legacies given amounted to more than the personal estate received from E. H. with the 500*l.* additional. *Held*, that the general personal estate of the testator was not liable to make up the deficiency. That the personal estate received from E. H. and the 500*l.* were alone applicable to pay the legacies, and that they must abate proportionately. *Read v. Strangways*, vii. 37.

7. *Real estate taken as auxiliary fund for payment of debts and legacies, except life estate in one parcel.* A testatrix devised her estate real and personal for the payment of debts and legacies, and afterwards devised one parcel of real estate to one for life, then to be sold for payment of legacies. The personal estate proving insufficient for payment of debts and legacies, it was *held*, that her real estate was to be taken as an auxiliary fund for that purpose, excepting the life estate in the parcel above mentioned. *Whieldon v. Spode*, x. 130.

8. *Charge on corpus of an estate.* Where there is a direction that certain costs and expenses shall be paid out of the rents and profits of the demised premises, and shall be charged on the premises, then the charge is on the *corpus* of the estate, and the *corpus* may be sold, if necessary, to get rid of the charge. *Dixon v. Wilkinson*, xxi. 450.

9. *Debts of testator's father charged on real estate.* Where a son who has promised to pay his father's debts, though not liable to do so, declares in his will, "I hereby charge all my just debts, and also all the debts of my late father, which shall remain unpaid at the time of my decease, upon all and every my real estate," those debts of the father which were not barred at the time of his (the father's) death, are to be charged on the son's real estate. *O'Connor v. Haslam*, xxxi. 38.

10. *When descended estates liable to charge.* Where an estate is devised subject to a mortgage, those words are descriptive merely, and the descended real estate is to be applied in discharge of the mortgage, that is, if the personal estate be not sufficient to pay, then the real estate must make good the difference. *Goodwin v. Lee*, xxxi. 560.

11. *Devise of estates subject to debts—Contribution.* If a testator devises one estate subject to debts, &c., to A for life, with remainders over, and another estate subject to debts, &c., to A absolutely, and subsequently mortgages the first estate, then, on a deficiency of personal estate, both estates must contribute ratably towards payment of the mortgage. *Middleton v. Middleton*, xxi. 542.

12. *Charge of debts on copyhold estates.* A bequest to the testator's daughter, so long as she should continue single, of all his copyhold estates, furniture, moneys, &c., after payment of just debts, and if she should marry after his death, or die unmarried, the whole of the estates with the furniture, stock, &c., should be sold and the proceeds divided between B, C, and D. *Held*, that the copyhold estates were charged with the payment of his debts. *Moore v. Whittle*, xv. 433.

13. *Survivor.* Bequest to one for life, and then to be divided among four equally, as tenants in common; if either died in the life of the tenant for life, his share should be divided among his children; if either died during that period without leaving then his share to go to the survivors or survivor of them. One died leaving children, and then another died without issue, and then the tenant for life died, *Held*, that the children of the legatee who died first took no interest in the share of the one who died afterwards without issue. *Moate v. Moate*, xiii. 475.

14. *Legacies and annuity a charge on real estate.* J. G. gave all her real and personal estate to trustees, upon trust to convert the personal estate into money, and debts, &c., and a legacy of 10*l.* to M. H., and to stand possessed of the residue of the money, and seised of all the real and leasehold estate, upon trust, out of the residue, &c., to pay and discharge such debts, &c., as the personalty should be insufficient to satisfy; and subject thereto, in trust for three grandchildren. J. G. by a will directed that the "trustees acting under such will should pay M. H. 40*l.* in addition to the former legacy," and also pay to S. G. during her life an annuity of 100*l.* If the personal estate being insufficient to pay the legacies and annuity, it was *held*, that the legacies and annuity were a charge upon the real estate. *Gallemore v. Gill*, xxiii. 512.

15. *Devise of real estate charged with payment of certain sum.* A devised his real estate to B in fee, charged with the payment of 6,000*l.* to C, and directed that should he die without leaving issue living at his death, this sum should form a part of (the testator's) personal estate, and then gave all his personal estate to B. He conveyed these real estates to certain uses, subject to the charge of 6,000*l.* After C died without issue, and then B died. The money had not been raised. *Held*, that this sum of 6,000*l.* was a subsisting charge, and that the personal representatives of B were entitled to have it raised out of the real estates. *Johnston v. Webster*, 410.

16. *Fine payable out of general personal estate in exoneration of leaseholds.* A was at the time of her decease possessed of a lease from charity trustees, for forty years of certain lands held by them for lives, renewable when the *cestuis que vie* should be reduced to five. A. B. had in her sub-lease covenanted to pay the fine on renewal. By her will, after devising her freehold estate, she bequeathed "all her leasehold at H. or elsewhere, and all her shares in the C. W. Company, and all her stocks, funds, and securities for money, and all other her personal estate and effects to trustees, upon certain trusts as to each moiety thereof, being for her two nieces for life, with remainder to their children, with cross-remainders over in default of issue. The testatrix gave to her trustees special powers of leasing, cutting timber, &c. The testatrix died in September, 1826. In the month of July, 1825, the number of charity trustees had been reduced to five, and the fine therefore became payable, but, in consequence of disputes as to the amount, no trustees were admitted until 1835. In 1850, the number again became reduced to five. *Held*, first, that the fine which became payable in the testatrix's lifetime was payable out of her general personal estate in exoneration of the leaseholds. And, secondly, that the second fine which accrued after the testatrix's decease, was not, as between the legatee of the leaseholds and the general personal estates payable out of the latter, but the legatee took the leaseholds *cum onere*. *Fitzwilliams v. Kelly*, xvii. 218.

17. *Devise of leasehold mines—Charge of debts on net produce of mines.* A testatrix seised of real estate, and leasehold and personal estate, and, among other property, of leasehold collieries or mines, gave certain real estates to his son; he devised by will all his other real and personal estate upon trust, with the approval of his son, at some convenient and proper period to sell and convert the same into money, to invest and apply 1,000*l.*, part thereof, for his granddaughter; and after giving her small annuities, in trust to pay to his daughter 200*l.* a year; but that what he converted the produce of his personal estate was not to be taken as the income derived from the mines, but the profit arising, after laying by 10*l.* per cent. to pay back the capitals.

pended in plant, &c.; and subject to these gifts and devises, he gave all his real and personal estate to his son; the son was appointed, with the trustees, executor; they disclaimed and renounced, and he entered into sole possession. In taking the accounts of the testator's estate, it was *held*, that the son had a right to apply in payment of debts, all permanent personal property before disposing of the mines. That, having paid off with his own moneys debts which could not have been paid off without resorting to the mines, the debts so kept alive in his hands were a charge on the net produce of the mines, and that he was entitled to interest on the same; that the accumulations of the 10l. per cent. were a fund liable to the debts in exoneration of the mines; that the 1,000l. legacy to the granddaughter was a charge on the real and personal estate *pro ratâ*. *Lord v. Wightwick*, xxi. 299. See s. c. xxiii. 267.

18. *Devise to widow for life, remainder to another tenant for life, with remainders over—Charge of legacy on specified part of lands devised—Receiver.* A testator in possession of lands devised the same to his widow for life, remainder to another tenant for life, with remainders over; and he gave to the plaintiff 200l., which he charged on specified land, part of his lands devised, payable after the widow's death. The widow was possessed for her life, and, on her death, a stranger entered into and kept possession of the lands of the testator. The plaintiff by his bill, to which the tenants for life, and in remainder, and the stranger, were defendants, asked that the 200l. legacy might be raised out of the specific land. The tenant for life disclaimed. The stranger alleged a title paramount to that of the testator, and objected that he ought not to be a party. *Held*, that the stranger could not be sued in Equity by any person claiming under the will, and he was dismissed with costs; and the court declared the plaintiff entitled to his legacy, appointed a receiver, and ordered that the plaintiff should be at liberty to bring such action as he should be advised, for the recovery of the specified land in the names of the tenants for life and in remainder, upon an indemnity. *Daniel v. Davies*, xix. 311.

19. *Two funds—Legacy thrown upon real estate.* Where one legatee has two funds to resort to for the payment of his legacy, in full, and another legatee has only the personal estate or one fund to resort to, the court presumes that the intention of the testator is, that all should be paid in full, and therefore marshals the assets, throwing the particular legacy upon the real estate. *Scales v. Collins*, xv. 187.

IX. Charitable Gifts.

1. *Annual bequest for repair of tomb.* An annual bequest for the repair of a tomb is not bad as a charity; and, if it proceeds out of a life interest, it is not void as a perpetuity. *Lloyd v. Lloyd*, x. 139.

2. A devise of rents to a minister and churchwardens, for the purpose, first, of taking 5l. for themselves, and then for repairing a tomb, is void. *Id.*

3. Bequest to the governors of a society instituted for the "increase and encouragement of good servants," &c. &c. No such institution could be found. *Held*, that the gift was charitable, and did not fail. *Loscomb v. Wintringham*, vii. 164.

4. A gift towards contributions for the political restoration of the Jews to Jerusalem not a charitable legacy, and held to be void. *Habershon v. Vardon*, vii. 228.

5. A gift towards the fund for the bishopric of Jerusalem agreed to be a good charitable legacy. *Id.*

6. *Charitable gift to corporation—Increased rents, right to surplus of.* A testator devised property producing 47l. a year to a corporation, "in trust and confidence," to pay three sums of 20l., 10l., and 10l. to three charitable objects; and so long as certain taxes continued, what the corporation could not spare "out of the overplus of the rent," viz.: 7l., should be deducted out of the two sums of 10l. and 10l. The rental increased, and it was *held*, that the corporation took merely seven forty-sevenths of such increase, and that subject to the payment of the ordinary repairs, &c., of the

property; and that the charities were entitled to the residue. *Semble*, that the which, in a case where the whole profits of an estate are given to a charity, and rents are afterwards increased, gives the charity the benefit of the surplus rent; and also where the only portion of the rents not directly given to the charity is to exonerate the estate from burdens to which it is subject. *The Attorney-General v. The Corporation of Beverley*, xxxi. 498. See also *The Mayor of South Molton v. Attorney-General*, xxvii. 17.

7. *Gift of dividends forever.* A gift, after the death of a tenant for life, of dividends of stock forever to a charitable institution, is a gift of the *corpus* of the stock to the institution. *Tyrrell v. Clark*, xxiii. 536.

8. *Charitable uses.* A gift of pure personality for the purpose of establishing a school, the testatrix expressing in her will that the legacy was not to be employed in the purchase of land, or the erection of buildings, her "expectation being that persons would, at their expense, purchase the necessary land and buildings," is valid against the policy of the statutes relating to charitable uses, but is valid. *Care v. Thompson*, xxi. 31.

9. *Taking beneficially and not as trustees.* After giving charitable legacies by will, a testatrix, by codicil, declared that if any of them should fail, by reason of the part of her estate being of such a nature as could not legally be made applicable to charitable purposes, she gave such part to A and B, for their absolute use and benefit, having full confidence that they would desire to carry out her intentions, and she declared that that should not have the effect of imposing a trust upon them, or in any manner qualify their interest in the bequest. *Held*, that A and B took beneficially and not as trustees for the next of kin. *Ib.*

10. *Conversion.* A testatrix gave charitable legacies, and the residue to her son who survived her, and also made several bequests to charities. *Held*, that the residue of pure personality, which the son took under the former will, and kept unconverted until her death, was not to be treated as converted for the purpose of the charitable legacies in her own will. *Ib.*

11. *Failure of.* Where there is a gift by will to a particular charitable institution, and that fails, then the gift falls into the residue of the estate. But if the gift is for a general charitable purpose, and one mode fails, then another may be selected to carry out the general purpose. *Clark v. Taylor*, xxi. 308.

12. *Charitable legacy chargeable on pure personality and general legacies on pure personality.* Where a testator gave a charitable legacy "to be raised and paid out of such part of his ready money, goods and personal effects, as he could by law charge with the payment of the same," and his estate consisted partly of pure personality and partly of personality savoring of realty, the latter being more than sufficient for the payment of the general legacies, it was *held*, that the general legacies ought to be paid out of the personality savoring of realty, so as to leave the pure personality for the payment of the charity legacies. *Held*, also, though not as the ground of the decision, that in the present case the charity legacies were analogous to and had the same incidents as demonstrative legacies to individuals, except so far as regarded the right of satisfaction out of other assets than the fund out of which they were directed to be paid, a right from which they were debarred by the Stat. 9 II. c. 36. *Robinson v. Geldard*, xii. 63.

13. *Charity legacy—Pure personality insufficient to pay debts—Apportionment between personal and mixed estate.* In case of a gift of real and personal estate to trustees, and, after payment of debts, to pay certain legacies, one of which is a charitable legacy, and to divide the residue among certain persons, and the pure personality is not sufficient to pay the debts, but the mixed estate is ample, then the charitable legacy does not fail altogether, but there ought to be an apportionment according to the proportion which the value of the pure personality bears to the mixed estate. *Briggs v. Chamberlain*, xxiii. 87.

X. *Revocation and Cancellation.*

1. *By conveyance.* Where real estate is contracted to be purchased, and the purchaser then makes a will devising all his real estate which he had contracted to buy, upon trusts for sale, and subsequently takes a conveyance to the ordinary uses to bar dower, it was *held*, affirming the decree below, that the conveyance operates as a revocation of the devise of this estate. *Plowden v. Hyde*, ix. 238; xiii. 175.

2. *By reconveyance.* Where an estate stood limited to the ordinary uses to bar dower, and the owner mortgaged it in fee, with a proviso for redemption, that on payment the estate should be conveyed to the mortgagee, his heirs, appointees, or assigns, or to such uses as he or they should direct, and he then made his will, devising all his real estate upon trust for sale, and afterwards the mortgagee reconveyed to the mortgagor to the ordinary uses to bar dower, it was *held*, reversing the decree below, that the reconveyance was not a revocation of the will as to this estate. *Plowden v. Hyde*, xiii. 175.

3. *By subsequent will, without express clause of revocation.* Prior wills of real estate held to be revoked by a subsequent will, although the latter contained no express clause of revocation, and the result of the decision was a partial intestacy. *Plenty v. West*, xv. 283.

4. *Testator's name torn from some of the pages.* A left a will; from the bottom of the several pages of this will, the name of the testator had been torn or cut; part of one page had also been torn off, but was reannexed by a pin. The signature of the testator and the subscribing witnesses at the end of the will remained. *Held*, that the will was not revoked partially or entirely. *Clarke v. Scripps*, xxii. 627.

5. *By second will.* Where a second will (not expressly revoking the first) does not dispose of the whole property, the disposition of the first will may be valid so far as it is consistent with the second. Two wills may stand at the same time. *Freeman v. Freeman*, xxvii. 351.

6. *Two testamentary papers.* E left two testamentary papers, neither termed a last will, but with different executors. There was no revoking clause in the latter paper, nor any disposition of residue. Two of the three residuary legatees under the first paper died before the date of the second. *Held*, that the intention of the testatrix was that both should operate, and that both were entitled to probate. *Richards v. The Queen's Proctor*, xxviii. 610.

7. *Express revocation necessary.* A will under the 1 Vict. c. 26, s. 11, remains operative, unless expressly revoked, although the maker of such will lives in England several years after the date of the will. *In the Goods of Leese*, xxii. 636.

8. *Revocation by codicil—Partial revocation.* A testator, by his will, devised certain houses to his son A for life, and after his death unto his children then born, or thereafter to be born, upon their attaining a certain age as tenants in common, and in case of the death of any of them under the specified age, the share and shares of the child or children so dying to go to the survivors and survivor, and in case of the death of all of such children under that age, then to trustees to permit the testator's three daughters, B, C, and D to receive the rents during their lives in equal shares, and after their decease to their children in fee. The testator made a codicil in these words: "I likewise revoke that part of my last will and testament whereby I give (the houses in question) unto my son A and to his heirs, and my will is that my daughters C and D, should enjoy them, and I hereby give and bequeathe the said freehold ground and houses to my said daughters C and D equally and jointly between them and to the survivor of them, and after their decease to their child or children equally, and if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will." The daughters C and D died, leaving no child. A, the son, died in 1850, leaving a daughter, his only surviving child, (one of the lessors of the plaintiff,) who was born in the testator's lifetime and attained the

required age. A had another daughter born in the testator's lifetime and had a son, but she and her son both died in the lifetime of the third daughter, B, died, leaving children, who were the devisees under the codicil operated as a revocation, only so far as to effectuate the testator's intent to prefer C and D and their children to A and his children. The lessors of the plaintiff were entitled to a moiety of the estate. *Evers v. Ward*, ix. 418.

9. Bequest of a successive life-interest in personal property after the death of the survivor to the eldest son then living. By a codicil, the testator revoked so much of his will as gave the property to D, leaving C, on the death of A and B, in possession. Held, that the revocation operated as a revocation not only of E's interest, but also of the interest of the other children. *Wells v. Wells*, xxiii. 4.

10. *Lapse by revocation.* A testator gave his real and personal property to his eight nephews and nieces by name, with a proviso, that if any of them died in his lifetime, without leaving issue, their shares were to be divided among the survivors, in the same manner as the original shares. By a codicil, the testator revoked the shares given to two of the nephews. One of the nephews died in the lifetime of the testator. Held, that the shares of the two nephews lapsed by the revocation, and that the share of the other six nephews and nieces remained. *Boulcott v. Boulcott*, xxiii. 128.

11. *Second revocation—First gift not revived.* Where a testator gave a legacy to a certain person, and afterwards, by a codicil, revoked the legacy and gave another gift, and by a still later codicil revoked the second gift, the first gift was not revived by the revocation of the second gift. *Wells v. Wells*, xxiii. 4.

12. *Unrevoked gift of tithes—"Real estates."* A testator gave by will "all and every my shares, parts, and proportion of and in the tithes of the growing and renewing within the parish of L., and the tithes of the glebe and except, &c., to hold the same, with the appurtenances, subject to the proviso that, in a certain contingency, said shares, should be paid to the testator for life, and "then and after the expiration of the term of years therein expressed and contained of and in the said tithes." In a subsequent part of the will, the testator gave and devised "all and every my shares, parts, and proportion of and in the tithes of what nature or kind soever and wheresoever situate, subject to the payment of my just debts, &c., in aid of my personal estate as aforesaid," to the testator in strict settlement. The testator made four codicils to his will, after providing for the payment of certain annuities, he gave by the first codicil "all and every my shares, parts, and proportion of and in the real estates of what nature or kind soever, subject to the charge of the said annuities, to the defendant, in strict settlement; and on failure, &c., all his said real estates in such manner as in that behalf should be directed by the testator, declaring it to be his will that the devisees thereinbefore named should have precedence to the devisees of his real estates in his said will, and that the person who should become entitled in possession to his real estate thereby made should, within twelve calendar months, obtain possession of the same, and the surname of Evans, &c." Held, that the gift of the tithes was not revoked, there being nothing to show that it was the intention of the testator that the words "real estates" in the fourth codicil in a different sense than the words "real estates" in the first codicil were used in the will. *Williams v. Evans*, xviii. 329.

13. *Revoking codicil.* Where a will was conceived in such manner as to show that whether or not after acquired property was intended to pass under the will, and afterwards contracted for, and a codicil was then made directing the purchase, &c., which was afterwards done by the testator, and the codicil had been revoked as to the newly acquired property, the will was construed as to that estate as if there had been no codicil. *Wells v. Wells*, xxiii. 4.

14. *Revocation of devise by codicil—Trustee.* In case a testator gives his estate to A and B in trust, and then by a codicil appoints "C to be trustee and executor in place of A," whom he does "not wish to act as executor," the codicil operates as a revocation of the devise to A. *In re Hough's Estate*, vi. 61.

15. A testator, by his will, devised and bequeathed the residue of his real and personal estate to his wife, J. G. and another party, upon trust to sell and convert as therein mentioned, and appointed his wife, J. G., sole executrix. The testator, by a codicil, revoked the appointment of his wife as executrix, "as the duties were too arduous for a lady to perform," and appointed three other parties, "executors in trust" of his will. *Held*, that the testator did not revoke the appointment of his wife as trustee. *Graham v. Graham*, xix. 242.

16. Devise to the children of A held not to be revoked, by an expression in a codicil that they were not intended to take any beneficial interest under the will or codicil. *Cleobury v. Beckett*, xi. 329.

17. *Revocation by subsequent will—Parol evidence.* A. duly executed a will in 1835, leaving B. his sole executrix, and this was the only will found at his death in 1858. G., a party hostile to the will, alleged that, in 1852, A. executed a subsequent will, and proved this by witnesses, who recollected seeing the will, but could speak to none of its contents, except that it began, they thought, "this is the last will and testament of me, A." This will was not found after A.'s death. *Held*, reversing the judgment of the prerogative court, that the *onus* lay on G. to prove, that the later will expressly revoked the former, and was of different contents; that the mere words "this is the last will" were not of themselves sufficient for that purpose; and that, as the evidence failed to establish this, the former will remained valid. *Cutts v. Gilbert*, xxix. 64, reversing decree below, xxix. 597.

18. No authority lays down the proposition, that the execution of a subsequent will, destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in the case where a revocation has been held to be effective, there has been proof of a difference of disposition. *Ib.*

19. To revoke an existing instrument by parol evidence that another will has been executed, and by such evidence alone, though the law may admit of that course of proceeding, is one attended with danger, and consequently the oral evidence produced must be strong and conclusive. *Ib.*

20. *Repetition of legacies—Proof of fraud.* B. made her will, in which she gave T. a legacy of 500*l.* and appointed him executor thereof, jointly with A. C. and L. C. By a codicil, B. revoked the appointment of A. C. and L. C. as executors, and appointed T. sole executor, and gave him 50*l.* for his trouble as such. The capacity of B. was admitted, and A. C. and L. C. prayed probate of the will, without the legacy of 500*l.*, and of the codicil without the appointment of T. as sole executor and the legacy of 50*l.*, on the ground that the legacies and the appointment of T. were fraudulently inserted without the knowledge of B. T. prayed probate of the will and codicil, with the legacies and appointment. *Held*, on the evidence, that B. was aware that the will and codicil contained the legacies and appointment of T. as sole executor, and probate decreed accordingly. *Clearson v. Teague*, vi. 586.

21. *Cancelling.* The deceased duly executed his will in 1846; in 1850 circumstances occurred which rendered this will inoperative, except as to a legacy of 100*l.*; and in December he drew a pen across the will, and wrote at the top of each sheet "cancelled," and also at the end of the will, he wrote, "cancelled by me, this 1st day of December, 1850." *Held* that the will was not revoked, under 1 Vict. c. 26, s. 20, and probate was decreed. *In the goods of Fary*, ix. 600.

XI. *Thellusson Act.*

1. A, the mother of B, by her will, directed trustees to invest 50,000*l.*, and to pay a competent part of the income for the benefit of B, for his life, and to invest the sur-

plus of the income, to the intent that it might accumulate for the benefit of the person who, under the will, should be entitled to it; and, after the death of B, to apply said sum and accumulations, or a competent part, for the children of B, during minorities, or until their portions should become payable; and, when the child should attain twenty-one, to divide the said sum and accumulations among such children equally. A died in 1831. B was living. *Held*, that the trust for accumulation came within the exception to the 2d section of the Thellusson Act, and was not *Middleton v. Losh*, xvii. 423.

2. A testator gave the residue of his personal estate to trustees, in trust, to receive and accumulate the income from time to time during the life of his niece, and after her death to transfer the securities and accumulations to her children in equal shares, the shares of male children to be vested at twenty-one, and those of females at twenty-one or marriage. Then followed other provisions with regard to what the testator sometimes called the "portions" and sometimes the "shares" of such children, as to maintenance and education, and if the trusts for the benefit of the children of his niece should fail, there were similar trusts for the benefit of the children and issue of other parties, and failing those trusts, for his own next of kin. The testator's niece was living, and had survived the period of twenty-one years from the death of the testator. *Held*, that this provision was not one for raising portions within the meaning of the 2d section of the Thellusson Act; that from the expiration of twenty-one years from the testator's death, the trust for accumulation was void; and that from that time until the death of the niece, the legal personal representative of the testator was entitled to the accumulations. *Bourne v. Buckton*, ix. 144.

3. A testator, after disposing of parts of his real and personal estate for the benefit of his granddaughter, F. E., for life, and after her death for her children at twenty-one, gave all the residue of his real and personal estate to trustees, upon trust to accumulate the income and transfer one moiety of the corpus and accumulations to the children of F. E., and the other moiety to the children of his nephew, C. W. C., the shares to be transferred to them at their respective ages of twenty-one years. Twenty-one years after the testator's death expired in 1847. Upon a bill filed by F. E., who never had any children, it was *held*, that the direction to accumulate for the twenty-one years from the testator's death was void under the Thellusson Act; that such accumulations were not within the 2d section of the act; that they were not imposed of; and that, at the expiration of the twenty-one years, the income of the estate belonged to the testator's heir at law, and the income of the personalty to the testator's next of kin. *Edwards v. Tuck*, xvii. 485. See p. 774.

4. A direction to accumulate is only valid for one of the periods mentioned in the Thellusson Act. *Wilson v. Wilson*, iii. 138.

5. Accumulations directed by will and resulting by operation of law. If a testator directs that to be done which as a necessary consequence leads to an indefinite accumulation, he must be taken to have directed accumulation within the meaning of the "Thellusson Act." *Semble*, that the distinction, that where the accumulations directed by a will are such as would result by operation of law from the dispositions contained in the will, independently of directions to accumulate, they are not prohibited by the statute, is not a sound distinction. *Tench v. Cheese*, xxxi. 392.

6. Cesser of accumulation—Payment of portions—Accumulation for payment of portions. By a marriage settlement of 1823, family estates at B., of which Lord B. was tenant for life in remainder, were charged with a sum varying from 20,000*l.* to 40,000*l.* according to the number of younger children of Lord B., for their portions, which portions were to be divided and payable among the younger children, as Lord B. should by deed or will appoint; and in default of appointment, equally to be divided among them, and payable at the decease of Lord B., with a power in Lord B. of advancing any child's portion in his lifetime. The Bishop of D., the great uncle of Lord B. in his will, dated in 1825, reciting the settlement of 1823, bequeathed 15,000*l.* to trust

upon trust to accumulate the same during the lifetime of Lord B., or if he should die within the term of twenty years from the decease of the testator, for such further period as should make up the full term of twenty years from the decease of the testator; and upon completion of the accumulation, to apply the same, or a competent part thereof, in discharge of the said portions, when and as the same respectively shall become payable, and in exoneration of the hereditaments charged therewith; with a proviso, "that if, before the expiration of the period for accumulation, the accumulated fund should be of sufficient amount for the purposes aforesaid, then the accumulation shall thereupon immediately cease." The testator also gave certain chattels to go as heirlooms with the settled estates, and bequeathed 30,000*l.* for building a mansion-house upon the same. The testator died in 1826. The number of Lord B.'s younger children was such that 40,000*l.* would be raisable under the marriage settlement. In 1847, twenty-one years after the testator's death, the accumulated fund amounted to 35,622*l.*; at the time of the institution of this suit it amounted to 43,643*l.* Lord B. was still living, and had only appointed a small sum, by way of advancement, to one of his younger children. *Held*, first, upon the construction of the will, that the proviso as to the cesser of accumulation applied to the period of Lord B.'s lifetime, as well as to the twenty years from the testator's death. Secondly, assuming this case to be within the 1st section of the Thellusson Act, 39 & 40 Geo. III. c. 98, (reversing the decision below,) that the sum accumulated within the twenty-one years was, so soon as the 40,000*l.* was accumulated, a fund applicable to the payment of any of the younger children's portions which were then payable, and would be applicable to the rest of the portions when they should become payable; and that the latter part of the 1st section would be satisfied by giving the residuary legatees the difference between the 35,622*l.* and the 40,000*l.*, which was the limit of accumulation. Thirdly, (reversing the decision below,) that this was a case within the exception in the 2d section of the act, it being a provision for raising portions for children of a person taking an interest under the devise; and that the whole accumulation directed was valid. *Semble, contra* the dicta of the court below, (xiii. 445)—First, that the exception in the 2d section, as to accumulation for payment of debts, is not confined to the debts of the person directing the accumulation, but extends to a provision for payment of the debts of any person or persons; and it extends to past and future debts. Secondly, that to bring a case within the exception in the 2d section, it is not necessary that the parent of the portioned child should take an interest in the same real or personal estate, the income of which is directed to accumulate. And, *contra Bourne v. Buckton*, 2 Sim. N. s. 101, s. c. 9 Eng. Rep. 152, that it is not necessary that the parent should take an interest under the particular clause directing the accumulations; but that "such devise" means "such will." *Barrington v. Liddell*, xvii. 188.

7. *Condition precedent.* In case of a gift to A of a certain sum upon her marriage, with all the accumulations thereon from the death of the testator, and the income of the residue of the estate of the testator to B for life with remainders over, the marriage of A is a condition precedent to the vesting of the legacy in her; and in the event of her not marrying, B is entitled to the interest of the legacy from the death of the testator. But in such case the accumulation of interest after the expiration of twenty-one years is prohibited by the Thellusson Act. *Morgan v. Morgan*, ii. 35.

8. *Tenant for life.* A testator gave a legacy of 5000*l.* to A on her marriage, and gave the residue of his personal estate to B for life, with remainder to C, and died in 1825. Upwards of twenty-one years elapsed from the death of the testator, and A was not married. B died in 1838, and the twenty-one years from the death of the testator expired in 1846. At this time the legacy fund consisted, first, of the original legacy; and, secondly, of the interest on the legacy accumulated for the twenty-one years, called "the accumulation fund." *Held*, that the interest of the 5,000*l.* accrued, and to accrue, between 1846 and the death or marriage of A, belonged to C; that the interest on such part of "the accumulation fund" as was produced between 1825

and 1838, accrued, and to accrue, between 1846 and the death or marriage of A longed to the personal representatives of B; and that the interest on the remainder part of "the accumulation fund" accrued, and to accrue in like manner, belonged to C. *Morgan v. Morgan*, vi. 130.

9. *Portion, what is.* When a testator gave a sum to accumulate for a child or children who should live to be twenty-one, and made the parent of such children a residuary legatee, it was held that this sum was not a "portion" within the meaning of the exception of portions in the Thellusson Act. *Jones v. Maggs*, x. 159.

10. *Semble*, a "portion," within the act, is a sum of money secured to a child or children, the income of which is given to the parent. *ib.*

11. If a testator directs his property to be accumulated during the lives of children named in the will, and the life of the survivor, and then to be divided equally amongst all his grandchildren, if more than one, and if but one, then all to that child, the shares of the grandchildren are not portions within the second section of the Thellusson Act. *Burt v. Sturt*, xxi. 515.

12. *Direction for raising portion.* A gift of a residue to accumulate for children. *Held*, not to be a direction for raising "portions," within the meaning of the 2d section of the 39 & 40 Geo. III. c. 98. *Semble*, per the lord chancellor, that where the gift is of a residue for the children of a person who takes any thing under the will, the parent must be considered to be a person taking an interest under such devise, within the meaning of the last part of the 2d section. *Edwards v. Tuck*, xxi. 138.

13. *Cross-remainder.* A testator having directed his property to be divided into two moieties, giving one of the moieties to the children of F. E. as tenants in common to become vested at twenty-one, and giving the other moiety to the children of C. W. C. in the same manner, declared that the share and shares provided for the children of C. W. C. and F. E. respectively, should be vested at twenty-one or marriage, "and that if any such child or children should die without having obtained a vested interest in his or her share, the share of every such child so dying, should accrue and belong to the survivors or survivor of the said children." *Held*, by Tufnell J., that this clause must be read distributively, and that it did not create cross-remainders between the children of C. W. C. and F. E. *ib.*

14. *Accumulation.* A testator devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trust, out of the income to pay 400*l.* a year for the maintenance of his son D, until his death or recovery from a mental malady, and to accumulate the rest of the money; and directed that if his son should so recover, to pay him all the accumulations; and, if his son should die without having so recovered, to apply the accumulations as therein mentioned and appointed A, B, and C his residuary legatees. The son lived more than twenty-one years after the death of his father. *Held*, that the trust for accumulation was void at the end of the twenty-one years from the death of the testator, and that the accumulations arising from the rents after that time belonged to the heir, and not to the residuary legatee. *Wilde v. Davies*, xvii. 466.

15. *Income to be applied in payment of premiums on policies of life assurance.* A testator directed by his will that the income of his property should be applied in payment, among other things, of the premiums on certain policies of assurance for the lives of his sons. *Held*, that such direction did not constitute an accumulation of income within the meaning of the Thellusson Act. *Basil v. Lister*, vii. 157.

XII. Wills Act.

1. The Wills Act does not do away with the distinction between real and personal property, and (except where it is otherwise expressly enacted,) it leaves the operation of words in a will the same as before it passed. *O'Toole v. Browne*, xxv. 210.

2. *Chose in action.* The Wills Act (1 Vict. c. 26,) does not enable a testator

bequeathe a chose in action so as to pass the right of suing to the legatee. *Bishop v. Curtis*, xiv. 49.

3. *General devise of lands including leaseholds.* A testator by his will, devised "all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, &c., at or near W., in the county of D., and B., in the county of Y., and all other his real estates in the said counties and elsewhere, and all his estate and interest therein," to uses in strict settlement. In 1841, the testator made a codicil ratifying and confirming his will. At the time of his making his will and of his decease, the testator was possessed of freehold estates in the county of D., and of some church leases in the same county, which were usually renewable every seven years; in some instances the leaseholds were let and occupied with the freeholds, at undivided yearly rents. Upon part of the leaseholds, nearest to the freehold mansion, ornamental cottages were built, as well as buildings occupied by persons employed about the mansion and freehold estate. *Held*, that under the 1 Vict. c. 26, § 26, passed in 1838, which provides that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will or otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate, if the said testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will, the leaseholds passed under this general devise, and that no contrary intention appeared upon the will so as to prevent the operation of that section. *Wilson v. Eden*, xiv. 41, affirming s. c. ii. 345.

4. *Lapse of legacies.* The provisions in the Wills Act against the lapse of legacies given to children, render it necessary for a testator, intending that a legacy to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will. *In the Matter of Mores's Trust*, xvii. 577.

5. *Execution of powers over real and personal estate.* The Wills Act, 7 Will. IV. & 1 Vict. c. 26, has not, by making the will speak as from the date of the death of the testator, and thereby passing real estate of which he was not possessed at the date of the will, assimilated the doctrine as to the execution of powers over real estate to that of the execution of powers over personal estate. *Lake v. Currie*, xiii. 485.

6. *Estate for life in copyholds.* Before the passage of the Wills Act, a testator gave "all his copyhold estate called M." to S. for life, charged with an annuity to the testator's brother; and, after the death of S., "the same copyhold hereditaments" to the children of S., in equal shares. A subsequent clause gave "all his other copyhold messuages, &c." to A. in fee. There was a residuary devise of "all his real estates, not otherwise disposed of" to V. in fee. S. and her child being dead, it was *held*, that the children of S. took only a life-estate in the copyhold M.; and that the remainder upon that estate passed to V. and not to A. *Vick v. Sueter*, xxv. 71.

7. The 24th section of the Wills Act, 1 Vict. c. 26, which enacts that a will is to be construed to speak as if executed immediately before the death of the testator, does not apply to the objects of a testator's bounty who are to take the real and personal estate given by the will, but only to the real and personal estate comprised in the will. *Bullock v. Bennett*, xxxi. 463.

8. *The Mauritius—Unattested will and codicil.* Deceased, domiciled at the Mauritius, left an unattested will and codicil, which were duly registered in the proper court there. Probate of both papers was allowed to pass, the Wills Act not extending to the Mauritius. *In the Goods of Smith*, ii. 598.

XIII. Miscellaneous Cases.

1. *Codicil—Revival of legacy.* The confirmation of a will by a codicil does not

revive a legacy adeemed in the interval between the will and codicil. *Montagu Montague*, xxi. 575.

2. *Double portions.* The presumption is against double portions, and the burden of proof lies on those who contend for two portions, to show that this presumption is rebutted. *Ib.*

3. *Devise to son on condition of making weekly payment to his mother—County Certiorari.* Devise by a testator to his son of certain freehold and leasehold estates and chattels as follows: "On condition of my son paying the following sums, *inter alia*, I will, order, and direct him to pay unto his mother the sum of 4s. a week, and every week during her natural life. Held, that this was not a claim legacy within the 65th section of the County Courts Act, 9 & 10 Vict. c. 95, but debt, and an action having been brought in the county court, the court granted certiorari. *Longbottom v. Longbottom*, xvi. 528.

4. A codicil does not for all purposes republish a will so as to make it speak at the time of the testator's death. *Stilwell v. Mellersh*, v. 185.

5. Will delivered out to the foreign secretary, for the purpose of being given to legal authorities in France. *In the matter of Napoleon Bonaparte*, xviii. 599.

6. *Trial of validity of will.* It is at the option of the heir at law to have the validity of a will tried in an action of ejectment, or by an issue *devisavit vel non*. *Gro Young*, vi. 38.

7. *Devisable interest.* Where a testator has a right to set aside a voidable conveyance, this is an equitable estate in him, descendible to his heir, and which he may dispose of by his will. *Stump v. Gaby*, xvii. 357.

8. As to what is a devisable interest—see *Morgan v. Holford*, xvii. 174.

9. *Declarations of testator before and after execution of will.* Declarations made by the testator before the execution of his will, that he intended to make provision for himself in whose favor certain alterations appear in the will, may be given in evidence to prove that the alterations were made before the execution of the will; but such declarations made by a testator after the time when the will is executed, though they had provided for a person whose name occurred on an interlineation, would not, however, be evidence that the interlineation was made before execution. *Doe d. Shall v. Palmer*, vi. 155.

10. *Delegation of trust.* A testator gave and devised the residue of his real personal estate to A, B, and C, their heirs, executors, and administrators, upon certain trusts, and empowered his said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, to sell. The surviving trustee devised the trust estate, and his devisees contracted to sell it. Held, that there was so much delegation about their having the power to sell, that the court would not compel the purchase to perform the contract. *Wilson v. Bennett*, xiii. 431.

11. A residuary bequest is a legacy within the 9 & 10 Vict. c. 95, s. 65. A bequest of money may be a legacy within the meaning of that section, although payable through the intervention of a trustee. *Pears v. Wilson*, vi. 445.

12. *Executors directed to carry on trade—What estate liable for debts incurred thereby—Equitable mortgage.* Where a testator by his will directs his executors, to whom he has given all his estate in trust for his son, subject to an annuity to his widow, to carry on, for a limited time, a certain business, freeing them from all personal liability for debts incurred thereby, without specifying what assets shall be so liable, all real and personal estate, against which are also other legal liabilities, will be liable therefor. And a deposit of title deeds, by the executors, to secure a loan necessary for the carrying on of said business, will constitute an equitable mortgage. *M'Neillie v. Acton*, xxi. 3.

13. *Bequest of chattels subsequently lost at sea—Interest in insurance money.* A testator bequeathed chattels to A, and afterwards, having insured them against loss at sea, embarked with them in a ship and is lost with them, then A has no interest in the insurance money recovered by the executors. *Durrant v. Friend*, xi. 2.

14. *Direction by testator to raise moneys by mortgage—Master's report in favor of sale.* A testator directed moneys required for the purposes of his will to be raised by mortgage of part of his real estate; the master reported that the money could be more advantageously raised by a sale of part of the estate; but the court declined to direct a sale. *Drake v. Whitmore*, xix. 316.

15. *Evidence—Presumption of survivorship—Shipwreck.* A testator, by his will, gave all his real and personal estate to W., in trust for his wife absolutely, "and in case my said wife shall die in my lifetime, then in trust for such of them my three children A, B, and C, as shall attain the age of twenty-one, or marry under that age; or in case all of them shall die under the age of twenty-one years, being sons, or under that age and unmarried, being a daughter," then he gave all his property to W. absolutely. The testator, his wife, and children, were drowned at sea; the testator, his wife, and two of his children, B and C, being washed off the deck of the ship by the same wave, and A was proved to have survived the others. W., as executor, proved the will. Upon a bill by the administratrix of A, claiming as under an intestacy, it was held, that, in the absence of evidence, the court would not presume that the testator survived his wife; and that as against the next of kin, the onus of proof rested upon the person claiming under a will to make out a perfect title, by analogy to the rule as to the heir at law in the case of real estate; and the fact of survivorship not being proved, the property would go to the next of kin; and, also, upon the construction of the will, that the benefits given to W. were to be dependent upon the survivorship of the husband. *Underwood v. Wing*, xxxi. 293.

16. *Incapacity of executor.* The residuary clause in a will was altered by striking out the words "to A in trust," and substituting "to B." A was named executor. Administration with the will as altered annexed granted to B, as interested in the residue, A being incapable of acting, and proceedings being taken in chancery to ascertain the construction of the residuary clause. *In the Goods of Boschetti*, xiv. 600.

WINDING-UP ACTS.

I. WHAT COMES WITHIN THEM.

II. LIABILITIES OF DIRECTORS, &C.

III. OF CLAIMS.

IV. WHO MAY BE MADE CONTRIBUTORIES, &C.

V. OF CALLS.

VI. PRACTICE, AND HEREIN OF OFFICIAL MANAGERS; COSTS.

VII. MISCELLANEOUS CASES.

I. *What comes within them.*

1. *Club—Association.* A club is not a company within the meaning of the Joint-stock Companies Winding-up Acts; and although it is an "association," yet it is not an "association" within the meaning of the 12 & 13 Vict. c. 108, that act pointing at "associations" established for profit. *In re St. James's Club*, xiii. 589.

2. *Company for commercial or trading purposes.* *Semble*, that a body of persons associated to obtain an act of parliament to enable them to act as a company for "commercial or trading purposes," whose ultimate though not immediate purpose is commercial or trading, is within the 7 & 8 Vict. c. 111. But it is well settled at law that there is no partnership between such an association, "no common power of binding each other merely by such a relation; each binds himself by his own acts only." *Bright v. Hutton*, xii. 1.

3. *Object of loan society being profit—Order granted whether beneficial or not.* In a petition for winding-up a loan society whose business had virtually come to an end, it was held, that the petitioner, being a member, was entitled to present the petition,

4. The mere presence of a person at a meeting does not make him responsible for a resolution there passed, if he protests against it. And where a director of a company opposed a resolution at a meeting of the subscribers, but finding himself in a minority, insisted on the insertion of certain terms, believing that those terms would prevent the plan of the majority from being carried out, it was *held*, that he was not responsible if the plan was carried out on those terms. *Re The Direct East and West Junction Railway Co.* xxxi. 430.

III. *Of Claims.*

1. *Claim by secretary for his salary.* On the formation of a company it was resolved that no director should be personally responsible for the salaries of the officers, and that no officer should obtain payment for his services until a sufficient sum should have been obtained by the funds of the company for that purpose. It was also agreed that the officers should receive half their salaries until it might be convenient to the company to pay the whole. Upon the company being wound up, the master disallowed the claim of the secretary for salary during the two years he had acted as such, and one year afterwards for default of notice. *Held*, that the claim for the full amount of salary for two years only must be allowed. *Cope, ex parte*, i. 87.

2. *By committee appointed to wind-up.* A committee appointed by the shareholders of a dissolved trading company, for the purpose of winding-up the concern, incurred expenses in procuring the insertion of certain clauses in a general act of parliament which had the effect of making it applicable to the winding-up of the particular concern. *Held*, affirming the decision below, that these expenses were not payable out of the assets of the company, the committee not having been authorized by the shareholders to incur them. *Ex parte Cropper*, x. 29; s. c. ii. 72.

3. *Winding-up acts—Claims under.* A claim was not admitted as a proof, since it did not establish a debt against any particular persons, or against the whole class of the contributories. *Lloyd, ex parte*, iii. 279.

4. *Jurisdiction of master—Allegation of claim.* Where a company or association is ordered to be wound up, the master has no jurisdiction under the order to take cognizance of a claim not alleged to be due from the company, but only from individual members of it, and it makes no difference that the money was applied for the purposes of the company. *Ex parte Wryghte*, xiii. 182.

5. *Claim by trustee of company having borrowed money on his own bond.* If a trustee of a company borrow money for the company on his own bond, and it be decided against the company that he had a right to borrow the money, he is entitled to claim the bond debt, and the costs, charges, and all expenses growing out of his endeavors to recover the same from the company, which had left him to pay the bond debt. *In re The Oundle Union Brewery Company*, xiii. 402.

IV. *Who may be made Contributories, &c.*

1. *Provisional committee-man.* A provisional committee-man of an abortive company who pays his assessment on the number of shares which the managing committee resolve shall be assessed to him, and who, at the time of payment, is assured that he will be protected from creditors, cannot be held to be contributory. *Roberts's case*, xiii. 7.

2. *Member of a provisional committee not liable to other members.* A person, by becoming a member of a provisional committee in a railway or other company in the course of being formed, does not thereby make himself liable to the other members of the provisional committee, or to any of the officers of the association, in respect of the dealings between those other members or their officers, and third parties, strangers to the association. *Cottle, ex parte*, i. 9.

3. A member of the provisional committee accepting shares allotted him in character, is liable as a contributory, although there is no proof of the publication of any prospectus with his name, or any other publication or pledging of his credit to the world. *Nicholay's case*, iv. 24.

4. *Non-acceptance of shares by committee-man.* A provisional committee-man, has not accepted or bound himself to take shares in the company about being for nor in any manner authorized expenditure on his behalf, is not liable to contribute towards expenses incurred in preparing to establish the company. *Carmichael parte*, i. 66.

5. *Allotment of shares to provisional and managing committee-men.* A and B provisional and managing committee-men of an abortive company. Before they became so, it was resolved that a certain number of shares should be allotted to member of the two committees. Subsequently, it was determined that a less number should be allotted for the time being to the members of the provisional committee and the other shares were kept in reserve. A and B executed the deed of settlement for this smaller number of shares. Held, that A and B were liable only in respect of the shares allotted and for which they executed the settlement. *Ex parte Shillington*, xii. 261.

6. *Attendance upon one meeting, but taking no shares.* H. was a member of a provisional committee of a railway company, and attended one meeting, at which he moved a resolution for the appointment of the officers of the company. He had taken no shares and had not signed the subscribers' agreement. There being no evidence that any expenses remained unpaid which had been incurred with his sanction, it was held, that his name had been improperly placed upon the list of contributories. *parte Hight*, xix. 571.

7. *Attendance at a meeting of the provisional committee—Abandonment of project.* A was a member of a provisional committee of a projected railway company, and, as such, attended a meeting of the provisional committee, and concurred in the appointment of a number of gentlemen as a committee of management. This committee of management, immediately on their appointment, undertook the exclusive conduct of the affairs of the company, and gave orders to engineers to make surveys, &c. and the name of the company, and incurred considerable expenses in respect of the undertaking, but, after some time, abandoned the concern. The provisional committee after such abandonment, held a meeting, at which, under the impression that the members were personally liable, they came to certain resolutions as to contributions from themselves in respect to the expenses incurred. A attended this meeting, and took an active part in carrying out the resolutions. Held, that A was not liable as a contributory. *Ex parte Tanner*, ix. 162.

8. *Having taken shares and been on provisional committee.* A party was held liable to be placed on the list of contributories from having taken shares and been on a provisional committee, though he never executed the subscribers' agreement, with which it was expressly stated he could take no interest in the company. *Brittain parte*, vii. 28.

9. *Non-allotment of shares—Taking no part in any of the proceedings.* A member of the provisional committee of an association to form a railway company which failed, applied by letter, begging that shares might be allotted to him. The shares were not allotted. He took no part in any of the proceedings, nor attended any of the meetings. Held, that he was not a contributory, the circumstances being in these respects different from *Upfill's case*. *Conway's case*, viii. 250.

10. *Consent to have name placed on provisional committee.* A person consented to have his name placed upon the provisional committee, but not otherwise interested in the company, and giving no authority for the incurring any expenses, is not liable to contribute towards the expenses of the company. *Clarke, ex parte*, i. 69.

11. *Consent to be nominated—Declining to take shares.* B. consented to be nominated

a provisional committee-man of a projected company, upon an assurance that he would incur no liability, nor be bound to take any shares. By a letter to the secretary he afterwards declined to take shares, and requested that his name might be taken from the list. The letter was laid before the managing committee, who resolved that the secretary should be instructed to inform B. that his wish should be complied with. After the scheme had been abandoned, B., in ignorance of the resolution, attended meetings, at which it was agreed to pay certain sums, and afterwards paid them, but upon the faith that no further claim would be made upon him. *Held*, that B.'s conduct prior to the abandonment did not render him liable to the creditors of the concern, or to contribute to the indemnity of those who were liable to the creditors; that the partial payments made by him after the abandonment did not render him liable to further payments; and that he was not properly on the list of contributories. *Ex parte Besly*, iv. 149.

12. *Liability to contribute beyond deposit.* A., a member of the provisional committee in a projected, but abandoned company, who was not present at the meeting when the managing committee was appointed, and who never acted in the affairs of the company, but who accepted shares as a provisional committee-man, and paid his deposit thereon, is not liable at law to a creditor, on the employment of the managing committee, for work done, necessary for obtaining the proposed act of parliament. And *held*, that A. is not liable in equity to contribute, beyond his deposit, towards the expenses of the company. *Bright v. Matson*, xii. 1. See *Upfill's case*, i. 13; s. c. iv. 128.

13. *Shares allotted in trust.* A provisional committee-man who has accepted shares allotted to him in "that character" is liable as a contributory. *Sichel's case*, i. 194.

14. *Taking shares.* A consented to become a provisional committee-man on condition that he should not incur any liability. Afterwards he took shares in the company without repeating the stipulation. *Held*, that by taking shares he became liable as a contributory, under the authority of *Upfill's case*. *Ex parte Markwell*, xiii. 456.

15. The mere fact of a person consenting to be nominated a member of a provisional committee does not authorize the committee to pledge his credit. *Ex parte Besly*, iv. 149.

16. *Extent of liability.* If A agrees to take certain shares in a company about to be formed, and acts as provisional committee-man in the attempted formation, which is not successful, he cannot be compelled to act as contributory any farther than to the extent of his positive agreements. *Ex parte Stocks*, xv. 438.

17. A member of the provisional committee of a company was held liable to contribute to the expenses of the committee incurred between the day on which he accepted his shares and the day on which the company ought to have taken certain steps in order to become established, which steps were never taken. *Bright's case*, vii. 133.

18. A person accepted shares in a projected company and paid the deposit upon them, but did not belong to the provisional committee; the company never came actually into existence, owing to the requisite amount of capital not being paid up; it was *held* that he did not, by taking such shares, render himself liable for any expenses incurred without his sanction. *Maudslay, ex parte*, i. 61.

19. *Subscribing deed of settlement—No stipulation as to time of payment.* If one subscribes the deed of settlement of a joint-stock insurance company for a given number of shares at a given price, and no stipulation be made that the sum shall be payable at any fixed period, or by instalments, nor the subscription be in any way modified, and the company become bankrupt and wind up, the subscriber must contribute to the amount of his subscription. *Ex parte Lord Talbot*, xiii. 205.

20. *Resignation of agent of company.* If the resignation of an agent of a company who has accepted shares, but paid nothing on them, be accepted as to the

agency, but not as to the shares, he may be held contributory. *xiii. 435.*

21. *Allotment of shares—Assent to acknowledgment of receipt.* A person who has applied for shares in a company, received a deposit on such allotment, and afterwards assented to a copy of the receipt of such deposit by the company, is a member to be made contributory, even if he has not gone through the deed of settlement of the company. *Ex parte Yelverton, 1882, 11 Q.B. 171.*

22. *Allotment—Non-payment of deposits—Preliminary expenses.* Shares have been applied for in a projected company, but made in accordance with the requisition for that purpose, informing the applicant of the allotment of shares to him, and he has not paid the deposit. He is not a contributory towards preliminary expenses.

23. A person who has accepted shares in a projected company, and has not paid the deposit on them or not, is not responsible or liable for the expenses incurred in the process of the formation of such company. *See Onions' case, v. 8.*

24. *Acceptance and allotment of shares—Variation of plan.* Where there was an offer to A of shares in a company, and subsequent allotment, but no deposit paid, it was held that he was contributory, though before the contract was complete the company varied the projected plan by adding a branch railway. *Manwaring's case, 1872, 11 Q.B. 171.*

25. In answer to a letter from the secretary of a company, A took a hundred shares, he wrote, "I have to request that you reserve for me." The court directed an issue to try whether A was a contributory. *Onions' case, vii. 64.*

26. *Acceptance by letter.* The managing committee of a company, that each provisional committee-man should be offered 25 shares, was by letter offered that number, which he by letter accepted. He did no other act than write to accept the shares. He never accepted the 100 shares. *Held*, that although the company issued a second letter, stating that the remaining 150 shares were to be allotted to him, the committee of management were able to effect it, he was not a contributory. *i. 190.*

27. *Acceptance of shares and payment of deposits.* The payment of deposits cannot make a man liable to help in the formation of a company in which he had agreed, when he had not paid the deposits. *Ex parte Beardshaw, xv. 330.*

28. *Taking part in proceedings—Acceptance.* A person who has applied for shares, and afterwards took part in proceedings in which 500 shares were allotted, and he did not pay the deposit, it was held that his name should remain on the list of contributories, besides the original 100. *Morrison, ex parte, iii. 129.*

29. *Want of signature to subscribers' agreement.* In a company, where a party applying for shares, but no signature of the party to the subscribers' agreement or parliamentary contract, it was held that he was not a contributory; that this was the law prior to the Companies Act, 1862, and the provisions of that statute have made no alteration. *Hutton v. Thompson, v. 4.*

30. *Conditional acceptance of shares.* A request to a company to reserve shares, in answer to an offer of allotment of such shares, and a subsequent promise to pay the deposit, does not bind the promisor, until it is shown that the company has accepted the offer. *Manwaring's case, x. 222.*

31. An allottee is not a contributory merely because he may be entitled to receive back what he paid as deposit. *Carrick's case*, v. 114.

32. A committee-man is not a contributory unless he authorized expenses to be incurred. *Ib.*

33. *Shareholder who has paid up in full.* A shareholder in a joint-stock company (completely registered) who has paid up the full amount of his shares in such company, is still liable as a contributory under the Winding-up Acts, to pay the necessary calls to defray the expenses of winding up the company. The same rules apply to such shareholder as to partners in a common partnership, wound up under a decree of the court; and it is not competent to parties entering into a joint-stock company to stipulate that they will not be liable to the costs of any proceedings that may be instituted against them. The effect of, and the construction to be put upon the Registration Act, 7 & 8 Vict. c. 110, considered with reference to the rights and liabilities of shareholders. *Greenwood's case*, xxiii. 422.

34. *Shares improperly given, and recalled by directors.* The directors having improperly given shares to the managing director, he induced his brother to execute the deed in his name for part of these shares. The directors subsequently recalled these shares. *Held*, that the brother was a contributory. *Holt's case*, iii. 208.

35. *Prospectus of company.* The prospectus of a railway company set forth that "power is hereby given to the provisional committee-men to apply the funds received in payment of expenses of plans," &c. The scheme proved abortive. An allottee of shares was held not to be a contributory. *Ex parte Hirschel*, vi. 101.

36. *Deposits paid, but recovered back at law.* E. had taken shares in a joint-stock company and paid the deposit, but had since recovered back the deposit in an action at law against one of the directors. *Held*, that she was not liable as a contributory under the Winding-up Act. *Walstab, ex parte*, i. 170.

37. *Agreement to take back shares.* The directors of a joint-stock company passed a resolution in 1840, to take a number of shares among them, and signed letters agreeing to take them. One of them signed a letter for 100 shares, and, on a call being made, gave his promissory note for the amount. The deed of settlement contained a power for the directors to buy shares, and a provision that a shareholder transferring should be, as between him and the company, exempt from all demands up to that time. This party, in 1842, retired from the direction, and applied to have the 100 shares taken back, which was agreed to, and his letter of application and promissory note delivered up to him. *Held*, that he was not a contributory. *Cockburn, ex parte*, i. 139.

38. *Deposits paid, but deed not executed.* A party took shares in a joint-stock company, paid deposit and calls, but did not execute the deed. Having neglected to pay a call, the directors, in pursuance of a clause in the deed, resolved that his shares were forfeited, and communicated this resolution to him. The company being ordered to be wound up, the master placed this person's name on the list of contributories; but, upon appeal, it was declared that he was not a contributory. *Baily, ex parte*, i. 141.

39. *Director of banking company agreeing to take additional shares.* A director of a joint-stock banking company held twenty shares as a qualification, and executed the deed in respect of them. The directors having subsequently agreed that each should take a number of additional shares, this director signed a letter agreeing to take 100 more shares, and gave a promissory note for them. The deed was never executed in respect of these shares, nor were the shares ever allotted. Debtor and creditor entries were made in the bank ledger concerning the dividends on the shares, and the interest on the note. The note, when due, was not honored. The master included the executor of this director in the list of contributories in respect of the whole 120 shares, and, on appeal, his decision was affirmed. *Ex parte Robinson*, iv. 38.

40. Another director in the same company, having qualified in the same manner,

and having agreed to take 500 additional shares, as in the last case, and having a promissory note for 5,000*l.*, afterwards, before the note became due, died, no share being allotted. His executors applied to the directors to know the number of shares held by him, and were told twenty shares, which twenty shares the executors sold and transferred in due form. The directors afterwards cancelled the 500 shares and the note. *Held*, that the executors were not properly on the list of contributories in respect of these 500 shares. *Ex parte Meux's Executors*, iv. 40.

41. *Assent of executor.* A proprietor of shares bequeathed them to an unmarried lady, who subsequently married. Neither on the death of the testatrix, nor on the marriage of the legatee, were the regulations of the deed of settlement complied with. The court was of opinion that there was no sufficient evidence of the assent of the executor of the testatrix to the legacy, or that the directors of the company had approved of the legatee and her husband or all of them, as proprietors or priors of the shares; and, therefore, it was *held*, that the legatee and her husband were not liable as contributories, and that the liability of the executor not having ceased, his name was properly placed on the list of contributories, without qualification. *Ex parte Wood*, xvii. 236.

42. *Executors—Power of master to review his own decisions.* A B owned ten shares in a joint-stock banking company. He died, having by his will appointed D and E F executors, who proved the will, and in 1840 the probate was entered in the books of the bank. The name of C D appeared as executor on the dividend lists of 1845 and 1846, but on the warrants his name appeared without any additions and notices were addressed to him alone. In his letters to the secretary he styled himself as executor of A B. In 1845, he, in his character of executor, transferred fifteen of the shares to a purchaser. The master placed C D's name alone on the list of contributories, excluding E F, but on reviewing his decision included I. *Held*, that, under the 17th section of the act of 1849, the master had jurisdiction to review his decision, and that the name of E F was properly on the list. *Ex parte Croxfield*, iv. 125. See also s. c. xiii. 284.

43. *Transfer of shares—Power of directors.* Some of the shareholders of an prosperous company paid a sum to the directors, which sum was accepted, and they were discharged from all liabilities, their shares being transferred. The court *held* that the directors had no power to grant such a discharge, and all the shareholders were made contributories. *Ex parte Bennett*, xxvii. 572.

44. *Powers of directors—Executors.* The directors of a company may do acts binding upon the whole body, such as waive formalities in regard to the transfer of shares and if the dividends on shares be paid to one of two co-executors, when the company had a right to retain them till certain formalities were gone through, it is a privilege granted alike to both executors, although the one not receiving any of the dividends supposed that the company had insisted upon its rights, and that the other executor had become a member of the company with respect to the shares held by the testator. Hence both might, in such case, be made contributory. *Ex parte Croxfield*, 284.

45. *Waiver of formality in transfer of shares.* In cases where formality in the transfer of shares has been waived by the purchaser, then the purchaser cannot be placed on the list of contributories when the company is wound up. *Ex parte Ward*, xi. 128.

46. *Liability of transferrer of shares.* If, by the deed of settlement of a company it be provided, that, in case of any complete and effectual transfer of shares from one holder to another person, then the liabilities of the first owner shall cease and the purchaser shall become a proprietor in said company, with all the rights and liabilities of the previous owner, the transferee becomes, in respect to the transferred shares, subject to all the liabilities of the company, as well those incurred before, as those incurred after the transfer. *Ex parte Cape's Executor*, xiii. 325.

47. *Rules of mining company—Transferree of shares.* Where the rules of a mining company provided that any shareholder might determine his liability by giving notice to the purser of his intention, depositing the transfer and signing a relinquishment of all claims upon the company, and S., a shareholder, entered into a contract with M. to sell him his shares, M. to take them subject to all the conditions on which they were held, and the two parties went together to the office and deposited the transfer, without having given any previous notice, and the company was afterwards wound up, it was *held*, that M. was liable as a contributory, and his liability was not limited to the time from which he took the shares. *Ex parte Mayhew*, xxxi. 331.

48. *Mining company—Relinquishment of claims on company.* Where it was provided by one of the rules of a mining company that any shareholder might determine his liabilities by giving notice to the purser, depositing with him a transfer, and signing a relinquishment of claims on the company, and one of the adventurers signed a document furnished him at the office, relinquishing his claims in respect of shares, it was *held*, that the company being afterwards wound up, such adventurer was not liable to be made contributory. *Ex parte Fenn*, xxi. 331.

49. *Purchaser of shares.* By a clause in the deed of settlement, shareholders were allowed to sell and transfer their shares with the consent of the directors, "such consent to be testified by the managing directors signing their names in the margin of the instrument of transfer." In the present case it was not done, but across the notice to the directors of the vendor's intention to sell was written the word "transferred," signed by a director. The deed, which was executed in the place of the deed of settlement, was not signed by the purchaser, but in his name by a member of his family, who was in the habit of signing for him, but this was unknown to the directors; and the purchaser subsequently received regularly the dividends upon the shares. The deed of settlement contained a clause, that "all sales and transfers of any shares not made conformably to the provisions of the deed of settlement, and according to the regulations of the directors, shall be invalid at law and in equity." *Held*, all matters of substance having been complied with, and the deed which was executed being considered equivalent to an execution of the original deed by the purchaser, that the purchaser was properly placed on the list of contributories. *Ex parte Straffon's Executors*, x. 275.

50. *Estoppel.* The doctrine of estoppel applies to questions as to contributories under the Winding-up Acts, as well as to any other cases. *Ib.*

51. If a man, who is about to execute a particular deed, executes another deed at the request of the persons who have a right to call upon him to execute the particular deed, and the deed he executes contains a covenant that he will perform all the covenants in the principal deed, he is, by infusion as it were, as much a party to the principal deed as if he had executed that deed. *Ib.*

52. *Want of formality.* *Semble*, if any formalities have been wanting upon a sale and transfer of shares, either the seller or the purchaser has a right in this court as against the other to compel him to do all acts necessary; as to the seller, to relieve him from all liability as owner; as to the purchaser, to clothe him with the complete legal interest. *Ib.*

53. *Liability of vendor of shares.* A shareholder in a joint-stock company sold his shares to a trustee on behalf of the company, taking, pursuant to a resolution of the company, a loan note, at a certain rate of interest, at five years' date. A regular certificate of transfer was given, and entry made of the substituted shareholder's name. *Held*, that the vendor of the shares was still a contributory, without qualification. *Laves, ex parte*, ii. 106.

54. *Transfer by an agent.* A. purchased 120 shares in a joint-stock company. The deed of transfer of ten of these was executed by an agent. No other deed of transfer was executed. The purchaser received the dividends upon the whole. *Held*, that

he was a contributory in respect of the whole 120 shares, as on the list. *Straffon's Executors, ex parte*, iii. 101.

55. *Losses before transfer—Evidence of.* The holder of transferred them. Before the transfer balance-sheets were appeared that there had been considerable profits. After suspended payments, and an order for winding up was made the transferrer on the list of contributories, the affidavit of the balance sheets was not admitted to prove that, in considerable losses before the transfer. Motion refused. *Holm*

56. *Liability after transfer.* In the deed of partnership directors were ordered to present at each semi-annual meeting the condition of the company; and that this balance-sheet the shareholders, unless, &c. In case of transfer, the transferrer from all obligation as to subsequent losses, &c., but not from period of the transfer. The directors for several years at meetings, very erroneous balance-sheets, purporting to show had been made; and they declared dividends, when, in fact, had been sustained. A shareholder sold and transferred to the directors, more than three years before the order for winding up. *Held*, that the losses to which a transferrer of shares would must be taken to mean such as appeared upon the balance-sheet losses appeared upon them, it was not competent, by other evidence of such losses; and that the balance-sheet was binding. *Ex parte Holme*, xiii. 341.

57. *Advancement as a loan—Fraud on parliament.* Where the holders of a projected company were paid back their full value they had advanced money only as a loan to the company, in the order of the house of commons, it was *held*, that such shareholders, such shareholders were liable as contributories. *Clark*

58. *Giving promissory note in payment for shares.* A joint-stock banking company, was a subscriber for, and a member in respect of twenty shares of the company, each director twenty shares as a qualification. The directors subsequently in privity of the shareholders, to appropriate to themselves a portion of credit shares, which they were to pay for, by giving an amount for which each subscribed. A. B. agreed to take a promissory note in payment for, 100 of such credit shares; he also signed himself to pay the deposit and calls on them, but did not execute them. Eight years after the execution of the promissory note, having paid any interest on, or any part of the principal in the books of the company, credit was given to him in the books of the company, and he was charged interest upon the promissory note being wound up, *it was held*, that his executor was rightly a contributory, not only in respect of the twenty shares, but also of the credit shares, although the creation of the credit shares was not proved, were they in fact ever issued or allotted. *Robinson's Executors*

59. C. D. agreed to take 500 of such additional shares, at a price payable in five years, for the amount; he also signed a letter to the deposit and calls on them, but did not execute the deed. He died three months afterwards. Within one month from his death the executors applied to the directors of the company, to ascertain their interest in, or liability to, the company. In answer to this they formed that their testator held twenty shares, which were to be sold to a purchaser; the directors afterwards cancelled the

promissory note. Eight years after the death of C. D., the company was wound up. *Held*, that the executors of C. D. ought not to be placed on the list of contributories and that, although his estate might have been bound, if the claim had been promptly asserted at the instance of the shareholders, yet that so long after the distribution of his assets, the loss resulting from the misrepresentation of the directors must fall upon themselves and the company, and not upon the estate of C. D. *Meux's Executors' case*, xix. 210.

60. *Party having signed subscribers' agreement—Deposit unpaid.* A person to whom shares have been allotted in a projected railway company, and who has signed the subscribers' agreement and parliamentary contract, but who has not received his shares or paid his deposit, is liable to be placed on the list of contributories. *Ex parte Bowen*, xxi. 422.

61. *Agreement to take shares.* A person who agrees to take shares in a projected company, which becomes abortive, and to pay a preliminary deposit on them, is not thereby rendered a contributory even with respect to the deposit. *Capper's case*, ii. 77.

62. *Registration, evidence of.* The master, upon winding up a company, excluded certain shareholders from the list of contributories, on the ground that the requisitions of the statute in regard to the deed of incorporation, had not been complied with before the certificate of complete registration was obtained. *Held*, that the certificate of the registrar was sufficient evidence of complete registration, although all the requisite provisions might not have been fully complied with. *Bird, ex parte*, i. 90:

63. *Limitation of three years—Executrix.* An original shareholder in a joint-stock banking company died possessed of shares, and his executrix received in that capacity the dividends for four years, but did not take the steps for becoming a member in her own right. By the deed of copartnership each shareholder was to partake proportionately of the profits and losses; and each shareholder, his heirs, executors, &c., were to observe the stipulations in respect of shares remaining part of his assets. The master struck out the name of the executrix from the list of contributories, upon the ground that more than three years having expired since the death of the shareholder, his estate was not liable. *Held*, first, that the limitation of three years, contained in the 7 Geo. IV. c. 46, s. 13, applied to claims by creditors only, and not to claims for contribution as between the partners. Secondly, that, in the absence of any proof that the executrix had done any thing which could have the effect of constituting her a member in her own right, she ought to be on the list of contributories in her representative character. *Gouthwaite, ex parte*, ii. 57.

64. *Company not to treat transaction with shareholder as void.* A company after having dealt with a shareholder for the purchase of the shares held by him, cannot treat the transaction as void for a non-observance of forms which they had rendered it impossible to observe, and such shareholder's name is rightly excluded from the list of contributories. *Ex parte Bagge*, iv. 72.

65. *Devisee not liable at law.* In a case where a devisee would not have been liable at law, it was *held*, that he was not liable, under the Joint-stock Companies Winding-up Acts, as a contributory. *Hamer, ex parte*, iii. 177.

66. *Set-off of advances made by contributories.* Directors and shareholders in an unincorporated company made *bonâ fide* advances of money for the purpose of carrying on a mine established abroad, and without which advances the property would have been wholly ruined. The money was applied to purposes for which these parties and the other shareholders were jointly personally liable. The company was ordered to be wound up, and the master made a call on these directors and shareholders and the other shareholders, as contributories, and he allowed these parties their several advances as set-off against their calls as contributories. *Held*, on appeal, that the master was correct. *The German Mining Company, in re*, xix. 591.

67. *Authority of manager.* A manager of a mine is authorized to incur debts for wages and goods necessary for carrying on the mine. *Id.*

68. *Committee of management.* A member of the abortive railway company attended many of the meetings, only meeting at which the only unsatisfied debt of the company (the engineer) was contracted; he, however, attended a subsequent report of the engineer was received and adopted. *Held*, that of the engineer was a liability of the company within the meaning of the Acts; and that, although the member was not directly liable to the persons liable to the engineer, to contribute to the expenses of the company, his name was retained on the list of contributors.

69. *Contributory may attend meeting in master's office.* applied under sect. 38 of the Joint-stock Companies W right (but at his own expense) to be served with notice meetings in the master's office in relation to the windin when there is strong ground for suspecting that his prese ous to the estate. *Ex parte Slattery*, viii. 133.

70. *Alleged contributory—Witness—Costs.* Where an name is not finally settled on the list of contributories of a j to be wound up, is summoned to attend before the master the act of 1848 (11 & 12 Vict. c. 45): *semble*, (per Lord entitled to have his travelling expenses tendered to him at the summons. *Ex parte Mercer*, xiii. 339.

71. *Liability.* The liabilities of persons concerned in such companies are not altered by the Registration or Winding-up Act, 1890.

V. *Of Calls.*

1. *Call made while debts are due the company.* Where a company have signed an agreement to contribute ratable shares to forming the company, and thus made themselves liable for such expenses, from persons who are solvent. *Ex parte G*

2. *To provide for payment of claims.* In proceedings in which the master cannot make a call to provide a fund for payment of claims which have not been, but which may be, allowed. *Ex parte The Earl*

3. *Costs.* The master cannot make a call for costs, unl from which to infer that the sum raised will be necessary.

4. *Bankruptcy of contributory.* The master may, in account the bankruptcy or insolvency of some of the contri

5. *Call on provisional and managing committee-men.* An ally registered, but no deed of settlement was executed wound up. The master, by his report, found that the provisional and managing committee-men, who had agreed to become liable equally among them to the expenses of forming the company, had paid the expenses of its being wound up; that the greater part of the expenses were paid by means of calls and other payments; but for paying the costs of winding up, &c., which he estimated at a certain sum, he made a call by a call of 60*l.* on each of the contributories. He accordingly made a call, dated the same day as his report. *Held*, that each contributory was bound to pay the call; that the principle on which the master had proceeded was no objection to the call that if all the contributories were liable to pay the call; and that it was unimportant whether the company was wound up or unliquidated. *Held*, also, that the call, being founded on the contributories had an opportunity of questioning, but which it

not be impeached on the ground of any invalidity of the report. *Ex parte Dale*, ix. 255.

6. *Call made for costs before priority of contributories' liability is ascertained.* The master to whom is committed the winding up of an abortive association for the formation of a railway company, in an urgent case, may make a call, for costs incurred by the official manager for the common benefit of all the contributories, upon contributories clearly liable as such, although there may possibly be a certain class of them primarily liable, the question of prior liability being left to be afterwards determined. But it seems that such a call ought not to be made to pay the debts of the company until the question of primary liability is determined. *Ex parte Gay*, viii. 173.

7. *Indemnity of shareholder by directors—Primary liability.* The provisional directors of a projected railway company, pursuant to a resolution, transmitted a circular letter to M., amongst others, by which they undertook to return to the subscribers the whole deposit in case they should not be able to obtain their act of parliament. On the faith of this letter, M. subscribed for shares and paid the deposit and executed the subscribers' agreement, a deed under seal, which contained a covenant by the subscribers to pay the expenses of the provisional directors, whether the act passed or not. The company failed to obtain their act, and it was ultimately ordered to be wound up. M. was placed upon the list of contributories; and the master made a general call upon all the contributories, for the purpose of defraying the expenses of the company. The vice-chancellor refused to discharge that call as against M. *Held*, upon appeal, discharging the order against M., that the provisional directors, by sending that letter to M., had as between themselves and M., rendered themselves primarily liable to the expenses; and that the call ought to be made in the first instance exclusively against those primarily liable, except in the case where they were confessedly insolvent, or there was difficulty in recovering the money from them. *Ex parte Mowatt*, xix. 414.

8. *Scripolders who have received back part of deposit.* The subscribers' agreement of an intended railway company provided that the committee of management might dissolve and wind up the affairs of the company at any time before the act of incorporation was obtained; under these powers the committee of management dissolved the company, and proposed to return to each scripholder a certain amount of the deposit. Before such amount was received by any scripholder, he had to sign an assent to the cancellation of his scrip, and he became entitled to receive such further sum as the committee of management might declare payable after a final settlement of all claims upon the company. The company being subsequently wound up under the Winding-up Acts, a list of contributories, divided into several classes, was settled, and a call was made for the costs incurred in the winding-up. *Held*, that the master was not justified in making the call exclusively on that class of the contributories which included those scripholders who had received back part of the deposit, but that such class being entitled to participate in any further sum which might be declared payable, was liable, *pari passu*, with all the other contributories, to the call made to discharge the expenses incidental to the winding-up. *Preece's case*, xix. 168. See s. c. iv. 161.

9. *Joint-stock company—Contributory.* Where no debts have been established against a contributory, though costs have been incurred in winding up, a call cannot be made on the contributory. *Hunter's case*, iv. 164.

10. The placing of a person's name on the list of contributories decides only that he is liable to the payment of some debt of a company, but does not at all show the extent of his liability, and no call can be made on any contributory until it has been ascertained to which of the debts or liabilities proved such contributory is liable. *Upfill's case*, iv. 128.

11. *Suitors' fee fund.* In winding up joint-stock companies, certain claims of

contributories are to be set off against calls, and the amount from percentage to the suitors' fee fund. *The North of 1* iii. 94.

12. *Judgment creditor.* A person who had obtained judgment against a company was allowed to proceed at law against the company but the court would not make a call for payment of the debt. *xxvii.* 372.

13. *Notice of call.* The provision with regard to service of notice, c. 48, s. 108, is not complied with by sending a notice of address in England of the person sought to be made known that such person is abroad doing military duty. *E.*

VI. Practice, and herein of Official Manager

1. *Official manager may defend in his official name.* An action against a contributory of a joint-stock company, is not an action against a person authorized to be sued as nominal defendant, under the Winding-up Act, (11 & 12 Vict. c. 45,) and, therefore, neither the official manager appointed under the act. An action under the 62d section, which enables the official manager to defend such action in his official name, or in the name of the company. *Beardshaw v. Lord Lonsborough*, vii. 496.

2. *Pending suit.* Winding-up order refused, on the ground that a suit was pending for the same purpose. *Phillips, ex parte*

3. *Delay—Petition.* A petition to discharge a winding-up order, on account of delay in presenting it. *In matter of the Railway Co.* xi. 281.

4. *Discretion of master—Reserved bidding.* The master of a company is committed has no discretion, under the Winding-up Act, to attend him for the purpose of fixing the price of the intended sale of the company's property, privately, without the presence of the contributories, or allowing them to be present. *Re The In* viii. 49.

5. *Master's order to a creditor to bring suit against official manager.* An order against a creditor, who wished to prove against a company, is an action against the official manager, it is an action under the Act of 1848, for the purpose of ascertaining the quantum of the debt, if due, and is improper to order the admission that the debt, if due, is not due, that point being established in the winding up. *E.*

6. *Order obtained by one member of managing committee, by other members.* If an order is obtained by one of the members of the railway company to wind up the concern, and he obtains the concurrence of the other members of the committee, who obtained the order, the other members cannot move to discharge the order, all rightfully made responsible for the expenses. *Ex parte*

7. *Simple order substituted for master's—Costs.* Where a winding-up order did not seem, under the circumstances, justifiable, a simple order substituting that made by the master, and giving all parties the same costs. *Ex parte Carew*, xxvii. 95.

8. *Order going beyond notice.* The circumstance that a winding-up order is made beyond the notice of motion on which it is made, however irregular, is not a ground for setting it aside, if those who have appeared and taken part in the discussion upon the motion, and those parties interested in the subject-matter of the motion, are not prejudiced.

notice thereof, did not appear thereon, for these are entitled to rest on their right to assume that nothing beyond what is contained in the notice will be asked upon the motion. *Ib.*

9. *Order of inquiry directed to master.* A shareholder in a railway company had concurred in its dissolution, but afterwards, being dissatisfied with the directors' accounts, petitioned for an order for the dissolution and winding up of the company, or for winding it up if it had been already dissolved. The court refused to make the order at once, and directed the master to inquire and state whether it was necessary or expedient that the company should be dissolved and wound up, or wound up. *Williams, ex parte*, iii. 215.

10. *Informal certificate—Amendment.* The master certified that he had included A's name in the list of contributories, not as a shareholder, but as a contributory in respect of any expenditure which he might be proved to have authorized. The court held the certificate to be informal, and directed the master to review it. *Riddell, ex parte*, vii. 65.

11. *Of appeal from master's order.* A person who has been placed on the list of contributories may appeal from the decision of the master even after he has paid the first call, supposing it to be the last, if he can show that he has good grounds for an appeal, and there has not been a too great delay. *Ex parte Holroyd*, v. 150.

12. The name of a person who had purchased shares in a joint-stock bank was, after the stoppage of that bank, placed on the list of contributories, but only from the date at which he made the purchase. An appeal was presented by the official managers against this qualification of his liability. When the case was called on, this qualification was, by agreement, struck out, and the order of the court below varied in that respect. *Henderson v. Sanderson*, xviii. 80.

13. *Stay of proceedings—Prosecution of claim continued.* Where a company had commenced to wind up, but proceedings were stayed, a claimant who had commenced to prosecute his claim was allowed to proceed, and a solicitor also to finish the taxation of costs which he had commenced. *Ex parte Clifton*, xxxi. 223.

14. *Motion to stay pending proceeding in equity.* A bill was filed by the shareholders of a company against the directors, containing allegations of fraud, and praying an account, &c. The proceedings were continued and answers got in even after the defendants obtained an order for winding up. Afterwards the plaintiffs moved to have the proceedings in the suit stayed, which motion was refused. *Decks v. Stanhope*, v. 97.

15. *Interim manager not an official manager—Stay of proceedings in suit against company.* An interim manager appointed under the Winding-up Act is not an official manager within the 73d section; and, therefore, the court will not, under that section, stay proceedings in an action against the company ordered to be wound up, or other person representing the company, unless an official manager has been appointed. *Brettle v. Dawes*, viii. 539.

16. *Judge's order to stay proceedings.* When a judge's order is made under the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, to stay proceedings until after the plaintiff shall have "made or exhibited proof" of his debt or demand before the master in chancery; on allowance of that proof by the master in chancery the power of the judge to stay proceedings is at an end. *Prescott v. Hadew*, i. 487.

17. *Order refused, though a creditor was in a position to issue execution against the company, or individual members.* Where a company had ceased to carry on business, but the governing body were *bonâ fide* putting in execution their powers, under the deed of settlement, to wind up the affairs of the company, the court refused to make an order under the provisions of the Winding-up Acts, although a creditor of the company to a large amount was in a position to issue execution for his claim against the company, and if not successful by such means, then against the members individually. *In re The British Alkali Co.* xiii. 412.

18. *Judgment against company—Scire facias for execution against shareholder*. Where a creditor had obtained a judgment against a company which had been or to be wound up under the 11 & 12 Vict. c. 45, having first proved his debt before the master, and execution had been ineffectually issued against the company, and was no prospect of a payment being made to the creditors out of the funds in under the Winding-up Act within a reasonable period, the court granted a *scire facias* for execution upon the judgment against a shareholder. *Mackenzie v. The S. Shannon Railway Co.* xxviii. 216.

19. A sum of money was placed, without notice, in the official manager's book debit of certain persons, and then they received notice to discharge themselves of other moneys on a certain day. *Held*, that the entry must be removed, without notice to any question. *Ex parte Chadwick*, v. 83.

20. *Second summons*. When the master has specially excluded the name of a person from the list of contributories in respect of any shares, that person cannot be summoned before the master in respect of the same shares. *Best's case*, i. 191.

21. *Discretion of court—Application by single shareholder*. Stat. 11 & 12 Vict. gives the court a discretion in the case of an application from a single shareholder of a banking company, to wind up the concern, and the court may allow the shareholders and creditors time to settle their affairs by compromise, or otherwise. *Re Monmouthshire and Glamorganshire Banking Co.* xv. 90.

22. *Fraud—Bill by one in behalf of several—Official managers*. A bill was filed by a subscriber to an abortive railway company, on behalf of himself and others, as the defendants, (the promoters, directors, and secretary,) alleging a fraudulent issue of spurious shares, upon which no deposit had been paid, but in respect of which a payment of a pretended deposit was made; and praying, among other things, that all fraudulent payments might be made good by those charged with the fraud. *V.* a subscriber for forty shares, and had paid 2*l.* 2*s.* per share deposit. It was resolved to wind up; half the deposit of 2*l.* 2*s.* was repaid, and subsequently a further return of 2*d.* per share was made to the scrip-holders, and they signed a memorandum engaging to release the promoters. Afterwards, however, the bill was filed, and in the course of the suit an official manager was appointed. In July, 1849, an order was obtained for the official manager to carry on the suit in the place of W. *Held*, first, that he could not have maintained a suit if he had still continued the nominal plaintiff. Secondly, that the official manager was not in a better position to maintain the suit than W., the original plaintiff; in adopting the suit, he took it with all its infirmities. *The Grand Trunk Stafford, &c. Railway Co. v. Brodie*, xiii. 1.

23. *Overdrawing bank account—Admission of debt*. If a joint-stock company draw its account with its bankers, and the amount of the debt be disputed, the same may be admitted, and the public officer of the bank have liberty to bring such action against such persons as he should be advised. *Ex parte The East of England Railway Co.* xiii. 194.

24. *Costs*. A suit was instituted before the passing of the Joint-stock Companies Winding-up Acts, for the winding up the affairs of a company. The bill was dismissed with costs, as against some of the defendants. An order was afterwards made under the Joint-stock Companies Winding-up Acts for the winding up of the company's affairs, and the official manager petitioned to have the money in court in the suit paid to him. The defendants, against whom the bill had been dismissed, with costs, applied for payment of those costs out of the fund, on the ground that they had no means of getting them from the plaintiff. The court ordered those costs, and also their costs of appearing on the petition, to be paid out of the fund accordingly. *Walworth v. Holt*, vi. 50.

25. Costs incurred by official managers in suits for the benefit of their companies may be paid out of the estate. *The Grand Trunk Stafford, &c. Railway Co. v. E. & W. R. Co.* xiii. 1; *Roberts's case*, xiii. 7.

26. A petition for winding up or inquiring into the expediency of winding up a company was dismissed for want of ground; and the petitioner was ordered to pay the respondent's costs, although the respondent was not liable as a contributory, nor had been served with the petition, but appeared voluntarily. *James, ex parte*, iii. 218.

VII. Miscellaneous Cases.

1. *Bill by shareholder against finance committee—Chancery jurisdiction.* On demurrer to a bill filed by a shareholder in a projected company, on behalf of himself and all other shareholders except the defendants, who were called "the finance committee," stating that he and other shareholders had paid their deposits, that the finance committee had the sole control, and that 17s. 6d. had been repaid on some of the shares, and praying an account and an apportionment of the surplus between the plaintiff and the other shareholders, it was *held*, that rendering an account by the defendants upon their own representations was not sufficient, that the jurisdiction of the court of chancery was not ousted by the Winding-up Act, and that the plaintiff was not bound to proceed under it, and that no other parties were necessary. *Clements v. Bowes*, viii. 238.

2. Upon the formation of a joint-stock company, two of the members advanced part of the purchase-money for the land required for the concern, upon a mortgage made to a trustee for them, when the land was conveyed in trust for the company. The mortgage was afterwards transferred to strangers. The company being wound up under the Winding-up Acts, the transferees, by arrangement with the official manager, sold the land, which did not realize sufficient to pay the mortgage debt, and proved for the deficiency as creditors. Being unable to obtain payment from the official manager, they filed a bill against him. *Held*, upon demurrer, that payment of the debt was properly enforceable by suit in equity against the official manager, and that the plaintiffs were not precluded from instituting such a suit by the proceedings under the Winding-up Acts. *Thompson v. Norris*, xix. 341.

3. *Shareholders of provisionally registered railway company, privity between, after abandonment of scheme—Power to sue by, after appointment of official manager under Winding-up Acts.* After the abandonment of a provisionally registered railway company, there is still, as in the case of a common partnership, a privity amongst the shareholders, for the purpose of winding up the affairs of the concern; and where the affairs of such a company had been ordered to be wound up under the Winding-up Acts, and an official manager had been appointed, it was *held*, that, notwithstanding such appointment, a shareholder might, with the sanction of the master, institute a suit, on behalf of himself, and all the other shareholders of the company, for the recovery of a sum of money, as having been affected with a trust for the company, and in the recovery of which all the shareholders had, in their character of contributories, a common interest. *Bryson v. The Warwick, &c. Canal Navigation Co.* xxiii. 91.

4. *Judgment against official manager—Enforcement of, against shareholder.* The 7 & 8 Vict. c. 110, s. 66, provides that judgments obtained against a completely registered company may be enforced against shareholders. The 11 & 12 Vict. c. 45, s. 50, provides that, after the appointment of an official manager, actions which might be brought against a company, or any person authorized to be sued on behalf of the company, shall be brought against the official manager. The 57th section provides that judgments against the official manager shall have the like effect on shareholders as if the judgment had been against the company, or a person authorized to be sued on its behalf. The 12 & 13 Vict. c. 108, s. 1, extends the operation of the former act to all companies of more than seven members. *Held*, that as the 57th section of the 11 & 12 Vict. c. 45, must be construed with reference to the 50th, a judgment obtained against the official manager of a company only provisionally registered could not be enforced against a shareholder, as the action could not have been brought against the company,

or a person representing them. *Prichard v. The Birmingham Extension, &c. R. Co.* xxviii. 364.

5. *Right of company to rank as special creditors.* If a contributory, under Winding-up Act, covenants in a deed of transfer with respect to a part of the only that he has agreed to take, the company are entitled to rank as specialty creditors only to the extent of the said covenant. *Hay v. Willoughby*, xv. 464.

6. *Effect of transfer.* The transfer of shares in a company for making a railway is the equitable transfer of the right to recover back the deposit on the failure of the scheme, and so, even if the scripholders are not all contributories. *In re Madrid and Valencia Railway Co.* xiii. 354.

7. *Joint liability of managing committee and finance committee for fraud.* If, in the direction of the managing committee of a winding-up railway company, the finance committee, consisting of five members of the managing committee, expend large sums in buying up shares in the market, the finance committee cannot alone be responsible, but rather all those who were implicated in the transaction, and the responsibility is joint and several. *Ex parte Carpenter's Executors*, xiii. 201.

8. *Liability of members at large after dissolution.* The members at large of a company are not liable for the rent of offices accruing after the dissolution of the company, the lease of the premises having been taken by the provisional directors, or the trustees. *Ex parte James*, vi. 95.

9. The official manager of a winding-up company has the right to prove before the assignees of a bankrupt shareholder. *Ex parte Nicholas*, xiii. 586.

10. *Contract of indemnity.* Plaintiff and defendant were both on the committee of a proposed company, which was abandoned after certain expenses had been incurred in a consideration, defendant agreed to save plaintiff harmless from all debts mentioned in a schedule annexed. Subsequently, by an order under the Winding-up Act, plaintiff was ordered to pay a certain sum as his contribution to the amount of the debts in the schedule and of the expenses of the order, which he did, and sued on the contract of indemnity. Defendant paid into court more than the debt itself. Held the indemnity did not extend to the costs and expenses incidental to the proceedings under the Winding-up Act. *Tanner v. Woolmer*, xx. 491.

11. *Inspection of documents.* Creditors of a company ordered to be wound up are entitled, under some circumstances, to inspect documents in the hands of the official manager. *Ex parte Walker*, vi. 51.

WITNESS.

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